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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

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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IN MEMORIAM

WILLIAM H. THOMPSON

At the session of the Supreme Court of the State of Nebraska, September 20, 1937, there being present Honorable Charles A. Goss, Chief Justice, Honorable William B. Rose, Honorable George A. Eberly, Honorable L. B. Day, Honorable Bayard H. Paine, Honorable Edward F. Carter, and Honorable Frederick W. Messmore, Associate Justices, and Honorable Ellwood B. Chappell, District Judge, the following proceedings were had:

May it Please the Court:

Your Committee on Memorial to William H. Thompson ask leave to submit the following memorial and tribute:

Again this court pauses in its work to note the passing of a distinguished member who for many years was closely associated with it as lawyer and judge. How frequently in these later years do these occasions come.

William H. Thompson, to whom we pay tribute today, was an outstanding citizen of our state and nation. He was born in Perryville, Carroll County, Ohio, December 14, 1853, the son of Eli and Eliza Kirby Thompson. In 1864 the family moved to Fayette County, Iowa. He was educated in the public and select schools of Fayette County, Upper Iowa University at Fayette, and the State University of Iowa, from which institution he graduated in 1877. He immediately began the practice of law at Brushcreek, now Arlington, Iowa, and in 1881 removed to Grand Island where he took up his residence and began the practice of law in this state. During his long career as a lawyer he built up a practice that took him to all courts

of the state and to the federal courts, and he early established a reputation and became known as one of the leading lawyers of Nebraska. He was married at West Union, Iowa, September 7, 1879, to Miss Nettie I. Hutchinson, and to this union four children were born of whom two, Grover of Casper, Wyoming, and Lloyd of Grand Island, Nebraska, together with his wife, survive him.

While his chief and absorbing interest was in the practice of his profession, his devotion and loyalty to his country prompted him to a deep concern for civic, state and national welfare. He spent many years in the service of the public. He was County Attorney of Hall County, Nebraska, Mayor of Grand Island, presidential elector, candidate of the Democratic Party for Congress and for Governor, delegate at large to six national conventions, member of the Nebraska State Capitol Commission, the State Normal Board, and United States Senator, in addition to his period of service on this Honorable Court. In each of these positions he served the public fearlessly and faithfully. In public office as in the practice of his profession Judge Thompson was a tireless worker. He frequently said: "The law is to me a labor of love," and true it was. He was possessed of exceptional ability both as an advocate at the bar and as judge. His opinions were always couched in clear, concise language and reflect the result of his diligence and extraordinary ability. When he reached a conclusion as to what right dictated he stated that conclusion in a way all could understand.

Nature endowed William H. Thompson with a personal charm possessed by few men. He loved his fellow men with a love that was genuine, and this genuineness manifested itself without effort on his part. His genial, affable disposition drew men to him. He found happiness in associating with others. To him all men were equal. He gave ear to the humblest citizen no less than to the man of prominence and influence. He hated sham and make-believe. He was concerned only with that which was real and genuine. While he held firmly to his belief, he was tolerant of others who disagreed with him.

Mortal man is ever subject to the evils of extremes. These Judge Thompson avoided. Diligent and industrious as a lawyer he employed his ability and talents in elevating the ideals and standards of law and justice. In character he was upright and true. His time was shared with his family, his church, his friends and his country. He was a sociable, sincere, unselfish and loyal friend to man, and during his long life he accomplished much in an unassuming and unostentatious way. Thrifty in accumulating an estate for protection from want in his declining years he was nevertheless a generous man. He gave liberally to worthy causes and individuals in distress. To help others was to him not alone a duty but a distinct pleasure. He found the utmost joy in giving.

Without the slightest exaggeration, and in full justice to him and to ourselves, we can say that he was a genuine friend, a faithful coworker, a good lawyer, an upright judge, an ideal citizen and a Christian gentleman. We shall miss him from our councils, and we deeply mourn his death. He leaves to his loved ones and to us a rich heritage and a fine example of faithful friendship, loyal devotion to his home, to his loved ones, to his church, to his country, and particularly to his native state. By and large he wrought well. The world is better because he lived in it and life to many people is richer and sweeter because of his friendship.

Therefore, let this appreciation and memorial have a permanent place in the records of this court, and let a copy thereof duly certified be sent to his widow, and with it an expression of the deep sympathy which we feel for her in the overwhelming sorrow which has come into her life.

Respectfully submitted,

THOMAS S. ALLEN
WM. SUHR
WILMER W. WILSON
SEYMOUR L. SMITH
FRANK J. TAYLOR

Honorable William Suhr.

May it Please the Court:

From humble beginnings, without money or influence, but with determination, industry, intelligence, and character, William H. Thompson rose to great heights, as a lawyer, judge, and statesman.

His distinguished career is an illustration of what is possible in a free America. With American opportunities, equal laws for all, with no class distinctions or privileges to bar the way, the humblest citizen may reach the highest places in the land. To safeguard those opportunities and conditions for his fellow man was ever a paramount principle in the creed of Judge Thompson.

Judge Thompson had a charming personality and an unusual capacity for winning affection. He loved companionship. He was a gentleman of simple, innate dignity, always kind, tolerant and honorable. He had firm convictions, and had the courage of his convictions.

His political career is interesting. He was elected County Attorney of Hall County in 1886, thirty-eight years later became a member of this Honorable Court, and in 1933 was appointed United States Senator. During the intervening years he was elected and appointed to other public offices. His long years of public service give proof that he was no mere politician, but a statesman, worthy of the respect and confidence of his constituents.

In victory or defeat he never lost his equanimity. He was gifted with a sense of humility that saved him from that foolish egotism which too often ruins the careers of men in public life.

It has often been remarked of Judge Thompson that political opposition never lost him a personal friendship.

It was as a lawyer I knew him best. I first met Judge Thompson in 1914 when I was looking for a place to practice law. I told him that long before I came to Nebraska I had heard and read of him as "The Little Giant of Nebraska," which brought out his characteristic smile. We had a long visit. He praised the ability and integrity

of the members of the Grand Island Bar, and its judges. He extolled the community and predicted its future growth and development. He was proud, and justly so, of the Bar and the community of which he was a part.

He told me of his early experiences, said how grateful he was for the opportunities of free America, and he emphatically stated that it was the duty of the lawyers and the courts to see that those opportunities were never denied.

Later, I had the privilege of meeting him in the trial courts, sometimes with him, sometimes against him. Here I think his talents served him best. He knew human nature; in the selection of a jury he was a master; he was also a brilliant examiner, effective and eloquent in his arguments and pleas. His great ability frequently called him to distant counties and districts. Whenever it was known that Judge Thompson was engaged in a trial, there was always an interested audience.

In his trial work he displayed a trait of character too often lacking in members of the Bar. No matter how bitter the contest, no matter what was said during "the heat of the trial," displeasing incidents were never carried from the courtroom; after adjournment he was the same agreeable and courteous gentleman you had always known, willing to forgive and forget.

You could not do other than like the man.

From Judge Thompson I heard many expressions of his pleasurable associations here, as a member of this Honorable Court. He appreciated and understood the responsibilities and importance of the courts in government. As he himself was fearless, impartial, and independent, so he admired a fearless, impartial and independent Court.

Judge Thompson enjoyed a long and eventful career and deserved the numerous honors which came to him. He went his way quietly, unobtrusively, without ostentation or display; a common man who rose to great heights, but never lost the common touch.

Whether he was addressed as "Bill," "Senator," or "Judge," his response was always the same.

In his home life, no one could have been more faithful and devoted. He performed with fidelity and with conscientious care the duties of public and private life.

Honorable Thomas S. Allen.

May it Please the Court:

It is a privilege to be present today to speak with other friends to the resolutions just presented in memory of Judge Thompson. There is something almost sacred about friendships that last almost as long as life endures, that transcend the grave, and through the years bring back old friends to speak in reverent memory. For 47 years I knew Judge Thompson and to me he possessed a rare unity of life. He kept an unusual level of nobility. He was the same man at home, in business, in the practice of his profession, in politics, on the bench and in worship.

Those of us who were privileged to know him intimately, know that there was about him a charm as strong as magic. He was familiarly and affectionately known in this state and throughout the country as the "Little Giant," a title that he won by merit, and wore with honor throughout his long life.

In speaking of him here I am reminded of his wonderful personality and charm of manner. I had during the years many intimate contacts with him, both at the bar and in the field of politics. As a lawyer and while serving the public in office he was determined that right should always receive from him a helping hand.

Before he became a member of this court his scrupulous adherence to the ethics of the profession, his seemingly boundless knowledge of the law, of incisive insight, and great power of application, made him an outstanding figure.

As a member of this court he had all of the qualifications that go to make an eminent judge, namely, legal training, broad experience in his profession, unquestioned integrity, the judicial temperament, a keen sense of justice, and a charming personality.

His analysis of legal questions was always clear and to the point, and his decisions while a member of this court reflect a high order of ability and integrity.

Judge Thompson believed in common with all great jurists that the goddess of justice within him should not remove the blindfold from her eyes even long enough to glance at the consequences to him personally as the result of the decision he was about to make.

In looking back over his life I think we could choose three words as fitting him best of all: Friendship, Tolerance and Loyalty. These were the dominant traits in his character. He was always tolerant of the opinions of others, and above all loyal to his friends. In the long list of faithful members of this court whom the bar has known and loved, and lost awhile, few were more widely acquainted or better loved. To him friendship was a vital and basic thing in human life and conduct. On the personal and human side he was an extraordinary combination. He had a genius for friendship and a kindliness of nature combined with a pleasing personality which made and which held for him thousands of friends in every walk of life. He combined perfect dignity with perfect affability. He was tender and sympathetic for human weakness, but in matters involving principle he was as the solid rock. His loyalty to his friends, his tolerance toward them, his continued interest in them, bound them to him with an unfailing devotion which held fast through all the years. He had a serenity of mind that was immune to the turmoil of recent years, and among the reasons why he was honored and loved was because he was firm in his convictions, modest, impressive and genial. His personality included two rare combinations; he was idealistic and he was practical; he possessed dignity and a keen sense of humor.

Though he is gone and his familiar figure will no longer grace this chamber, yet, in memory and affection he is still with us. His life work and service have left a memory and affection in the hearts and minds of those who knew him more lasting than any shaft of marble that may be erected at his grave.

Honorable Seymour L. Smith.

May it Please the Court:

It was my good fortune to serve as secretary to Judge William H. Thompson for some two years, following his appointment to membership on this Honorable Court. From this intimate association I came to know and admire him as a judge and as a man.

To be associated with William H. Thompson was both a pleasure and an inspiration. His gentle simplicity, straightforward manner, and eminent fairness made it a joy to labor with him. Kindness and good humor radiated naturally from his very being. He took an especial interest in young men, and he was ever willing to help them. His active life was replete with rich experiences, which made his counsel and advice invaluable.

In both his private and his public life, Judge Thompson was guided by the one thought: What is right? When he determined the course that right indicated, no influence, however powerful, could swerve him.

He was a most generous man. Few people, even among his closest friends, realized the full extent of his benefactions, because he gave in the true Christian spirit of charity and not to gain notice. Quietly, and without ostentation, he gave liberally to charitable causes and to individuals in need.

Judge Thompson possessed an innate desire to help others. He was happiest when, by word or deed, he could relieve the burden of a fellow man.

The passing of Judge Thompson removes from our state and nation, a true citizen; from his family, a devoted husband and father; and from me, a loyal friend.

Honorable Frank J. Taylor.

May it Please the Court:

I have no written speech prepared, but I want to say that I fully indorse and entirely approve of all that has been said about the Judge. I was one of the resolutions committee, so will not take up much time in further remarks. I became acquainted with Judge Thompson in 1887. He at one time was the county attorney of our county by employment. We had no county attorney and the commissioners employed Judge Thompson to act as county attorney for one or two years.

I first became acquainted with him while I was in Darnell & Kendall's office in St. Paul reading law. He always took great interest in the young men. I always had considerable contact with him, and I know many times while I was associated with him in trials in our county I often assisted him in the trial if I was not on the other side.

He was considerate and did not take advantage of any technicality. A great many times they would ask him if he thought he could win a case. I have heard him say, "I have never had but one case that I was dead sure of, and I lost that," and I always remembered that.

We always called him Billy up there at first, and a good many times when he was on the bench and when he was Senator I would speak to him and say, "How are you, Billy?" and then I would apologize, and he would say, "That name sounds better to me than any other name."

He was a loyal citizen and a good member of the bar and a good judge, and while we have always agreed politically I know he was a power in the counsels of the party conventions. I have been with him as a delegate at many national conventions and he was a man whose opinions were considered.

I certainly indorse all that has been said about Judge Thompson. I feel that with his loss Nebraska has lost one of its best citizens.

Honorable O. A. Abbott.

May it Please the Court:

It is eminently fit and appropriate that we should pause for a time in our labors to take notice of the departure of Judge William H. Thompson and place upon record some token of respect for, and appreciation of a life spent in the practice of the law and in the service of his country.

No matter how strongly one may focus the searchlight of investigation upon him, one will find no trait in his character, no period of his life over which one would, in charity, wish to draw the mantle of silence.

Like some sturdy oak of the forest, he withstood the storms of many years, serving always as a guide and a landmark to others.

He was born in a log house on a farm in Carroll County, Ohio, on December 14, 1853; worked his way through school; and in 1877, was graduated from the Law Department of Iowa State College.

Thirteen years later when he was running for Congress on the democratic ticket in the Third Congressional District, he was known as the "Little Giant from the Big Third." His attractive personality, his persuasive manner, his ability to state strongly and lucidly his argument won for him countless admirers and clients.

He reached preeminence in his chosen profession by courageously marking out a pathway which can be successfully followed by the humblest of his associates and one which must be followed by those who would achieve an enduring reputation.

He had established an outstanding position at the bar before he became a member of this court. Many volumes of your reports, and the records of numerous other courts, as well as those of my own city, of which he was Mayor for four years, and those of my own county, of which he was County Attorney, and those of Congress, bear silent testimony to his tireless vigilance and faithful labors as citizen, lawyer, Judge and United States Senator. And, the man who had been essentially the lawyer was developing

into one who became essentially the jurist, earnest, conscientious, sober-minded, doing justice to his fellow men.

His wide acquaintance with men and affairs enabled him to keep abreast of the times on all social, moral and political questions. Few men were so free from vice of envy; so ready to recognize and applaud the merited success and achievements of others.

His widow, Mrs. Nettie I. Thompson, whom he married on September 7, 1879, and two children, Grover C. and Lloyd G., survive. His domestic ties were of the strongest. For him, a devoted husband, father, and grandfather, home possessed many attractions which nothing else could supply.

His generosity and kindness won for him the friendship, not only of the young practitioner, who could wish for no more helpful and sympathetic an adviser, but also of those who sought him at home or in his office, for business or for pleasure.

I knew him for more than 45 years in his varied relations of "country lawyer and prairie politician," neighbor and friend, statesman and civic leader. He remained, no matter what his position, friendly "Billie" Thompson, as his early Nebraska friends called him. For the man who was "ready to dare and to do," he had the greatest admiration. I remember a memorial service in which he said "men are not remembered for their usual thinking and usual acting but for their exceptional thinking and exceptional acting."

No one observed more often than I how he sought the approval of his own conscience with unflinching zeal, serving loyally the interests committed to his care, despising the plaudits of the thoughtless multitude that approves today and condemns tomorrow with equal lack of knowledge and understanding.

He was magnanimous in victory, courageous in defeat; he accepted the results of legal contests with equanimity. Seldom did an acrimonious word escape his lips, and still less often one of denunciation.

In his dealings with the courts, with his fellow lawyers, and his clients, there was always noticeable that deep re-

gard for justice in its full and complete meaning and that pervasive touch of deep responsibility.

I saw him many times during his last illness and, realizing he was near his journey's end, wondered how many others, at the end of their lives, could look back and find so much to their credit? Who of us, if called upon suddenly to account for our services, could be as satisfied with the record we had made?

He left his imprint in the life of his community, the jurisprudence of his state and in the lawmaking body of the nation.

It is fitting that we, who have been coworkers and laborers with him in an arduous and exacting profession, who have witnessed his triumphs and defeats, his charities, his constancy to his friends, his fidelity to duty, and who know of the honors he has conferred upon our profession and this Honorable Court, should pay tribute to his memory. For the history of the world is only the history of the distinguished men and women who have helped to make this world of ours wiser, better and happier; and among those individuals who have led in the march of human progress and who have helped to mark out safe highways for you and me was the man whose life we commemorate today.

Judge Bayard H. Paine:

I am constrained to add my tribute to the life and character of one whom I knew for 50 years, and whom I succeeded as a member of this court when he declined to be a candidate.

My friendship with Judge Thompson began in the late eighties, and I well remember the occasion. A district patriotic meeting was being arranged by the program committee of Lyon Post No. 11, G. A. R. of Grand Island, and this committee requested that Judge Thompson and I give addresses on Washington and Lincoln. Knowing that Judge Thompson had recently given a fine address upon Abraham

Lincoln in several neighboring cities, I suggested that I would get up a talk on George Washington and he would give the address on Lincoln. He instantly responded, "No, this is your first patriotic address and they will particularly enjoy any talk on Abraham Lincoln, so you get up one on 'Old Abe' and I'll prepare some kind of an address on Washington." This unusual consideration on his part shown to a mere schoolboy was never forgotten by me.

Judge Thompson was born in Carroll County, Ohio, in a log cabin located on a 20-acre farm, upon which his father ran a country blacksmith shop. Judge Thompson was the fourth son in a family of nine children.

In 1889 his father, Eli Thompson, came to Custer County and took a homestead, where he continued to reside until his death.

It is said that when Judge Thompson was seven years of age he declared that he wanted to be a lawyer, and from boyhood days was always greatly interested in court trials, which he attended wherever possible.

His education, in private schools and in Upper Iowa University at Fayette, as well as in the law department of the University of Iowa City, was secured only by the greatest efforts on his part, for he paid his way through school by farm work, railroad work, and teaching school. He never forgot these early hardships, and perhaps because thereof he was always more than willing to extend to struggling young lawyers every assistance that he could.

A daughter, Edith, died in September, 1901, leaving a little son, whom the grandparents dearly loved and desired to rear. Litigation over the custody of this little grandson finally reached the supreme court (State v. Porter, 78 Neb. 811), and the record of this case discloses the unusually deep love of these grandparents for the grandson. Love for his family was also shown in his tender solicitude for his wife, Nettie. She recently told me that she had gone to school to him when she was 12 years of age, and had known him always.

His two sons and their families were a great joy to him, and it might be added that he and his wife opened their

home to two of his nieces, who lived with them until they were self-supporting.

No account of Judge Thompson would be complete without a reference to his assistance to the Grand Island Baptist College. For a score of years he faithfully served on its board of trustees. Their meetings were often held in his office, and although he was not a member of the Baptist church, yet few men did more to assist this struggling college through its early years of financial distress than Judge Thompson.

In the murder case of State v. Hamlin, tried in 1907, Judge Thompson called to his assistance Mr. J. L. Cleary and myself, who were struggling young lawyers in Grand Island, and to our surprise he permitted us to take a prominent part in the trial, both in the district court and also in the supreme court. In his argument in the supreme court Judge Thompson declared that his client was insane and unaccountable; that he had fulfilled his full duty to him; that he would file no motion for a rehearing, and would never ask for a pardon or parole. Judge Reese in writing the opinion (81 Neb. 148) modified the sentence of death to life imprisonment, and added that the defendant should never be discharged from confinement.

Judge Thompson took part in many murder trials in Nebraska, including that of State v. Cole and Grammar.

He was always a gentleman in court, fair to opposing counsel and courteous at all times to the presiding judge, and unusually successful in winning jury cases.

Judge Charles S. Lobingier, who served upon the commission of this court in 1902 and 1903 and was then for many years judge of the United States Court for China, and who now resides in Washington, D. C., made a careful study and analysis of all of the opinions written by Judge Thompson while a member of this court. This article, published by the Nebraska State Bar Association (12 Neb. Law Bulletin, 421) sets out many characteristics of Judge Thompson as found in these many opinions. Judge Lobingier said that "practical common sense" guided Judge Thompson in his work; that "he reached the merits with-

out undue stress of technical rules," while in criminal cases he showed an equal solicitude for guarding the constitutional rights of the accused. He held that bread and water diet did not constitute a cruel and unusual punishment, and wrote the opinion upholding the act providing for testing tuberculosis in cattle. He held that a municipal council could not act arbitrarily and deny to one citizen privileges which it granted to another. In a notable decision he held that a private agreement to pay an ordinary witness more than the fee which the law fixes is contrary to public policy and void. In another decision he announced that a church congregation had the right to discharge its pastor under certain conditions.

True to his kindly nature, Judge Thompson, in writing these opinions, always avoided personal reflections and strictures upon the parties. Where the evidence was of such a character as to cause them unnecessary mortification, he discussed it only in general terms.

Judge Lobingier said in conclusion that the extensive and valuable body of opinions which Judge Thompson wrote will constitute his lasting monument.

Upon October 11, 1915, memorial services were held by Honorable T. C. Munger, in a session of the United States District Court at Omaha, to pay respects to the memory of the late Judge William H. Munger. In one of these many tributes, we find these words:

"Before Judge Munger was appointed we knew him in our familiar intercourse not as Judge, because the frontier life makes firm and lifelong friendships; we knew him as Billy Munger, just as we have known the very able judge presiding in South Dakota as Jim Elliott; just as we know the very able lawyer and worthy man who is a candidate and who is among those who are to be considered as a successor to Judge Munger,—just as we know him affectionately as Billy Thompson."

It was the general opinion at that time that President Woodrow Wilson would have appointed Judge Thompson to be a federal district judge in Nebraska had he not been over sixty years of age at that time. Yet remarkable as it

may seem, nine years later he was appointed a member of this court, and for nearly seven years performed his full share of its duties with industry and distinction.

Then eighteen years after he was considered by some to be too old for a federal judgeship, he began service as a member of the United States Senate by appointment of Governor Bryan and no criticism has ever been heard of his service in that august body, and his address before the Senate on April 14, 1934, urging that we keep faith with the Filipinos and grant them their freedom as promised was most appealing.

In the fine tribute which he paid to the late Senator Robert Beecher Howell, to whose place he was appointed, Senator Thompson used these words:

"He was frank and truthful and entirely free from that cowardice which breeds deception. He was sincere in his beliefs; he was faithful to his work, and he was loyal to every cause that he espoused. He was free from narrow partisanship and enjoyed to the fullest extent the confidence and esteem of Democrats as well as Republicans. There was no sham or hyprocisy in his character. He was always frank, cordial, and courteous. In the study of economic questions he took special delight. He had decided convictions on every moral question and never hesitated to declare them in a modest way when the occasion demanded. Thus he became a recognized leader in progressive thought and action."

I conclude my remarks by saying that these words which he so eloquently said of another we may well apply to the one in whose memory we have met today.

Charles A. Goss, Chief Justice:

It was a disappointment to me when Judge Thompson announced in December, 1929, that he would not be a candidate for reelection to this court the following year. I know that every one of his associates felt the same way about his voluntary retirement, which took place after

he had passed his 77th anniversary of his birth. He was in good health, had always done with distinction his full share of the work of this court, and was loved by every member of it for his ability, courtesy and kindness.

Upon his retirement on January 8, 1931, he and Mrs. Thompson went back to Grand Island, where they had made their legal residence for fifty years. In 1933 he was appointed by the Governor to fill the vacancy in the Senate of the United States caused by the death of Senator Howell. When in Washington during his period of service I was permitted to enjoy the gracious hospitality of the Thompsons.

The resolution and remarks have in no way overstated his qualities and character. They will be spread upon the records of the court and published in the next volume of the Nebraska Reports.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1937

GEORGE F. MCGUIRE, APPELLANT, V. KANSAS CITY BRIDGE COMPANY, APPELLEE.

270 N. W. 669

FILED JANUARY 5, 1937. No. 29879.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY: BURDEN OF PROOF. In a proceeding under the workmen's compensation law to recover compensation, the burden is on claimant to prove by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course of his employment.
2. **Evidence.** "Cogent reasons and circumstances that strengthen the opinion of expert witnesses as to a scientific fact in issue and tend to weaken opposite expert opinions may determine the issue." *Montgomery v. Milldale Farm & Live Stock Improvement Co.*, 124 Neb. 347, 246 N. W. 734.
3. **Evidence** discussed in opinion *held* insufficient to prove the claim that a workman who received compensation for a total disability caused by an injury in 1920 suffered a total disability resulting from a fall from a locomotive crane in 1934.

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

J. J. Friedman, for appellant.

Brogan, Ellick & Shoemaker and *James J. Fitzgerald, Jr., contra.*

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

ROSE, J.

This is a proceeding under the workmen's compensation law. The claim of plaintiff, George F. McGuire, may be summarized as follows:

Defendant, Kansas City Bridge Company, employer, was engaged in constructing a bridge over the Missouri river between Omaha and Iowa. While plaintiff, an employee of defendant, was performing the duties of his employment as fireman on a locomotive crane operated in connection with the work on the bridge, he accidentally injured his neck September 25, 1934. The accident caused a fracture of the left lamina of plaintiff's sixth cervical vertebra and resulted in traumatized arthritis of his spine—total and permanent disability. Plaintiff's weekly wage was $33.60 and he prayed for compensation at the rate of $15 a week for 300 weeks and thereafter for $12 a week for life; also for hospital and other expenses.

In the compensation court defendant denied the alleged facts on which liability of defendant was based. The claim of plaintiff was rejected and the proceeding dismissed. Plaintiff appealed to the district court where the findings and judgment were again in favor of defendant. This is an appeal to the supreme court for the relief denied below.

Plaintiff takes the position that he proved a compensable injury by a preponderance of the evidence and that therefore the dismissal should be reversed and a decree for compensation entered in his favor on the record presented. His theory is that the fall and the resulting fracture activated former dormant arthritis of the spine and resulted in permanent disability.

It is well-settled law that the burden was on plaintiff to prove by sufficient evidence that he suffered a compensable injury arising out of and in the course of his employment, and that an award for compensation cannot be based on possibility, probability, speculation or conjecture. *Milton v. City of Gordon,* 129 Neb. 888, 263 N. W. 208.

Some of the facts proved are not in dispute. When plaintiff was about 55 years of age he was employed by defend-

ant July 2, 1934, as fireman on a locomotive crane, and continued to work in that capacity until March 26, 1935. While the locomotive crane was standing on a trestle on the morning of September 25, 1934, plaintiff blew sediment out of the boiler with steam in preparation for the day's work. Presently there was a sudden movement of the crane and he fell from his footing thereon through the trestle and struck the ground head first. He was shaken up and there was a gash on his left leg and he complained of pain in his neck. The distance of his fall was estimated by witnesses at 6 to 11½ feet and the time until he was back at work on the crane at 5 minutes to an hour. On account of the accident plaintiff did not lose any time or wages as locomotive fireman from September 25, 1934, until March 26, 1935, when the crane was no longer needed or used in the construction of the bridge and when plaintiff's employment was consequently terminated. His services were satisfactory for the entire period of his employment by defendant.

Testimony of plaintiff tended to prove the following facts: He was at first unconscious. Shortly after the accident his neck was swollen and painful; bones of his neck would not come together; he ate soft food for about a week; finally "snapped out of it and got along pretty well;" continued to work; in February his neck started to crack; at times everything turned kind of blue; legs were weak and he had to sit down, but recovered; had stinging in his neck once in a while but was able to perform the duties of his employment; had a "bad spell" about three weeks after he was laid off and seemed to see a big wheel of lights. At breakfast one morning he fell face forward on the table; dizzy spells increased until he had one or two a week; had pain on left side of neck; wore a brace on his neck; while in the employ of Phelan-Shirley Company January 17, 1920, injured his back and as a result was in a cast in a hospital for at least 33 days; that injury caused a fusion of his twelfth dorsal vertebra and his first lumbar vertebra; was disabled until 1927, but thereafter was continuously, except

for one short period, engaged in hard labor until accidentally injured while in the employ of defendant, September 25, 1934.

There was also additional testimony to the effect that, after defendant's employment of plaintiff ceased, he had severe headaches and fainting spells; pain in his back; did not sleep well; had no appetite; lost weight; was weak and unable to work.

To prove that total permanent disability was caused by the accidental fall from the crane, plaintiff called four physicians who testified as experts. From the history related by plaintiff, which was similar to that already outlined herein, from physical examinations of plaintiff and from what was disclosed by a number of X-ray pictures taken at different times, his experts testified, or expressed opinions, to the effect that X-rays disclosed an injury to the neck, a fracture of the left lamina of the sixth cervical vertebra; that a dark line on an X-ray film indicated the fracture; that all nerves and tissues in the area of the fracture are affected; that there is at the fracture an overgrowth of bone which impinges on the nerves; that the fall and resulting fracture revived former dormant arthritis of the spine; that vital organs were examined and blood tested; that evidence of an infection causing callus or a new growth of bone around the fracture was not found; that the impingement on the nerves is disabling and will grow worse; that plaintiff is totally disabled as the result of his accident September 25, 1934.

If the evidence adduced by plaintiff were unchallenged, it would be sufficient to support an award for compensation, but, on the issue of disability as a result of the fall, testimony of experts is in direct conflict.

From sources of information open alike to experts on both sides, three physicians testified for defendant. One or two or all testified, or expressed opinion, to the effect that it is not possible to get a satisfactory picture of the lamina itself, owing to the overlapping of bones in the path of the X-rays; that a line pointed out on one of the X-ray

films as indicating the course of a fracture of the left lamina of the sixth cervical vertebra is a shadow due to the overlapping of different bony projections; that the X-ray pictures in evidence do not indicate such a fracture; that a misplacement or a misalignment indicating a fracture is not shown; that osteoarthritis is evidenced on the third, fourth, fifth and sixth cervical vertebræ; that on the day plaintiff fell from the crane his injury was diagnosed as a sprain of neck muscles, not a fracture; that there was at first no physical abnormality in the neck except rigidity; that later examination showed an infection of the teeth, pyorrhea, pus oozing from the roots; that there was a kyphosis, or curvature of the spine backward near the middle, limiting motion backward and being more noticeable at the twelfth dorsal and the first lumbar vertebræ; that there was an old fracture of the first lumbar vertebra and a bony overgrowth extending upward to the twelfth dorsal vertebra; that other bones of the lumbar spine were likewise involved in the old arthritis; that the bones of the neck showed two tiny spots of mild arthritis like the overgrowth on the rest of the spine; that the left cervical nerve supplies the left arm which is normal in sensation and muscular movement; that there was no impingement of nerves at the lamina to cause disability; that the present condition of which plaintiff complains is due to the older fracture and to the former arthritis which goes up and down the spine, limiting motion, throwing the upper part of the back forward and so shifting weight as to make trouble in different bones of the spine; that disability was not the result of the fall from the crane.

There being a direct conflict in the testimony of experts on the traversed allegation that plaintiff suffered a compensable injury as a result of the accident, the determination of the ultimate fact from a scientific standpoint becomes a difficult problem. Circumstances and expressed or implied reasons for the opinions of experts in view of the entire record may determine the issue. In a recent case the following rule was announced:

"Cogent reasons and circumstances that strengthen the opinion of expert witnesses as to a scientific fact in issue and tend to weaken opposite expert opinions may determine the issue." *Montgomery v. Milldale Farm & Live Stock Improvement Co.*, 124 Neb. 347, 246 N. W. 734. See, also, *Sherman v. Great Western Sugar Co.*, 127 Neb. 505, 255 N. W. 772.

In the present case plaintiff himself testified that two vertebræ in his spine fused as a result of an accident in 1920 and caused total disability which terminated in 1927 —evidence of arthritis in his spine long before his alleged injury in 1934. Defendant introduced evidence of adjudications that plaintiff was totally and permanently disabled as a result of his injury in 1920 and that he was awarded compensation for life but satisfied the judgment therefor by a lump-sum settlement in 1927. See *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609, 197 N. W. 615.

Among reasons for the expert opinion that the later accident did not bring about the present condition of plaintiff are the following:

If there had been a fracture of the lamina, disabling pain would soon have occurred. Hard work continuously for six months or more after the accident in 1934 indicated there was no fracture of the lamina. An impingement of the nerve there would have interfered with articulation of the neck which has good motion. Impingement of the nerve would have disturbed muscular movement of the left arm which is free. Severe headaches and disability came too late to be attributable to the later accident. Infected teeth and arteriosclerosis account for dizziness. The crack in the neck was more likely due to arthritis than to a fracture. Worry over the loss of a job and pain in the back were sufficient causes of loss of appetite, loss of sleep and loss of weight. Disability would have occurred sooner, if attributable to reactivity of dormant arthritis.

The weight of circumstances, the probative effect of the evidence and the cogency of the reasons for the opinions of defendant's experts preponderate in favor of the defense

and defeat the claim of plaintiff. The conclusion is that plaintiff did not prove by a preponderance of the evidence that he suffered by his fall from the crane a compensable injury arising out of and in the course of his employment. In view of this finding on the controlling issue in the case, other questions are immaterial, though ably presented at the bar and in the briefs.

AFFIRMED.

HERSCHELL H. MASON V. STATE OF NEBRASKA.

270 N. W. 661

FILED JANUARY 5, 1937. No. 29861.

1. **Appeal.** Errors assigned but not argued will be considered as waived. *Sweet v. State*, 75 Neb. 263, 106 N. W. 31.
2. ———. Error to be available to the complaining party must affirmatively appear in the record.
3. ———. Error is not ground for reversal of a judgment unless prejudicial to complaining party.
4. **Criminal Law: INFORMATION: MOTION TO STRIKE.** Motion to strike alias names of defendant from an information, charging him with obtaining merchandise by false pretenses in using name not his own, should be overruled when such motion precedes the taking of evidence.
5. ———: **WITNESSES: CROSS-EXAMINATION.** Defendant in a criminal action is allowed wide latitude in cross-examination of state's witnesses. The extent of such cross-examination, however, is committed to the sound discretion of the trial court. An abuse of discretion must be disclosed to predicate error on restriction of cross-examination.
6. ———: **EVIDENCE OF OTHER OFFENSES.** It is a general rule in criminal action that evidence of other offenses than the one charged is inadmissible, but an exception is quite uniformly recognized where it is necessary to show the intent or guilty knowledge of the accused.

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

C. E. Walsh, for plaintiff in error.

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

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

GOOD, J.

Herschell H. Mason, plaintiff in error (hereinafter called defendant), was convicted in the district court for Douglas county of the offense of obtaining, by false pretenses, goods, wares and merchandise with the intent to defraud, and was sentenced to a term of five years in the state penitentiary. He brings the record of his conviction to this court for review.

The information charged that defendant represented himself to be Ralph F. Chambers, and that he had established a regular and permanent grocery business at 1428 Military avenue, in Omaha, Nebraska; that said representations were false and fraudulent, and that by such representation he obtained merchandise of the value of $70.

While many errors are assigned, only a few were argued. Only those argued will be considered. "Errors assigned but not argued will be considered as waived." *Sweet v. State*, 75 Neb. 263, 106 N. W. 31.

Complaint is made of alleged misconduct of the county attorney in his opening statement to the jury. The only record of statements made by the county attorney is contained in the objections of counsel for defendant and his motion to declare a mistrial and discharge the jury. Whatever statements were made by the county attorney, they were not taken by the reporter and incorporated in the record. The statements of counsel in his objections and motion were not under oath, and, in overruling the motion, the court, who had heard the remarks of counsel, may not have deemed the statements of counsel for defendant as fairly reflecting the facts. It is a rule that error is never presumed. To be available to the complaining party, error must affirmatively appear. Where misconduct of counsel is relied upon as ground for reversal, such misconduct must be shown by the record and must be prejudicial to the rights of the complaining party. Judgment in a criminal action will not be reversed for error as to any matter

of procedure, if this court, after an examination of the entire cause, shall consider that no miscarriage of justice has actually occurred. Comp. St. 1929, sec. 29-2308. This statutory rule has been applied in *Baker v. State,* 109 Neb. 558, 191 N. W. 666, and *Melcher v. State,* 109 Neb. 865, 192 N. W. 502. The record does not disclose prejudicial error with respect to misconduct of the county attorney.

Defendant was charged in the information under the name of Herschell H. Mason, alias Ralph F. Chambers, alias H. Macey, alias H. C. Mayson, alias C. W. Horn. When the case was called for trial and before the introduction of evidence, defendant moved the court to strike from the information the alias names of H. Macey, H. C. Mayson, and C. W. Horn. The motion was denied. Defendant assigns error. At the time this motion was presented, the court could not know nor anticipate what the evidence would be and, we think, properly overruled the motion. While the record does disclose that the defendant used at least one alias, that of Ralph F. Chambers, it does not disclose that the other alias names were used by the defendant. If defendant desired to have the other alias names stricken from the information, the motion should have been presented after the evidence was taken.

During the trial the witness Wilson, on cross-examination, was asked whether any effort had been made to collect from Mr. Mason or Mr. Chambers. He answered: "We didn't ourselves, we turned it over to an association here in town to proceed." Defendant then offered in evidence an authenticated copy of an affidavit for attachment which had been filed in a Missouri court, on the theory that it tended to contradict and discredit the witness. Objections to the offer were sustained. The affidavit does not appear to have been sworn to by Wilson, nor is it disclosed that he had any knowledge or information concerning the affidavit for attachment, or that an action had been commenced in Missouri. The proffered evidence did not tend to impeach or discredit the witness. The objection to the exhibit was properly sustained.

Defendant complains that he was unduly restricted in the cross-examination of the state's witnesses. The defendant in a criminal action, as a rule, is allowed a fairly wide latitude in cross-examining the state's witnesses, but the extent of such cross-examination is committed to the sound discretion of the trial court. We have carefully examined the entire record and find no abuse of such discretion. Defendant's right of cross-examination does not appear to have been unduly restricted.

Complaint is made of the introduction in evidence, on the part of the state, of similar acts committed by the defendant at practically the same time and place as that complained of in the information.

In *Davis v. State*, 58 Neb. 465, 466, 78 N. W. 930, 931, it was said: "The general rule is that evidence of the commission or attempt to commit a crime similar to the one charged is inadmissible. * * * But an exception has been quite uniformly made in trials of some charges, of which is the one in the case at bar, where it is necessary to show the intent or guilty knowledge of the accused." Other cases announcing the same rule are: *Knights v. State*, 58 Neb. 225, 78 N. W. 508; *Burlingim v. State*, 61 Neb. 276, 85 N. W. 76; *Goldsberry v. State*, 66 Neb. 312, 92 N. W. 906; *State v. Sparks*, 79 Neb. 504, 113 N. W. 154; *State v. Routzahn*, 81 Neb. 133, 115 N. W. 759; *Cohoe v. State*, 82 Neb. 744, 118 N. W. 1088; *Evers v. State*, 84 Neb. 708, 121 N. W. 1005; *Clark v. State*, 102 Neb. 728, 169 N. W. 271; *St. Clair v. State*, 103 Neb. 125, 169 N. W. 554; *Neal v. State*, 104 Neb. 56, 175 N. W. 669; *Katleman v. State*, 104 Neb. 62, 175 N. W. 671; *Welter v. State*, 112 Neb. 22, 198 N. W. 171; *Taylor v. State*, 114 Neb. 257, 207 N. W. 207; *Swogger v. State*, 115 Neb. 621, 214 N. W. 70.

Defendant insists that the evidence was insufficient to sustain the verdict, in that it was not sufficient to show criminal intent, or that the representations related to a past or present existing fact. The following is reflected by the record:

Late in September, 1935, defendant opened a grocery

store at 1428 Military avenue, in Omaha, under the name of Chambers Grocery. He made statements to Dun & Bradstreet, reporting agency, in which he represented that his name was Ralph F. Chambers and that he was establishing a permanent grocery business. He soon got in touch with the wholesale houses in Omaha and Council Bluffs, and between the 2d day of October and the 19th of the same month, in 1935, he obtained goods, wares and merchandise, for which he has not paid, as follows:

Nebraska & Iowa Wholesale Grocery Company	$ 78.51
Dold & Company	464.31
Cudahy Packing Company	129.13
Groneweg & Schoentgen Company	454.71
Armour & Company	214.82
J. Robinson Fruit Company	137.95
Omaha Flour Mills	79.88

It appears that defendant's first orders from these houses were for small amounts which he paid promptly, and that he then gave increased orders, the heavier orders being given from the middle to the 19th of October. On the night of the 19th defendant closed his store, and he and all of his clerks, who had been obtained from Kansas City, Missouri, left in the night. The stock of merchandise that was left in the store was very greatly depleted. The receipts from the business had mostly disappeared with the defendant. It appears that defendant's full and real name was Herschell H. Mason; that he had previously operated a number of grocery stores in and about Kansas City, and had been adjudged a bankrupt; that he had adopted the name of Chambers, because it would facilitate his obtaining credit.

From the entire record it clearly appears that defendant opened his store with intent of obtaining goods, wares and merchandise, converting them into money, and departing with the proceeds; that he harbored the intent to cheat and defraud at the time he purchased the merchandise; that he knowingly gave a false name, in order to obtain credit in purchasing the merchandise. We think the evi-

dence fairly shows that defendant had no intention of establishing a permanent grocery business, but only to run it long enough to obtain merchandise which he could convert into money for his own use. He misrepresented his name, with the design of obtaining credit, since he knew, as the evidence shows, that if he disclosed his true name, the fact that he had been adjudged a bankrupt would seriously impair his opportunity to obtain credit. The representations were false and made with respect to an existing fact, and the evidence of intent is established. The evidence is ample to sustain the verdict.

Defendant further asserts that the name of Chambers was not a fictitious name. It is true that he had rather closely associated with him in the transaction a man by the name of Ralph F. Chambers. However, the name that he gave was not his own. It was false or fictitious, so far as the defendant was concerned. The complaint in this respect is without merit.

It is insisted that the sentence is excessive. In view of the record, showing not only that merchandise was obtained in this particular instance but in many others, as above indicated, in like manner, we are of the opinion that the sentence is none too severe.

Prejudicial error is not disclosed.

AFFIRMED.

PETER VONBURG ET AL., APPELLEES, V. FARMERS IRRIGATION DISTRICT ET AL., APPELLANTS.

270 N. W. 835

FILED JANUARY 5, 1937. No. 29916.

1. **Appeal: LAW OF THE CASE.** The rule that the law of the case announced by this court on appeal will control the decision on a subsequent appeal is applicable only if, on the subsequent appeal, the issues and facts are substantially the same.
2. **Judgment: STARE DECISIS.** The validity of the water-right contracts in this action, except the provision for nonproration of water, has been hitherto decided in *Fenton v. Tri-State Land Co.*, 89 Neb. 479, 131 N. W. 1038.

3. Contracts: LAW APPLICABLE. The law in existence at the time a contract is made measures its legality, subject to any limitations subsequently made under the police power of the state.
4. Waters: IRRIGATION. Under the irrigation act of 1889 (Laws 1889, ch. 68), a water right for purposes of irrigation need not have been attached to any particular tract of land.
5. ———: ———: APPROPRIATION. The irrigation act of 1889 (Laws 1889, ch. 68) prescribed no method of making a claim of appropriation of water, except the construction of the works, in which to divert the water, and diverting it into such works. The extent of the appropriation was measured by the appropriation claimed, but within the limits of the capacity of the diversion works.
6. ———: ———: ———. Property rights in water for irrigation purposes consist not alone in the amount of, but also in the priority of, the appropriation.
7. ———: ———: CONTRACTS. Under the facts disclosed by the record and outlined in the opinion, the plaintiffs were the owners of a vested right to the use of the waters provided for in their contracts and were not required, in time of water scarcity, to prorate the water with subsequent patrons of the defendant corporation.
8. ———: ———: ———. The water-right contracts possessed by the plaintiffs could be attached and become appurtenant to lands under the irrigation canal at any point within 40 miles from the place of its diversion, as provided in such contracts.
9. ———: ———: WATER RIGHTS: TRANSFER. Where the owner of two tracts of land possesses a water right for irrigation purposes appurtenant to one of such tracts, he may, with the consent of the owner of the irrigation works, transfer it to the other tract. The owner of such irrigation works will be barred from asserting nonconsent to the transfer where it knowingly permits water to be supplied for a period of more than 10 years to the tract of land to which the transfer is made.
10. Judgment: WATER RIGHTS: STARE DECISIS. Where the validity of a water-right contract for irrigation purposes has been judicially determined in an action, wherein the irrigation company and the owner of the contract are parties, and the validity of such contract was in issue, such validity cannot, thereafter, be properly questioned in a subsequent action between the owner of such contract and the successor in interest of the irrigation works.
11. Waters: IRRIGATION DISTRICTS. An irrigation district may make reasonable rules and regulations with reference to the days on which it will deliver water to its contract patrons.
12. ———: ———: CONTRACTS. The owner of a water-right con-

tract for irrigation purposes is entitled to no more water for irrigation purposes than one second-foot of water for each 70 acres of land to be irrigated and not exceeding three acre-feet of water during each irrigation season.

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

Neighbors & Coulter, for appellants.

Morrow & Morrow, contra.

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

GOOD, J.

This is an action for injunction. Plaintiffs had decree. Defendants have appealed.

This is the second appearance of this cause in this court. The trial court sustained a demurrer to plaintiffs' petition. Plaintiffs refusing to further plead, a judgment of dismissal was entered. Plaintiffs appealed, and the judgment of the district court was reversed. The opinion of this court appears at 128 Neb. 748, 260 N. W. 383. Thereafter defendants filed answers, and issues were joined, with the result above indicated.

It is the contention of plaintiffs that the law of the case was settled on the former appeal and must rule the decision in this second appeal. The rule is that the law of the case is settled and is applicable where a second trial is had upon the same issues, and the evidence is substantially the same as on the first trial. To the extent that the material facts developed on the second trial vary from the allegations of the plaintiffs' petition, the rule is inapplicable.

It may be observed at the outset that all of the plaintiffs are not in an identical situation. Those plaintiffs whose claims are distinct from the others will be separately treated in this opinion.

In 1887 a number of farmers organized a corporation, known as the Farmers Canal Company, for the purpose of constructing a canal for irrigation and other useful pur-

poses. They took the proper steps to appropriate water from the North Platte river. They claimed an appropriation for a sufficient quantity of water to fill a canal 40 feet wide on the bottom and 4 feet in depth. Between 1887 and 1890 the canal company constructed a canal about 10 miles in length. No corporate stock was issued. The work of constructing the canal was performed by the farmers who organized the company, and each was entitled to stock in the corporation equal in amount to the value of the labor, material or money furnished by him. Some time in the year 1890 the owners of the canal company were irrigating some of their lands with waters from the canal. In the fall of 1890 the canal company entered into an arrangement with one Wright and others, whereby the then owners arranged to transfer to Wright and his associates the corporate franchise and canal, but reserving to themselves the exclusive, perpetual right to the use of a specified quantity of water from the canal for irrigation purposes. Each of the original owners of the canal, save one, which will be hereinafter considered separately, was given a contract for a specified quantity of water for irrigation purposes. The plaintiffs herein are either the owners of such contracts or successors in interest to such owners. The contracts in question were executed as a part consideration for the transfer of the rights of the then owners of the canal company to Wright and his associates. In truth and in fact, the canal and franchise and right to the use of water were only in part surrendered and turned over to Wright and associates. The owners retained a perpetual easement in the canal and the right to use of the quantity of water called for in their contracts. That part which was reserved to the original owners of the canal company, in fact, never passed to Wright and associates.

The contracts between the canal company and each of the former owners are identical except as to name and amount of water. Each of the contracts, among other things, contains these provisions:

"And for the better security of the second party (original

owner) for the faithful fulfilment and performance of the covenants and agreements upon the party of the first part, its successors and assigns forever, hereinabove covenanted and agreed by the said first party upon its part to be kept and performed, the said first party does hereby waive all right to prorate the water in said canal. And the said second party, his heirs and assigns forever, shall be supplied with water first in preference over any and all subsequent stockholders in the said canal. And it is further specially agreed that this perpetual water right, as above set forth, shall be forever free from any and all assessments of taxes of any nature or for any purpose whatsoever.

"Said first party agrees to deliver the water as above set forth, at the headgates erected and provided by the second party for a distance not to exceed forty miles along said canal from the point where the first party diverts the water, for the supply of said canal, from the North Platte river, viz., at a point in section 10, township 23, range 58, west of the 6th P. M. where the principal headgate is now located and established."

The validity of these contracts was involved in the case of *Fenton v. Tri-State Land Co.*, 89 Neb. 479, 131 N. W. 1038. The then owner of the canal, the Tri-State Land Company, denied the right of the contract holders to receive water without paying therefor, and in the cited case it was held that the contracts were valid and enforceable with respect to the right to receive water, without making any payment therefor. The court did not pass upon the question of whether the provision for nonproration of water was enforceable, since up to that time no question had been raised as to the insufficiency of the water to supply the needs of all patrons of the Tri-State Land Company, the then owner of the canal. Thereafter water was furnished to the contract holders as before until the year 1934, when there was a water scarcity and an insufficient amount to supply the needs of all of the patrons of the defendant corporation. It may be noted that the corporate

defendant has acquired the right to obtain storage water which is also carried in its canal, but plaintiffs assert no right to any part of the storage water, but only to the amount of water for which their contracts call, provided that the natural flow of the water in the canal at its headgate is sufficient to supply them that quantity.

In the former appeal it was held that, under the facts pleaded in the petition, the plaintiffs had acquired a vested right to the quantity of water for which their contracts call. The facts developed in a subsequent trial are somewhat at variance with the allegations of the petition and require us to reexamine the question as to whether the plaintiffs have obtained a vested right to the waters called for by their contracts.

From the present record it appears that the water had not been actually applied and used by the plaintiffs for irrigation purposes in a number of instances at the time the contracts were made, and that the water rights were not attached to any particular lands. The question then arises whether the water right, not attached to any particular land, was a property right vested in the plaintiffs. The applicable law in existence at the time a contract is written becomes a part thereof, and the validity of a contract must, therefore, be determined by the law in existence at the time of its making.

It is a rule quite generally recognized that the validity of a contract depends upon the state of the law at the time it was made. 13 C. J. 261. This principle was recognized and applied in determining the validity of the contracts in question in the case of *Fenton v. Tri-State Land Co., supra.* In that case it was said (p. 486): "At the time that the Farmers Canal Company was incorporated, there was no statute in this state providing for the appropriation of water from the public streams of the state. * * * In 1889 a complete act (Laws 1889, ch. 68) evidently intended to cover the whole subject of irrigation was passed. The transfer of ownership of the Farmers Canal Company from the incorporators to Wright and his associates was

made after the passage of the latter act, and the legality of the contracts must be measured by the law as it then stood, subject of course to any limitations subsequently made under the police power of the state." The rule was recognized and applied in *Boise City Irrigation & Land Co. v. Turner*, 176 Fed. 373.

At the time these contracts were entered into, the irrigation act of 1889 (Laws 1889, ch. 68) was then in force, and the validity of the contracts in question must be determined under that law.

Section 1, ch. 68, Laws 1889, reads as follows: "The right of the use of running water, flowing in a river or stream or down a canyon, or ravine, may be acquired by appropriation by any person or persons, company or corporation organized under the laws of the state of Nebraska." By section 8 of that act provision is made for the giving of notice of the intended appropriation. Section 9 provides that within 60 days after notice has been posted the claimant must commence construction of the works in which it is intended to divert the water. Section 10 reads: "By completion is meant conducting the water to the place of intended use." Section 11 reads: "By compliance with the above rules, the claimant's right to the use of water relates back to the time the notice was posted." Section 13 of the act provides: "All ditches, canals and other works heretofore made, constructed or provided by means of which the waters of any stream have been diverted and applied to any beneficial use must be taken to have secured the right to the waters claimed to the extent of the quantity which said works are capable of conducting and not exceeding the quantity claimed without regard to, or compliance with the requirements of this chapter."

In Wiel, Water Rights (3d ed.) p. 428, it is said: "Historically, an appropriation was simply the taking possession of the stream (a 'possessory right' on the public domain), so that diversion was the last step to such possession, and the last step in completing the appropriation. Consequently the California Civil Code says: 'By completion is meant

conducting the waters to the place of intended use,' ignoring actual application as an element of completion of the right. * * * It (appropriation) consisted in possession of the flow of the stream; diversion constituted the appropriation because it constituted possession, whence the rule protecting appropriators 'by actual diversion' and likewise the enforcement of the doctrine of relation upon completion of construction work and diversion; capacity of ditch, as the amount in possession, measured the right; the right, as one to possession of the stream, was independent of place or mode of use; nonuse did not cause loss of right without voluntary abandonment of possession; * * * Beneficial use was represented in the acquisition of the right by the requisite of *bona fide intention,* already set forth. The actual accomplishment of this intention was necessary, * * * the right being complete on diversion, that completing the formalities equivalent to taking possession of the stream."

The doctrine above announced was applied in the case of *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District,* 97 Neb. 139, 149 N. W. 363. In the course of the opinion in that case this court said (p. 143):

"Under these provisions of the act of 1889 one who has before that time 'claimed the right to water,' and had 'constructed works in which to divert it,' and had diverted and applied it to some useful purpose, was given the right of an appropriator. The act provided no other means of determining and fixing the extent and limitations of those rights. The policy of the act was to encourage the construction of works in which to divert water for irrigation and power purposes. The capacity of the works constructed would afford evidence of the amount of the appropriation.

"As the statute prior to the act of 1889 prescribed no method of making a claim of appropriation except the construction of the 'works in which to divert' the water and diverting it or applying it to some beneficial use, the appropriator was not required to do more until his right was challenged. If he then claimed the amount which the

works which he had constructed were capable of diverting to a beneficial use, and which he had diverted or so applied, his appropriation of that amount of water was complete."

On page 145 of the opinion it was further said: "This appropriation having been made under the law which permitted appropriations without actually applying it in any specified time, and this proceeding having been begun within a few months after the act of 1911 took effect, the plaintiff should be regarded as having appropriated water, within the limits of the capacity of its works, for lands under its ditch to which the water can be applied and was applied within a reasonable time." The same principle was applied in the case of *Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb. 121, 138 N. W. 171, and reaffirmed in the case of *Kilpatrick Bros. Co. v. Frenchman Valley Irrigation District*, 101 Neb. 155, 162 N. W. 422.

The evidence supports the finding of the trial court that the amount of water diverted from the river by the Farmers Canal Company was more than sufficient to supply the quantity of water provided in the contracts executed between the canal company and its original stockholders.

We therefore conclude that the original stockholders had a property right vested in them to the extent of the water claimed in their several contracts and such property right might be sold and disposed of as any other property under the law as it then existed.

In *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 278, it was said (p. 27): "Property rights in water consist not alone in the amount of the appropriation, but, also, in the *priority* of the appropriation. It often happens that the chief value of an appropriation consists in its *priority* over other appropriations from the same natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right." It necessarily follows that the owner of a priority right to the use of water is the owner of property and he cannot be deprived thereof without due process of law. Expressions may be found in some of our former decisions that the patrons of an irrigation canal,

and not the canal company which constructed the canal, are the real owners of the appropriation. While that point was not actually involved in any of the cases in which the expressions were used, we think the preference clause in these contracts is binding, in any event. The evidence clearly shows that the parties to whom these contracts were issued were all of the stockholders in the company and the only consumers of the water in the canal prior to the issuance of the contracts.

Defendants contend that the Farmers Canal Company did not have power to make a valid agreement, giving one landowner a preference in the use of water over another for a water right under the same appropriation. We think that this may be admitted. In this instance, the water right which the plaintiffs have in this case was reserved to them and never passed to the defendant corporation.

Defendants contend that, in any event, there is a distinction between the rights of landowners, whose land may be irrigated from the first 10 miles of the canal, and the rights of those whose lands may be irrigated under the extended portion of the canal. We are unable to perceive any distinction in this respect. Since plaintiffs, by their contracts and reserves, acquired a vested property right, as we have already seen, it was superior to the rights of any subsequent patrons of the canal company or its successor in interest.

The lands of plaintiffs Logan and Ledingham lie about 20 miles below the headgate or place of diversion of the water from the Platte river. Defendants contend that, since the lands lie below the constructed portion of the canal, as it existed at the time the contracts were entered into, and their lands were not then irrigated and could not be irrigated from the canal as it then existed, they could not have had a vested right on account of the beneficial application of water to their lands when the contracts were originally issued in 1891. We think the contention is without merit. The contracts provided for the application of water within a distance of 40 miles from the headgate. As we have already seen, each of the contract holders had a

property right to the quantity of water specified in his contract, to be applied to land within a distance of 40 miles from the headgate, and when the ditch was constructed to that point and the water conducted thence, it related back to the time of the original appropriation. We think the contracts of plaintiffs Logan and Ledingham are valid and enforceable.

Defendants contend that plaintiff Gibson possesses no water-right contract. The contract claimed by Gibson is under a conveyance from one Minner. It seems to be conceded that Minner was the owner, at one time, of one of the water-right contracts, and in the case of *Fenton v. Tri-State Land Co., supra,* it was determined that the contract owned by Minner was attached to and made appurtenant to the southeast quarter of section 9, township 23 north, range 57 west of the 6th P. M.; that Minner was the owner of that land and also the owner of the south half of the northeast quarter in section 21, township 23 north, range 57 west of the 6th P. M.; that while Minner was the owner of both tracts of land, in 1912, he ceased using the water on his land in section 9, and thereafter used it on his land in section 21, and continued such use until he sold the land to Gibson in 1917. Gibson has since used the water upon his land from 1917 to 1934. The evidence discloses that the defendant corporation had knowledge of the fact that Gibson was using the water upon his land in section 21, and that it never made any objection thereto except to raise the question of whether he, with the other contract owners, should be required to prorate the water in the canal with other patrons of the defendant corporation.

Defendants contend that, since the water was once attached and became appurtenant to the land in section 9, it could not thereafter be severed and transferred to other land, at least without the consent of the owners of the tracts to which it was attached, the owner of the tract to which it was attempted to be transferred, and without the consent of the defendant corporation. Minner was the owner of the tract to which the land had been attached and

the owner of the tract to which he had transferred the use of the water. The long-time use of that water, from 1912 to 1934, without question from the corporate defendant, is sufficient to indicate that the corporate defendant acquiesced in and consented to the transfer.

Defendants are barred by the statute of limitations from now asserting nonconsent of the corporate defendant to the transfer of the water right to the land now owned by Gibson.

Defendants challenge the right of the plaintiff Kearney to the validity of the water contract claimed by him, because it was not issued until 1903, after the original Farmers Canal Company had parted with its title. We think that is immaterial under the circumstances. The question of the validity of Kearney's contract was involved in the case of *Fenton v. Tri-State Land Co., supra,* and was there adjudicated to be valid, except as to the same question, involved in all of the contracts, as to whether he was required to prorate with subsequent patrons of the owners of the canal.

The trial court, with respect to Kearney's right, entered this finding: "That the water right now owned by the plaintiff Charles M. Kearney was not actually issued until 1903, which was after the Farmers Canal Company had lost title to said canal. The court finds, however, that said water-right contract was issued in accordance with an understanding made at the time the other water-right contracts were issued and that validity of said contract was in issue in the *Fenton* case herein referred to and it was therein decreed that said water-right contract was valid and binding on the predecessor of the defendant Farmers Irrigation District, the Tri-State Land Company, and the validity thereof cannot therefore be questioned in this action."

We think the record fully sustains this finding. It follows that the contract of plaintiff Kearney is in the same class with that of the other plaintiffs, so far as this action is concerned.

It is argued by defendants that plaintiffs, in any event,

should be limited to three acre-feet per acre during each irrigation season. We are inclined to agree with this proposition. While plaintiffs have a vested right to a certain quantity of water, they are not entitled to use more water than can be beneficially used upon their lands. It is within the police power of the state to prevent wasteful use of water. The legislature has provided that one second-foot for each 70 acres shall be the maximum rate of diversion, and that three acre-feet per acre during each irrigation season shall be the maximum quantity. We are of the opinion that the right of plaintiffs should be thus limited. Anything in excess of that would be a wasteful use of the water.

In *Fenton v. Tri-State Land Co., supra,* it was held that the defendant was entitled to make reasonable rules and regulations in the maintenance of its irrigation system. Conserving all water for beneficial use is a part of the public policy of the state, and we think that the defendant corporation is entitled to make reasonable rules and regulations with reference to the days on which water shall be furnished to each of the plaintiffs.

The trial court made elaborate findings of fact and separate conclusions of law. Each of the findings of fact appears to be sustained by the record, and the conclusions of law are likewise approved except in one respect, wherein the court held that each of the plaintiffs was entitled to the quantity of water called for in his contract, or a sufficient amount to irrigate his lands, without being compelled to prorate with other patrons of the district.

That part of the trial court's second conclusion of law, which awards to plaintiffs the amount of water for which their water-right contracts call, "or a sufficient amount to properly irrigate the lands to which it is applied," should be limited to a maximum rate of flow, not exceeding one second-foot for each 70 acres of land and not exceeding a total of three acre-feet during each irrigation season. The decree of the district court, with this slight modification, is affirmed.

AFFIRMED AS MODIFIED.

LESTER DAVIS, APPELLEE, V. LAWRENCE BIXBY, APPELLANT.

270 N. W. 834

FILED JANUARY 5, 1937. No. 29737.

Trial. The credibility of witnesses and the weight to be given their testimony are questions for the jury.

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

Robert O. Reddish, for appellant.

S. L. O'Brien, contra.

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

DAY, J.

This is an appeal from a judgment entered upon a verdict of a jury in an action to recover a commission for the purchase of cattle for the defendant.

The plaintiff alleges that he had an oral contract with the defendant by which he was employed to purchase 406 head of cattle, for which service he was to be paid one dollar per head. It is further alleged that in pursuance of the agreement the plaintiff negotiated the purchase of the cattle, for which he has received $206 and for which there is due the sum of $200. The defendant's answer was a general denial.

The appellant makes five formal assignments of error which, on account of the nature of the pleadings, may be summarized and stated as the evidence does not support the verdict of the jury. The plaintiff alleged the contract and the purchase of cattle thereunder, together with payment of a part of the contract price. The defendant filed a general denial. This squarely raised an issue of fact which was submitted to the jury under proper instructions. There are no exceptions to the instructions given by the court to the jury. The motion for new trial is not predicated upon an allegation that the instructions were erroneous. A critical examination of the record reveals that the evidence as

to the existence of the contract to pay the plaintiff a commission for the purchase of the cattle was in dispute. The evidence is amply sufficient to support a finding by the jury that the plaintiff negotiated the purchase of the cattle under a contract with the defendant; that the cattle were transferred to a party designated by the defendant; that, by agreement with the defendant, the plaintiff was paid a part of the commission by the seller of the cattle; and that there is $200 due under the contract which has not been paid.

As is usual in cases where the parties are operating under an oral contract, there is conflicting evidence as to the material facts of the transaction. But this conflict of evidence is, of course, for the jury to resolve and determine. It is a well-established general rule of law often announced by this court that the credibility of witnesses and the weight to be given their testimony are questions for the jury.

The argument of the appellant that the plaintiff cannot recover because part of the commission was paid by the seller for that one cannot recover from both parties unless it is agreed and understood by all parties to the transaction has not been overlooked. Neither the pleadings nor the evidence raises this issue. There is no error disclosed by the record.

AFFIRMED.

RIGGS OPTICAL COMPANY, CONSOLIDATED, APPELLEE, V. EARL F. RIGGS, APPELLANT.

270 N. W. 667

FILED JANUARY 5, 1937. No. 29797.

1. **Trade-Names.** One who acquires a trade-name in a particular locality is entitled to protection from unfair competition by a competitor using a name of such similar import as will probably deceive the public.
2. ———: EQUITABLE RELIEF. One is entitled to equitable relief if the use of the trade-name is such as is calculated to deceive the public and does mislead them.

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

C. Russell Mattson and *Chambers & Holland,* for appellant.

Flansburg, Lee & Sheldahl, contra.

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

DAY, J.

This is an appeal from a decree permanently enjoining Dr. Earl F. Riggs, a licensed optometrist, from the use in advertising of the names Dr. Riggs or Dr. Earl F. Riggs of the Riggs Optical Company, or the Dr. Earl F. Riggs Optical Company.

The plaintiff, the Riggs Optical Company, is a corporation organized for the purpose of manufacturing and selling optical goods. It manufactures eyeglasses according to prescriptions of oculists, optometrists, and refractionists and sells them to the public. The petition alleges that the Riggs Optical Company has been engaged in such manufacture and sale in Lincoln since 1924; that its name is a trade-name known throughout the United States; that the defendant Earl F. Riggs is a licensed optometrist in this state where he examines eyes and fits glasses for the public; and that for the purpose of taking advantage of the good-will, he has advertised extensively as "Riggs Optical Company" and as the "Riggs of said company," and that by reason of such advertising he has misled many of its patrons to its damage.

The answer of the defendant admits that he is a licensed optometrist, engaged in the business of fitting and selling eyeglasses to the public. He alleges that he is engaged in the retail business of selling glasses which are manufactured for him by others; that the plaintiff manufactures optical goods which it sells to various oculists, optometrists, and refractionists according to prescription; that the plaintiff is a wholesaler and does not engage in the retail busi-

ness; that its advertising is such that it is estopped to deny that it does a strictly wholesale business.

The evidence in the case is substantially without conflict. It appears that the Riggs Optical Company was originally organized as a Nebraska corporation in 1917 with the corporate name "Riggs Optical Company," and that later it was reorganized as a Delaware corporation with the name "Riggs Optical Company, Consolidated." It has always used as its trade-names "Riggs" or the "Riggs Optical Company." It has advertised its business extensively by catalogs and by magazines circulated among optometrists and oculists. It advertises in magazines and its catalogs that it does business at wholesale.

Its business is the manufacturing and selling of eyeglasses and optical goods. It receives its business from oculists and optometrists who send their patients and customers with a prescription showing the lens required for the correction of vision. The patient as a general practice takes the prescription to the office of the optical company where he picks out the shape of the lenses and selects a frame. The customer's face is measured, the glasses are manufactured, and the glasses are fitted, adjusted, and delivered to him. The Riggs Optical Company usually collects the price and remits a portion of it to the oculist or optometrist. The reason for this remittance is not apparent. However, it is upon this that it is asserted the business is wholesale.

Dr. Earl F. Riggs, the defendant, is a licensed optometrist who examines eyes, writes prescriptions for the manufacture of glasses, and sells them to the public. He sends his prescriptions to a manufacturer of eyeglasses in the same manner in which oculists and optometrists send their prescriptions to the plaintiff company. He has advertised widely as "Dr. Earl F. Riggs Optical Company" or as "Riggs," "Dr. Riggs" or "Dr. Earl F. Riggs of the Riggs Optical Company." His use of the term "optical company" is as a trade-name only, as there is no company or corporation. He has erected a sign exactly the same as the sign

used by plaintiff Riggs Optical Company with the word "Riggs" standing alone.

It should be noted that the purpose of this suit was not to prevent the defendant from practicing optometry but was to restrain him from the use of the trade-name of the plaintiff. The decree entered by the trial court does not restrain Earl F. Riggs from the practice of optometry.

The evidence also establishes that the use of the name Riggs Optical Company or its variants was such as to mislead people and to confuse them. The defendant, of course, contends that there was no confusion because he examined eyes and sent the prescription with the customer to a manufacturer of eyeglasses, and that there was no conflict or competition between his business and that of the Riggs Optical Company. This is not impressive because the persistence of the defendant in continuing to use these trade-names indicates that they are of some value to him. Both the plaintiff and the defendant are engaged in selling eyeglasses to the public. The plaintiff contends that if, on account of the advertising, a person went to the defendant for an examination, it did not get the business because the defendant did not send his prescriptions to it. The defendant's use of the term Riggs and Riggs Optical Company so as to confuse the public and cause them to believe that he was the plaintiff was beneficial to him and detrimental to them. Every patron who was attracted to his office by this advertising was lost as a customer by the plaintiff. Upon this foundation of fact the law of the case is predicated.

There was no error in the exclusion of evidence by the trial court. The evidence excluded was sought to be adduced by questions to the district manager of the plaintiff company and another as to whether there was competition between the plaintiff and the defendant. The contention was that the plaintiff in the wholesale business and the defendant in the retail business were not rivals for the same business. These questions called for conclusions and opinions upon an issue before the court, not the subject of ex-

pert testimony. It was an ultimate conclusion for the court's determination from all the facts in evidence.

It is apparent that there was competition. The nature of the business as depicted by the record is unusual. If the defendant is allowed to mislead the public, so that people go to his office for an examination, the plaintiff loses the business even though it does not examine eyes. The public was advised that the defendant examined eyes and by the wrongful use of the name the business was secured. Because of the peculiar nature of the business, and since both plaintiff and defendant are engaged in selling eyeglasses to the public, it is established in this case that they are competitors.

One who acquires a trade-name in a particular locality is entitled to protection from unfair competition by a competitor using a name of such similar import as will probably deceive the public. *Regent Shoe Mfg. Co. v. Haaker,* 75 Neb. 426, 106 N. W. 595.

There is no question that there cannot be unfair competition where there is no competition in fact, but the record does not establish such a situation here. The cause of action is based upon unfair competition resulting from confusion in the public mind. One is entitled to equitable relief if the use of the trade-name is such as is calculated to deceive the public and does mislead them. *Atlas Assurance Co. v. Atlas Ins. Co.,* 138 Ia. 228, 112 N. W. 232, 114 N. W. 609; *Weisman v. Kuschewski,* 243 Mich. 223, 219 N. W. 937.

The record has been critically examined to determine if the evidence is sufficient to support the verdict. It is concluded that there is evidence of the use of a name similar to the trade-name of plaintiff. The use of the names by the defendant has caused confusion which is detrimental to the plaintiff's business. The judgment of the trial court is not erroneous.

AFFIRMED.

STATE, EX REL GUSTAVE BOXBERGER, APPELLANT, V. CHARLES BURNS ET AL., APPELLEES.

270 N. W. 656

FILED JANUARY 5, 1937. No. 30003.

1. **Paupers.** There is no common-law liability upon any governmental unit to support poor and destitute persons, and they are not a public charge unless made so by statute.
2. ———: LEGISLATIVE POWER. The legislature has the power to impose upon the county the burden of relief of the poor and destitute and to prescribe the method of discharging the duty unless such power is limited by the Constitution.
3. **Statutes.** A statute is ordinarily mandatory which expressly imposes the care of poor and destitute persons upon the county.
4. ———. Whether a statute is directory or mandatory must be determined from the legislative intent, ascertained from a consideration of the entire statute in connection with other related statutes.
5. **Counties:** CARE OF PAUPERS. The emergency relief legislation (section 77-1820, Comp. St. Supp. 1935) does not limit the counties' statutory responsibility for poor and indigent persons to the fund raised thereunder.
6. ———: POWERS OF COUNTY BOARD. A county board cannot issue warrants for an amount exceeding 85 per cent. of the amount levied by tax for the current year except there be money in the proper fund for payment of same. Comp. St. 1929, sec. 26-116.
7. ———: ———. A county which has contracted to expend all the funds raised by emergency legislation and has exhausted the general fund cannot contract further and issue warrants for payment. Comp. St. 1929, sec. 26-116.
8. ———: ———. The powers of a county are limited to those prescribed by statute, and a county board can discharge a statutory obligation only by the statutory means provided by the legislature.
9. ———: CARE OF PAUPERS. When funds are available, a county must relieve such poor and destitute persons who come within the purview of the statute as entitled to relief.
10. **Paupers.** Whether a person comes within the purview of the statute so as to be entitled to relief is a question to be determined by the county board after an examination of the facts of each particular case.
11. **Counties.** The total expenditures of a county are limited by the amount of taxes it can assess under the Constitution.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, CHARLES LESLIE, JAMES M. FITZGERALD, HERBERT RHOADES, ARTHUR C. THOMSEN, WILLIS G. SEARS and JOHN W. YEAGER, JUDGES. *Affirmed.*

William R. Patrick, for appellant.

James T. English and *Jack W. Marer, contra.*

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

DAY, J.

Relator seeks a peremptory writ of mandamus requiring the respondents, the county commissioners of Douglas county, to provide relief for himself and family and all other poor and destitute persons similarly situated in said county. In response to a demand for such action, the board adopted a resolution denying relief for that the funds available for such purpose were exhausted. The case was heard before seven district judges sitting *en banc* (Hastings, Leslie, Fitzgerald, Rhoades, Thomsen, Sears and Yeager) who denied the application of relator.

The petition alleges that the relator is a resident of the county and state and is unable to earn a living for himself or his wife because of involuntary unemployment resulting from unavoidable economic conditions, and that there are 4,500 other families, residents of said county, who are similarly situated. It is also alleged that the question involved in this action is of common general interest to all such poor and destitute persons who are so numerous that it is impractical to bring them all before the court, and relator therefore sues for himself and for the benefit of all other such persons. The relator alleges that he is without any means of subsistence and has neither a father, grandfather, mother, grandmother, children, grandchildren, brothers or sisters of sufficient ability to provide for his support or to contribute thereto; that as a result of prevailing economic conditions he and others are destitute and without the necessaries of life and have no means of obtaining the same; and that his inability to provide for the

support and maintenance of himself and family is not due to intemperance or other bad conduct on his part. The relator prayed for an alternative writ of mandamus commanding the respondents as county commissioners to provide the necessaries of life for the relator and other poor persons, or that the respondents show cause why they have not done so; and that upon the final hearing of this cause a peremptory writ of mandamus be granted requiring and compelling respondents to make an immediate levy sufficient to provide for the estimated cost in an emergency for the necessaries of life for the relator, his wife, and other poor persons of said county and to issue their warrants and drafts on the county treasurer for payment of the necessary expenses incurred by them in support of such poor persons.

The respondents' answer is a denial of plaintiff's destitute situation and that of others similarly situated for that they have no information or knowledge concerning the allegations. The answer admits that relator made a demand upon them for relief and that it was refused for the reason that the county is without funds for the purpose. It is alleged that Douglas county has exhausted all funds available as well as its credit and that certain specified statutes prohibit the board from contracting to spend more money.

The issue presented by the pleadings is whether the statute places a mandatory duty upon the county board to relieve the poor regardless of its ability and financial condition, disregarding the statutory limitations upon county expenditures.

The relator insists that it is the mandatory duty of the county board to render relief in a proper case regardless of the financial condition of the county, notwithstanding statutory limitations upon expenditures. It is asserted that, if the statutes limiting expenditures are given effect, the statute requiring a county to care for the poor is nullified.

Let us first consider the obligation of the county. A county is not liable for the relief of the poor unless the duty is imposed by statute. There is no common-law liability

upon any government unit to support poor and indigent persons. The liability here, if any, must arise by virtue of statutes making it the duty of the county. Paupers are not a public charge unless made so by statute, but the legislature may impose the burden of relief on the county and prescribe how the duty shall be discharged. The legislature has the power to impose upon the county the burden of the relief of the poor unless such power is limited by a constitutional provision. *Gilligan v. Town of Grattan,* 63 Neb. 242, 88 N. W. 477. See, also, *Town of Clearwater v. Town of Garfield,* 65 Neb. 697, 91 N. W. 496; *Rock County v. Holt County,* 78 Neb. 616, 111 N. W. 366; *County of Saguache v. Tough,* 45 Colo. 395, 101 Pac. 411; *Cerro Gordo County v. Boone County,* 152 Ia. 692, 133 N. W. 132.

Our Constitution has no prohibition against such a legislative act. The legislature has by statute imposed the duty for the support of the poor and destitute upon the counties.

"When any such poor person shall not have any such relatives in any county in this state as are named in the preceding sections (68-101, 68-102), or if such relatives shall not be of sufficient ability or shall fail or refuse to maintain such pauper, then the said pauper shall receive such relief as his or her case may require, out of the county treasury, in the manner hereinafter provided." Comp. St. 1929, sec. 68-103.

"The county board of each county shall be the overseers of the poor and are vested with the entire and exclusive superintendence of the poor in such county." Comp. St. 1929, sec. 68-104.

"It shall be the duty of the county board in each county, to provide for all such persons as are unable to earn a livelihood, in consequence of any bodily infirmity, idiocy or other unavoidable cause, the necessaries of life, and in their discretion may confine such poor persons to some moral and discreet householder or householders in the county of sufficient ability to provide for them." Comp. St. 1929, sec. 68-105.

These statutes expressly make it the duty of the county

to provide the necessaries of life for the poor. Is the provision mandatory or directory? An authority states: "In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intent, from a consideration of the entire statute, its nature, its object, and the consequences that would result from construing it one way or the other, or from such statute in connection with other related statutes." 59 C. J. 1072.

However, where a statute expressly makes it the duty of a county to provide for poor persons, it is ordinarily mandatory. Nevertheless, it is subject to some limitation when considered in its relation with other statutes. Other statutes place a limitation upon the expenditures of the county.

The respondents had made an estimate of the amount to be produced by their anticipated levy under section 77-1820, Comp. St. Supp. 1935, as $102,000. That section provides: "Notwithstanding any more general or special law on the subject of revenue on maximum levies in force in this state, the county boards of the various counties in this state and the governing body of any municipality in this state, may, at their option, during the years 1935 and 1936, and during said years only, levy a tax of not to exceed one-half mill upon the taxable property within their respective corporate limits for the relief of unemployed and indigent persons."

In anticipation of this fund for emergency poor relief, respondents had contracted debts of approximately the full amount. There was no money in the treasury to the credit of the emergency poor relief fund upon which warrants could be drawn. This trial was held May 27, 1936. The levy was to be made in August thereafter, but the money was spent at least four months before. The emergency relief legislation (section 77-1820, Comp. St. Supp. 1935) does not limit the counties' responsibility for poor and indigent persons.

But the record reveals that there is no money in the general fund available for this purpose. The finances of the county are in serious condition. The primary respon-

sibility rests upon the respondents for its correction. It cannot be assumed by the court. The law does not contemplate that it should be. The respondents insist that since they have already contracted against the emergency fund for approximately the entire amount, and the general fund is exhausted, section 26-116, Comp. St. 1929, prevents them from contracting further and issuing warrants for payment.

Section 26-116, Comp. St. 1929, provides: "It shall be unlawful for the county board of any county in this state to issue any warrants for any amount exceeding the aggregate of eighty-five per cent. of the amount levied by tax for the current year, except there be money in the treasury to the credit of the proper fund for the payment of the same; nor shall it be lawful for the county board to issue any certificate of indebtedness in any form in payment of any account or claim, nor to make any contracts for or to incur any indebtedness in any form in payment of any account or claim, nor to make any contracts for or to incur any indebtedness against the county in excess of the tax levy for county expense during the current year; nor shall any expenditure be made, or indebtedness be contracted to be paid out of any of the funds of said county in excess of the amount levied for said fund."

A county board cannot issue warrants for an amount exceeding 85 per cent. of the amount levied by tax for the current year except there be money in the proper fund for payment of same. Comp. St. 1929, sec. 26-116.

Furthermore, section 26-732, Comp. St. 1929, makes all such contracts void, and section 26-733, Comp. St. 1929, renders the county official liable who causes funds of the county to be paid out in violation of the provisions. The relator argues that this is not applicable to the discharge of the mandatory statutory duty imposed by the pauper statutes. The law, it is said, creates the obligation, not the county board. After all, the county board has some discretion in the granting of relief, even when the funds are available for such purpose. A county board of commis-

sioners is one of very limited power. Both its powers and its duties are circumscribed by many statutes. Its powers and duties are largely, if not entirely, defined by statutes. The county itself is a creature of the state. It was intended by the legislature to so limit the expenditures of a county that the tax burden would not be unbearable.

It is asserted in argument, and the record supports the contention, that an emergency exists unlike any previous situation. The relator is unquestionably in a deplorable situation. Social workers retail a story of poverty, want, and need of cases numerous enough to depress and sadden any one who has any sympathy and concern for his fellow men. Various governmental agencies have spent vast sums of money for the relief of those distressed by the economic conditions. It is said that there were 4,500 families in dire need at the time of the trial. Of course, before granting relief to any, the board of county commissioners is required to satisfy themselves that each comes within the purview of the statute providing for relief. However, it is estimated that it would require at least $130,000 a month to meet the responsibility. This would amount to approximately $1,560,000 a year. The emergency, as serious as it appears to be, does not empower the county commissioners to do anything except what they are empowered by law to do. On the other hand, the enormousness of the burden does not lessen the power. We have examined the cases cited by the relator, but they are not helpful in the solution of this problem. The facts and circumstances are so unlike that they are not even analogous. Even in *State v. Weir*, 33 Neb. 35, 49 N. W. 785, the case most nearly applicable, the claim was for the payment of a "just indebtedness already incurred." There are cases, not cited, to the effect that where the county has obtained merchandise and keeps it the county is liable *quantum meruit*, though not on the contract. But that is not the situation here. This court is asked to issue a writ compelling the county to incur indebtedness for relief, when there is no money available nor prospective ability to pay. It cannot be done.

In 1935 Douglas county made a levy of 4.95 mills. The levy had not been made in May for 1936. The amount anticipated from the levy was approximately $1,273,532.29. This writ is sought to compel the respondents as commissioners of Douglas county to incur an additional indebtedness of $1,560,000, an amount larger than all the money raised by taxation for all purposes.

It ought not to be overlooked that the people of this state put a limitation upon expenditures by a county. Section 5, art. VIII of the Constitution, provides: "County authorities shall never assess taxes the aggregate of which shall exceed fifty cents per one hundred dollars actual valuation as determined by the assessment rolls, except for the payment of indebtedness existing at the adoption hereof, unless authorized by a vote of the people of the county." County officials should and do ponder the question, where is the money coming from? While the 1935 levy has not quite reached the limit, the difference, where so large a sum is involved, is imperceptible. While the record does not convey the information as to the levy for 1936, it would not, if increased to the limit, make funds available for the purpose of the granting of relief sought to be enforced on the county by the decree of this court.

If the emergency must be met, the legislature within constitutional limits under our system of government should take cognizance of it. If the Constitution is to be changed to meet the emergency, that change must be made by the people in the regular manner. After all, the people of Douglas county may vote to assume the moral obligation of suffering humanity within its borders. But the constitutional and statutory limitations on county expenditures prevent such a large burden from being forced upon the county by the judicial edict of this court.

It is a question whether mandamus is the proper remedy to enforce a statutory obligation to relieve 4,500 families. There is only definite accurate information as to one, the relator. Even the names of others are unknown. A writ could not be entered for their benefit. The board must in-

vestigate the condition of each to determine if they come within the class for which relief is provided. The only purpose their inclusion in this case can serve is to impress the court with the importance of the case and the seriousness of the situation. In this the unnamed parties have served their purpose well.

There is no reversible error in the record, and the judgment is the proper one.

AFFIRMED.

BERNARD O. SCOTT V. STATE OF NEBRASKA.

270 N. W. 833

FILED JANUARY 5, 1937. No. 29801.

Divorce: FAILURE TO PAY ALIMONY. Former husband's failure to make payments for the support of his minor children, as required by decree of divorce, is not contumacious under section 20-2121, Comp. St. 1929, if such failure is due to lack of means, and lack of ability to procure means, wherewith to pay such support money.

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

George H. Heinke and *Bruce Fullerton,* 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.

This is an appeal from an order of the district court committing the defendant to jail for contempt.

The action grows out of a decree of divorce, entered June 19, 1935, which required the defendant to pay $40 a month for the support and maintenance of his five minor children, and an attorney fee of $50. Upon an affidavit being filed by the wife, charging the defendant with failure to comply

with the order, an order to show cause was issued January 9, 1936, requiring him to appear before the judge of the district court on January 18 at 10:00 a. m., and show cause why he should not be punished for contempt for his failure to comply with said order.

At the hour fixed the defendant appeared in court and asked for one week's time to secure an attorney to represent and advise him, which request was refused, and defendant informed the court that the children had been with him a good deal of the time, and he had taken care of them and bought clothes for them, and that he was unable to pay more than he had paid; that three weeks before the hearing his wife had taken them to Beatrice. The defendant stated to the court that he had just come home from St. Elizabeth's Hospital, where he had been treated because of an injury received in an automobile wreck. The defendant stated that he was a renter, and had arranged for his wife to have the milk checks, which was all the income that he had coming in, and that the regional loan that he had on his horses and cattle took up the rest, but that he had a corn-hog check for $80 coming in shortly in the future that he would turn over, but he could not give the exact date. After further discussion between the court and the defendant, it was ordered that the defendant be confined in the county jail of Otoe county until he complied with the decree of the court, or until he was legally discharged.

The defendant sets out eight errors in his motion for a new trial, among them that there was not sufficient evidence in the record on which to base a conviction of the defendant in said contempt proceeding.

In the brief of the defendant, many citations were given which involved strictly questions of criminal contempt, and many of them are cited under section 20-2121, Comp. St. 1929. However, on the facts submitted in the case at bar, it appears to be only that of a civil contempt. The refusal to comply with the order in full does not appear to have been wilful and contumacious. *Cain v. Miller,* 109 Neb. 441, 191 N. W. 704; *Maryott v. State,* 124 Neb. 274, 246 N. W.

343. We therefore hold that there is no sufficient evidence in the record upon which to base the order entered in the case at bar. The same is reversed, and the defendant discharged without prejudice to the right to bring further proceedings if the defendant wilfully and contumaciously refuses to comply with any proper order in the future in reference to said payments.

REVERSED.

FRED GUSE, APPELLANT, V. GEORGE W. WESSELS ET AL., APPELLEES.

270 N. W. 665

FILED JANUARY 5, 1937. No. 29985.

1. Master and Servant: WORKMEN'S COMPENSATION LAW: "EMPLOYEE." The employment of a carpenter by a farmer to construct a machine shed on his farm is not in the course of the employer's occupation within the meaning of the workmen's compensation act.
2. ———: ———: ———. "In the workmen's compensation law the provision that the word 'employee' shall not be construed to include 'any person whose employment is casual, and which is not in the usual course of the trade, business, profession or occupation of his employer,' means conjunctively both casual employment and usual course of trade." *Sherlock v. Sherlock*, 112 Neb. 797, 201 N. W. 645.

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

Benton Perry, for appellant.

Kirkpatrick, Good & Dougherty, contra.

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

CARTER, J.

In this case the appellant brought suit against the appellees to recover benefits alleged to be due under the workmen's compensation act for injuries sustained while

in their employ. The trial court found against the appellant and dismissed the action. From this judgment, appellant appeals.

The record discloses that appellant was employed by the appellees, George W. and Albert Wessels, as a carpenter to assist in building a machine shed on the farm owned by appellees. It was agreed that appellant was to receive 40 cents an hour for his work. It appears that, when the shed was almost completed, and at a time when appellant was engaged in nailing metal roofing on the shed, he fell from the roof to the ground, breaking a leg and sustaining other injuries. Appellees contend that there can be no recovery against them for the reason that appellant was engaged in farm labor and is therefore excepted from the workmen's compensation law and that the employment was casual and not within the act.

Appellant testifies that he had followed the carpenter trade for many years, although he had taken other kinds of work when there was no carpenter work to do. He had previously worked for the appellees, George W. and Albert Wessels, during the threshing season. The record clearly discloses, however, that he had completed that employment a considerable time prior to his employment as a carpenter to assist in the construction of the machine shed. Appellant did not perform any labor except that in connection with the building of the shed. The question is whether the appellant was a farm laborer within the meaning of section 48-106, Comp. St. 1929, which provides in part as follows: "The provisions of this act shall apply * * * to every employer in this state employing one or more employees. * * * The following are declared not to be hazardous occupations and not within the provisions of this act: employers of household domestic servants and employers of farm laborers."

The Minnesota court aptly states the rule in the following language: "A workman is not a farm laborer simply because at the moment he is doing work on a farm; nor because the task on which he is engaged happens to be

what is ordinarily considered farm labor. The employee of an implement dealer does not become a farm laborer while engaged in correcting the behavior of a self-binder in the grain field of the owner, a farmer and customer of the dealer. Nor would the employee of a well digger become a farm laborer while stabling horses used on the drilling outfit. But a farmer's hired man would not cease to be a farm laborer while adjusting harvesting machinery or stabling the horses of a contractor drilling a well on the place. The modern farm laborer doubtless does much work on the rapidly increasing electrical equipment on farms. He continues a farm laborer while he does it. But an electrician sent out from town to do the same thing would not become a farm laborer for the occasion. So also a farm laborer does not step out of his own part while doing carpenter work for his farmer employer in the repair of farm buildings. Neither does the carpenter who comes onto the farm for the job of carpentry and nothing more. One continues a farm laborer and the other does not become one." *Peterson v. Farmers State Bank,* 180 Minn. 40, 230 N. W. 124.

We are convinced in the case at bar that appellees employed the appellant as a carpenter to assist in building a machine shed and not as a farm laborer within the meaning of the compensation law. It having been determined that appellant was not engaged in farm labor, the fact that the employers were farmers can make no difference. In *Keefover v. Vasey,* 112 Neb. 424, 199 N. W. 799, this court said: " 'Employers of farm laborers' as a class are expressly excluded from the employers' liability law, and once the character of the labor is determined, no inquiry as to the occupation or commercial status of the employer is pertinent."

Appellees next contend that the employment of the appellant was casual within the meaning of section 48-115, Comp. St. Supp. 1935, which provides in part as follows: "(3) It shall not be construed to include any person whose employment is casual, and which is not in the usual course of the trade, business, profession or occupation of his em-

ployer. The term 'casual' shall be construed to mean 'occasional; coming at certain times without regularity, in distinction from stated or regular.' "

It is clear from a reading of that part of the statute heretofore quoted that, where the employment is casual and not within the trade, business, profession or occupation of the employer, there can be no recovery under the act. *Sherlock v. Sherlock*, 112 Neb. 797, 201 N. W. 645. Was the employment casual and within the trade, business, profession or occupation of the employers?

In *State v. Nelson*, 145 Minn. 123, 176 N. W. 164, it appeared that Anna Foss owned a farm that was managed by her husband Walter Foss. Walter Foss employed carpenters to assist in tearing down an old barn and in rebuilding it. Two of the carpenters were injured and claimed benefits under provisions of the compensation law that were similar to those in the compensation law of this state. It was held that the employment was not within the usual course of the business or occupation of the employer. In deciding that case the court said: "But, if respondent can escape this conclusion, it is only on the theory that the building of a barn is within the usual course of the business or occupation of defendants. In our opinion the Fosses are not in a different situation, as far as this case is concerned, from a farmer living upon and operating his farm. If this was a work within the usual course of their business or occupation, then it was farm work, and, if it was farm work, there is no escape from the conclusion that one performing it was a 'farm laborer' and 'farm laborers' have been denied the benefit of the compensation act."

The record discloses that the appellees George W. and Albert Wessels were part owners of the farm where the machine shed was being built and the tenants in possession thereof. The other appellees were part owners only. The evidence is conclusive that George W. and Albert Wessels were engaged in farming and that they had no other trade or profession. We have already determined that the claimant was not engaged in farm labor. It is quite apparent

therefore that he was not employed in the usual course of the trade, business, profession or occupation of his employers within the meaning of the compensation law. The appellant was employed by the hour to assist in rebuilding the shed in question. It was employment that was occasional only upon the farm.

We conclude that the employment in the case at bar was casual within the meaning of the compensation law. It appears to us that, if it was within the usual course of the trade, business, profession or occupation of the employers, it would necessarily be farm labor and excluded from the operation of the compensation law for that reason. If it was not within the usual course of the trade, business, profession or occupation of the employers, it is expressly excluded by section 48-115, Comp. St. Supp. 1935. Upon a determination that the employment is casual, the claimant is in a dilemma from either horn of which he cannot escape.

The judgment of the trial court is right and is

AFFIRMED.

IN RE ESTATE OF JOHN W. SHIERMAN.
WILLIAM FRANCIS SHIERMAN ET AL., APPELLEES, V. NETTIE A. SHEA, APPELLANT.

270 N. W. 841

FILED JANUARY 5, 1937. No. 29836.

Appeal: LAW OF THE CASE. "When this court upon appeal determines the law of the case, the trial court is bound thereby, and its judgment accordingly will not under any ordinary conditions be disturbed upon another appeal." *Home Savings Bank v. Shallenberger*, 100 Neb. 113, 158 N. W. 455.

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

J. E. Willits, for appellant.

McNeny & Sprague, contra.

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

CHAPPELL, District Judge.

The complete history of this case and reversal thereof with directions appears in our former opinion. *In re Estate of Shierman,* 129 Neb. 230, 261 N. W. 155. A motion for rehearing having been overruled, the mandate issued and the trial court entered judgment thereon. Appellee, defendant herein, who is now appellant in this court, filed a motion for new trial which was overruled. Later a motion was filed to set aside the order overruling the motion for new trial and the trial court permitted alleged newly discovered evidence to be adduced in support of the motion. From the overruling of the motion for a new trial and the motion to set aside the order overruling it, an appeal is taken.

Many interesting propositions of law are discussed by appellant's counsel in his brief and argument to this court, but from a careful reading of the record and the former opinion we decide that if the trial court followed the mandate they are all answered.

A study of the alleged newly discovered evidence discloses it is not such; that there has been no change in the circumstances; no new question has presented itself; no cogent reason appears which would require a further hearing or different order or judgment than that required by the mandate to do justice and equity between the parties. *Regouby v. Dawson County Irrigation Co.,* 128 Neb. 531, 259 N. W. 365.

All matters now contended for by this appellant were distinctly presented by the issues and the evidence and we believe justly settled and adjudged in the former opinion. Under the circumstances they will not be relitigated in this court. *Burnham v. Bennison,* 130 Neb. 558, 265 N. W. 531. The rule that the law of the case announced by this court on appeal will control the decision on a subsequent appeal is applicable on the subsequent appeal where the issues and evidence in support thereof are substantially the same. *Vonburg v. Farmers Irrigation District, ante,* p. 12.

"When this court upon appeal determines the law of the case, the trial court is bound thereby, and its judgment accordingly will not under any ordinary conditions be disturbed upon another appeal." *Home Savings Bank v. Shallenberger*, 100 Neb. 113, 158 N. W. 455; *In re Estate of Clarke*, 130 Neb. 121, 264 N. W. 174. A study of the judgment entered convinces us that the trial court correctly interpreted and followed the mandate of this court and the judgment is

AFFIRMED.

IN RE ESTATE OF OLLIE E. CAGLE.
FRANK G. MELCHERT, APPELLANT, V. ALDEN MERLE CAGLE ET AL., APPELLEES.

270 N. W. 664

FILED JANUARY 5, 1937. No. 29789.

Wills: EXECUTION. "Statutory provisions regarding the manner in which wills must be executed are generally held to be mandatory and subject to strict construction, and if not substantially complied with, the will is inoperative." *In re Estate of Smith*, 130 Neb. 739, 266 N. W. 611.

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

Leamy & Leamy, for appellant.

Spillman & Ptak, contra.

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

RAPER, District Judge.

This is an appeal from a judgment disallowing the probate of the purported will of Ollie E. Cagle, deceased.

Ollie E. Cagle, a resident of Pierce county, Nebraska, became ill in April, 1935, and went to a hospital in Sioux City, Iowa, on April 27, and returned home next day. On April 29, 1935, at Pierce, Nebraska, after his return home, he wrote and signed in a small red memorandum book the

writing which was offered as his last will. On May 9 following he returned to the hospital in Sioux City, where he remained until his death on June 4, 1935, which occurred at 11:10 a. m. on that date. The principal part of his estate was his home in Pierce and a ranch in Pierce county of about 1,400 acres. It appears without dispute that the nurse in the hospital, who had the care of Mr. Cagle, first saw the memorandum book when he handed it to her about two hours before his death. He said the book contained what was to be his last will and she was to give it to Mr. Leamy (his attorney) when he arrived at the hospital, in case Mr. Leamy did not get to Mr. Cagle's bedside before he died, and to ask Mr. Leamy to take care of it. Mr. Leamy, who had been notified earlier in the day that Mr. Cagle wanted to see him, arrived at the hospital about noon, one or two hours after the death of Mr. Cagle. The nurse gave the red memorandum book to Mr. Leamy after he arrived. Mr. Leamy asked the nurse to sign her name on a page in the book so she could identify it, which the nurse did. Then on the same page Mary J. Leamy and M. H. Leamy wrote their names, and below their names wrote "witnesses to the foregoing will of O. E. Cagle." This was done after Mr. Cagle's death. Nobody saw Mr. Cagle write the instrument or sign his name; he did not request any one to witness his will. No witnesses signed the paper writing in his presence.

Section 30-205, Comp. St. 1929, provides: "No will made within this state, except nuncupative * * * shall be effectual to pass any estate, whether real or personal, nor to change, or in any way affect the same, unless it be in writing, and signed by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses."

In *In re Estate of Smith*, 130 Neb. 739, 266 N. W. 611, this court held: "Statutory provisions regarding the manner in which wills must be executed are generally held to be mandatory and subject to strict construction, and if not substantially complied with, the will is inoperative."

The opinion in that case sets forth clearly the principles applicable to the statutory requirements necessary to the valid execution of wills in our state, and further citation of authorities and discussion is unnecessary.

The proposed will in this case is clearly lacking in the essential acts required by the statute, and the trial court's judgment in refusing probate of the same is

AFFIRMED.

MARSHALL STUMP V. STATE OF NEBRASKA.

271 N. W. 163

FILED JANUARY 22, 1937. No. 29952.

1. **Appeal.** "A judgment will not be reversed for error in sustaining an objection to the evidence of a witness upon a point which is otherwise well established by the testimony." *Macrill v. City of Hartington*, 93 Neb. 670, 141 N. W. 825.
2. **Criminal Law:** INSTRUCTIONS. "A defendant in a criminal action may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made." *Crawford v. State*, 116 Neb. 629, 218 N. W. 421.
3. ———: AFFIRMANCE. The evidence examined and *held* sufficient to support the verdict.

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

Perry, Van Pelt & Marti, J. F. Fults and *J. P. O'Gara*, for plaintiff in error.

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

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

GOSS, C. J.

On an information charging murder in the second degree, defendant was convicted of manslaughter. He was sentenced to three years in the penitentiary and appeals.

The information charged that defendant pushed, forced and threw Gwendolyn Chapman from a moving motor vehicle, thus causing her death.

On the evening of September 16, 1935, Darryl Slonecker of Holbrook, Marshall Stump of Edison, and Gwendolyn Chapman of Beaver City, met at Holbrook. They spent most of the night driving from place to place among the towns in northern Furnas county, obtaining and drinking beer and pop which they "spiked." This term is defined in the evidence as meaning that the lighter drink is mixed with alcohol to give it a "kick." They were transported in Slonecker's truck all the time driven by him. They sat on a board or box-seat built over the tank in the front of the car. It was equipped with a narrow seat taken from a motor-coach and placed back of the steering wheel. The driver used this seat. Gwendolyn Chapman sat in the middle and Stump sat on the right side of the board seat. At the time Gwendolyn Chapman met her death they had started from Edison back to Holbrook. The tragedy occurred about four in the morning of September 17, 1935, and about a mile west of Edison. Defendant and Gwendolyn Chapman were quarreling, as they had been several times during the night. He wanted to take her back to Beaver City, where she lived, and she wanted to go to Edison, where he lived, to be with or near him. Slonecker testified that Stump told her he was going to take her back to Beaver City, she said she was not going, he slapped her, she hit him, then he grabbed her by the neck, slapped her two or three times, jerked her over his lap and she was "thrown off." Just after giving that testimony the witness said, in answer to a question as to what happened when defendant drew her across his lap, "Well, she fell off—was thrown off, the truck hit that mail box and that sign and went into the ditch."

Arising out of the testimony above recited, defendant argues that the evidence does not show that he threw Gwendolyn Chapman off the truck but that her fall was due to the truck hitting the mail box and, some distance

farther on, striking the road marker, causing her to be thrown off when the car went into the ditch. Slonecker's evidence indicates that she was thrown off before the car hit the mail box and that that was due to his looking around (as he testified he did) just before she was thrown off, thus causing the truck to swerve to the right. The testimony recited was sufficient basis of fact for the jury to decide that she was thrown off by defendant rather than because of the impact of the truck upon the mail box and road marker.

Defendant in his testimony denied any quarrel or controversy between him and Gwendolyn Chapman or that he took hold of her or attempted to throw her out of the truck and said that he did not see the mail box but felt a jar just before they were thrown out.

These two are the only living witnesses. Gwendolyn Chapman was taken at once to a doctor who said her neck was broken and that she was dead.

It is true that Slonecker admitted on cross-examination that before his own trial he told a lawyer, and on his trial he swore, that both Stump and Gwendolyn Chapman fell off the truck just as the truck passed the mail box. But whatever inconsistency there was in that testimony, and the effect of his whole testimony here, was a matter for the jury to decide.

Defendant assigns and argues error because the trial court refused to admit in evidence a journal entry in the case where Slonecker was charged, convicted and sentenced in Furnas county for causing the death of Gwendolyn Chapman on September 17, 1935, while operating a motor vehicle and under the influence of intoxicating liquor. Even if on the merits this ruling was erroneous, which we do not decide, it was not prejudicial because the record shows that, as a witness for the state, Slonecker had previously testified on this trial that he had been convicted for the offense and was then serving his term in the penitentiary. "A judgment will not be reversed for error in sustaining an objection to the evidence of a witness upon a point which

is otherwise well established by the testimony." *Macrill v. City of Hartington,* 93 Neb. 670, 141 N. W. 825. See *Hutchinson v. State,* 19 Neb. 262, 27 N. W. 113; 4 C. J. 1010.

The only other error assigned is as to the court's instruction No. 12, defining excusable homicide. The brief says: "The defendant in this case did not admit a homicide and did not plead or introduce any evidence of an excusable homicide. * * * The instruction was erroneous as it was not based upon or applicable to the evidence adduced." A sufficient answer to that argument is that defendant invited the instruction by his requested instruction No. 11, which said in part: "There are homicides which in the eyes of the law are justified. Among these are accidental killing; killing by misadventure; and killing in self-defense."

By instruction No. 12, the court not only properly defined justifiable homicide, as invited by defendant, and said that it was not incumbent upon defendant to prove that the acts which resulted in her death were excusable, but, if the evidence thereon raised in the minds of the jurors a reasonable doubt as to defendant's guilt, the jury should acquit him. The instruction was invited, it was fully as favorable to defendant as required by law, if not more favorable, and was in no way prejudicial to his rights. "A defendant in a criminal action may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made." *Crawford v. State,* 116 Neb. 629, 218 N. W. 421.

Defendant argues that a person can be killed only once, and that, if Gwendolyn Chapman came to her death by Slonecker's unlawful operation of the truck while intoxicated, she was not killed by being pushed or thrown from the truck by Stump. Defendant cites *Sherman v. State,* 113 Neb. 173, 202 N. W. 413, to the effect that, where two defendants were separately tried for a felony and the first was convicted but the second was acquitted, it was error to sentence the defendant first tried. That case is easily distinguishable. The charge there was a conspiracy to commit a felony. It takes two or more persons to form a con-

spiracy. No conspiracy was alleged here. The two parties were accused of different statutory crimes. We are charged with the duty of reviewing the trial before the court and jury of Stump only. This court is bound by the record made in the case before it.

We find no prejudicial error in the record. The judgment is

AFFIRMED.

CARTER, J., dissenting.

The defendant was convicted of manslaughter under an information charging that he did "feloniously and purposely push, force and throw" one Gwendolyn Chapman from a moving motor vehicle and thereby cause her death. Darryl Slonecker, the state's chief witness, was the driver of the truck and was, at the time of the trial, serving a three-year penitentiary sentence for operating it while under the influence of intoxicating liquors and by reason thereof unlawfully causing the death of Gwendolyn Chapman. It is quite apparent that both convictions cannot be right.

In my judgment, the evidence in the case at bar is insufficient to sustain the conviction. At approximately the same time that the deceased was thrown from the truck, the truck was driven into a mail box, a stop sign and into the ditch. There is not a single word of evidence in the record, nor is there any such pointed out in the majority opinion of this court, that the defendant pushed, forced or threw Gwendolyn Chapman from the truck. All the inferences that might logically be drawn from the evidence are more consistent with the theory that drunken and negligent driving were the cause of Gwendolyn Chapman's death rather than any unlawful act of the defendant.

The only eyewitness who testified for the state was Darryl Slonecker. He had previously been convicted of causing the death by driving the truck while under the influence of intoxicating liquors. He admits that he has previously told different stories as to what happened, one of which coincides with the story told by the defendant. The record clearly demonstrates that his evidence is unreliable

and his credibility impeached to such an extent that they are entitled to little weight in determining the sufficiency of the evidence.

The record discloses that Slonecker, the defendant and the deceased were, on the night in question, jointly engaged in an enterprise that was far from commendable. The jury were undoubtedly influenced unduly by their reprehensible conduct. It is the duty of this court to prevent a conviction to stand that is based on passion and prejudice. It appears to me that defendant ought not be required, in the absence of statutory authority, to spend three years in the penitentiary for participating in a drunken party for which all were equally responsible. The state failed to prove the defendant guilty of the crime charged beyond a reasonable doubt as a matter of law. The trial court should have directed a verdict for the defendant.

DAY, J., concurs in the above dissent.

FRANK E. FURST ET AL., APPELLANTS, V. F. L. KRUGER: W. B. DORMAN, APPELLEE.

271 N. W. 156

FILED JANUARY 22, 1937. No. 29775.

1. Guaranty: LIABILITY OF GUARANTOR. One who signs and delivers a guaranty without any pecuniary benefit to himself is not liable to the obligee beyond the strict terms of his contract.
2. ———: ———. "A guarantor is not liable on his contract, where the person for whose benefit it is made violates his own obligations as a party thereto and deprives the guarantor of the means of preventing the loss protected by the guaranty." *First Nat. Bank v. Wheatley*, 92 Neb. 807, 139 N. W. 673.
3. ———: NOTICE OF DEFAULT. "The neglect to notify the guarantor of the default of his principal does not operate to discharge the guarantor, unless such neglect is, on its face, unreasonable in view of all the circumstances of the case." *Lininger & Metcalf Co. v. Wheat*, 49 Neb. 567, 68 N. W. 941.
4. ———: ACTION ON CONTRACT: DEFENSE. In an action by wholesalers on a sales agreement and a guaranty of payment for goods sold under it to a retailer, it may be shown

as a defense that the circumstances and the bad faith of the wholesalers required them to give guarantor prompt notice of retailer's defaults and that there was an unreasonable failure to do so, though such notice was not required in specific terms by either the sales agreement or the guaranty.

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

Sanden & Anderson, for appellants.

Jessen & Dierks and *H. G. Wellensiek, contra.*

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

ROSE, J.

This is an action on a sales agreement and guaranty to recover from the purchaser and his guarantor the balance due for flavoring extracts, soaps, remedies and other products. Merchandise was sold under the contract on credit at wholesale by plaintiffs, Frank E. Furst and Fred G. Thomas, partners as Furst & Thomas, of Freeport, Illinois, to F. L. Kruger of Unadilla, Nebraska, a defendant. W. B. Dorman, also defendant, guaranteed payment for all products sold under the sales agreement to defendant Kruger who is therein designated as "Dealer."

It was alleged in the petition that, beginning April 20, 1932, and continuing until June 9, 1933, goods of the value of $692.85 were sold to and received by Kruger and that credits amounted to $239.23, leaving an unpaid balance of $453.62, for which judgment was demanded.

The signing of the sales agreement by Kruger, the dealer, and of the guaranty by Dorman, the guarantor, was admitted, but Dorman denied liability as guarantor. Kruger made no defense for himself. At the close of all the evidence plaintiffs moved for a peremptory instruction in their favor and Dorman asked for a similar direction to the jury in his own behalf. The cause on its merits was thus submitted to the trial judge who directed, and the jury rendered, a verdict for defendant Dorman against plaintiffs

and for plaintiffs against defendant Kruger for $476.10. From judgment on the instructed verdict for Dorman plaintiffs appealed.

It is argued on appeal that the dismissal of the case as to Dorman, the guarantor, is contrary to the evidence and the law. The "Sales Agreement" and the "Guaranty" bearing the signatures of obligors are as follow:

"Sales Agreement

"This agreement made and entered into at Freeport, Illinois, by and between Frank E. Furst and Fred G. Thomas, co-partners, doing business under the name of Furst & Thomas of Freeport, Illinois, and F. L. Kruger of Unadilla, Nebr. hereinafter called the 'Dealer,' witnesseth:

"That, whereas the aforesaid Dealer wishes to engage in the business of retailing the products handled by Furst & Thomas, buying from them on credit, and agrees to pay Furst & Thomas at their office in Freeport, Illinois, their regular wholesale prices for all products bought from them, in instalments satisfactory to Furst & Thomas out of the proceeds of his business until his account is balanced, therefore,

"Furst & Thomas agree, upon acceptance of this agreement, to sell to the said Dealer their products on credit at their regular wholesale prices, f. o. b. Freeport, Ill., or at their option their nearest Branch Warehouse, unless prevented by fires, strikes, accidents or other causes beyond their control, but it is expressly understood and agreed that Furst & Thomas shall have the right to limit the amount of credit to be extended to the said Dealer and to refuse to fill his orders in whole or in part if in their judgment his payments on account are not satisfactory. If he remits cash with order he shall receive a discount of five per cent. (5%) from their current wholesale prices if his account is balanced. The Dealer, as a matter of good faith and to show what the receipts of his business are from week to week, agrees to send Furst & Thomas each week an itemized record of his business on forms provided for that purpose by them.

"To assist the Dealer in building up a profitable business, Furst & Thomas agree to give him advice and suggestions based on their experience and on the methods of other successful Dealers retailing their products in a similar way, but it is expressly understood and agreed that nothing contained in such advice and suggestions shall be binding upon the Dealer nor shall be construed as in any way altering or modifying the terms of this agreement.

"Either party shall have the right to terminate this agreement by giving written notice to the other party and upon its termination

from any cause by either party the Dealer agrees to pay within two months the balance due Furst & Thomas on account; provided that if the Dealer fails to make regular remittances or attempts to avoid settlement of his account the balance shall become immediately due and payable at the option of Furst & Thomas. If the said Dealer wishes to sell back his stock of products he may ship them to Furst & Thomas to point designated by them, transportation charges prepaid, promptly after termination of this agreement, and Furst & Thomas agree to pay him for such products (sample cases and discontinued products excepted) when received by them in good condition, in original, unopened bottles and packages, their current wholesale price but not more than the price originally charged the said Dealer for such products, less 5% to cover the cost of checking, handling and putting the products back into stock and if on final accounting any balance is due the Dealer to pay it promptly.

"It is expressly understood and agreed between the parties that this agreement as signed by them constitutes the sole and entire agreement between them and no modification of this agreement shall be binding unless in writing and signed by all parties hereto.

"This agreement is subject to acceptance by Furst & Thomas at their home office in Freeport, Illinois, and shall be construed as an Ilinois contract. When so accepted it shall immediately be in force and effect and unless sooner terminated shall expire December 31, 1934.

(Signature of F. L. Kruger, only.)

"We, the undersigned sureties, having acquainted ourselves with the terms and conditions of the above agreement, in consideration of the payment of $1.00, receipt whereof is hereby acknowledged, and in further consideration of Furst & Thomas extending credit to the above named Dealer do jointly and severally guarantee payment to Furst & Thomas for all products sold by them on credit to him whether such products are for resale, for advertising or for other purposes, hereby waiving acceptance and all notice, and we further agree that the written acknowledgment of his account by the said Dealer shall bind us and that any extension of time or change in the conditions of payment for goods sold to him on credit shall not release us from liability hereon. We further agree that after two months from the termination of the above agreement by either party and the non-payment of his account by the said Dealer, this guaranty shall become absolute as to the amount then due from him and we shall be primarily liable for the payment of same and upon demand we promise to pay the amount to Furst & Thomas at their office in Freeport, Illinois, without any proceeding being taken by them against the said Dealer."

(Signature of W. B. Dorman, only.)

One of the defenses pleaded by guarantor is in substance that plaintiffs did not compel Kruger, the dealer, to make weekly reports of his business according to contract and neglected to notify guarantor of such defaults. Notice of defaults was not required by the contract and failure to give it was no defense, in plaintiffs' view of the sales agreement and the law applicable thereto, while guarantor contends that, without his knowledge or consent, plaintiffs and the dealer so changed the sales agreement as to release the guaranty, such notice inuring to both plaintiffs and guarantor. On these divergent views of the parties, courts in different jurisdictions seem also to be divided. In the present instance guarantor signed the guaranty without acquiring for himself any pecuniary benefit beyond the recited consideration of one dollar and therefore is not liable beyond the strict terms of his contract. 28 C. J. 994. In this connection guarantor referred in argument to the following rulings:

"Where the principal contract, which is described and covered by the guaranty agreement, is, without the assent of the guarantors, materially changed or varied from such contract as it is described in such agreement, the guarantors will be released." *Hunter v. Huffman,* 108 Neb. 729, 189 N. W. 166.

"A guarantor is not liable on his contract, where the person for whose benefit it is made violates his own obligations as a party thereto and deprives the guarantor of the means of preventing the loss protected by the guaranty." *First Nat. Bank v. Wheatley,* 92 Neb. 807, 139 N. W. 673.

The contract and guaranty involved in the case at bar, with the same obligees but with different obligors, were considered by the supreme court of Arkansas under material facts similar to facts in evidence herein and it was held that the provisions for weekly reports protected guarantor as well as plaintiffs. That case was decided under the announced doctrine:

"One who delivers goods to a dealer under a contract

requiring the dealer to make weekly report of his receipts to the former was bound to require such reports and to report immediately such omissions to the sureties in order to recover from the sureties the amount due from the dealer." *Furst & Thomas v. Rowland,* 188 Ark. 804, 68 S. W. (2d) 451.

If this doctrine were adopted in the case now under consideration, it would require an affirmance of the judgment below. The Arkansas ruling, however, is not approved as a general principle of guaranty law, where the sales agreement, by its terms, does not make the provision for weekly reports and notice of defaults available to guarantor. In Nebraska the following rule was adopted:

"The neglect to notify the guarantor of the default of his principal does not operate to discharge the guarantor, unless such neglect is, on its face, unreasonable in view of all the circumstances of the case." *Lininger & Metcalf Co. v. Wheat,* 49 Neb. 567, 68 N. W. 941.

This intimates that circumstances may be such as to imply timely notice of defaults as a condition of charging guarantor with liability for the unpaid purchase price. Obligees in a guaranty may of course be guilty of conduct requiring such notice to guarantor, though not specifically required by the sales agreement to do so. In reviewing the judgment releasing guarantor herein, the sales agreement, the guaranty, the other evidence and the surrounding circumstances must be subjected to judicial scrutiny.

The preamble of the contract itself evinces the purpose of plaintiffs to start Kruger in business as a retail dealer by selling to him their products at wholesale on credit and permitting him to pay the purchase price in satisfactory instalments out of the proceeds of his retail business until his account is balanced. Other provisions manifest a purpose of plaintiffs as wholesalers, by advice and suggestions, to assist the dealer in building up a successful business, but without recourse on them, even if their advice and suggestions, when followed, result in disaster to the new enterprise, with guarantor carrying the entire load. Whatever

the purposes of plaintiffs may have been in putting this fatherly solicitude in their own form of contract, whether to procure the signatures of obligors, or to become trustees to direct the new retail business of the dealer without fiduciary responsibility to any one, or to promise the success of an honest enterprise, guarantor had a right to rely on strict and conscientious performance by plaintiffs. The true import of the evidence is that, from the start, plaintiffs did not assist the retail dealer in building up a successful business.

Products of plaintiffs were sold to Kruger on credit at intervals from April 20, 1932, until June 9, 1933. The items for goods totaled $692.85 and the credits for payments aggregated $239.23, leaving an unpaid balance of $453.62. Six days after the sales agreement went into effect plaintiffs began to write high-pressure letters to Kruger urging him not to confine his business to cash sales but to adopt "Time and Trial," which meant the extending of credit and the leaving of medicines and other products at homes of farmers on trial with a guaranty of satisfaction. This method was urged by a second letter and circular in glowing terms May 10, 1932, without any notice to or knowledge of guarantor, notwithstanding its purported effect was to make him guarantee the satisfaction of medicines and other products sold on credit by the retail dealer, even if tried and found unsatisfactory. Such goods, under the method of "Time and Trial," could not be returned to plaintiffs at wholesale prices, as provided by the sales agreement, and defeated the right of the dealer to return them. He had, however, purchased them outright and guarantor, under the strict terms of his guaranty, had agreed to pay for them. The dealer adopted the method of "Time and Trial," but the proper inference from the evidence is that he would not have done so except for the advice and importunities of plaintiffs. He went among farmers in his territory to make sales on credit and a guaranty of satisfaction when national depression was known to be a public calamity, seriously affecting the farming industry.

Some of the products left for trial on credit were condemned as unsatisfactory. The purchase price of many other products so sold was never paid. Early in the transactions the dealer was in default of weekly reports and reports subsequently made were disappointing to plaintiffs who complained that his credits on his account were too small for profits to the wholesalers. They frequently demanded weekly reports and complained when not made but failed to exercise promptly the right of cancelation of contract for nonperformance by the dealer. They allowed the failing business to continue until the sales agreement was terminated September 19, 1933. On that date plaintiffs notified guarantor by letter that they had canceled the sales agreement, saying they were not then demanding payment of him but permitting the dealer to make settlement for the balance due within two months. May 23, 1934, the dealer was allowed a credit of $12.98, only, for all the products returned at wholesale prices.

"Time and Trial" as a method of selling medicines and other products did not appear on the face of the sales agreement or the guaranty as a hazard of guarantor. Prior to the cancelation of the sales agreement guarantor never had any notice of "Time and Trial," nor of the defaults of the dealer, nor of the bad faith and nonperformance of plaintiffs. The contractual provision purporting to screen plaintiffs as advisers from the consequences of their own wrongs in that capacity is, under the circumstances, not sanctioned by either law or equity. Plaintiffs did not perform in good faith on their part their promise to assist Kruger, the dealer, in building up a successful business but on the contrary, by high-pressure methods, induced him to pursue a course which ended in utter failure. Under all the circumstances, good faith and fair dealing required plaintiffs to give guarantor immediate notice of the dealer's failure to make reports and of the adoption of "Time and Trial" as a method of making sales at retail. For unreasonable and unconscionable neglect in those particulars, as clearly shown by the evidence, guarantor was released

from liability, without regard to the reasons that prompted the district court to dismiss the action as to guarantor.

AFFIRMED.

CARTER, J., dissents.

E. H. LUIKART, RECEIVER FARMERS STATE BANK, SCOTIA, APPELLANT, V. HENRY BREDTHAUER ET AL.: OSCAR HAGGSTROM, APPELLEE.

271 N. W. 165

FILED JANUARY 22, 1937. No. 29796.

1. **Bankruptcy**: JUDGMENT: DISCHARGE. Where a judgment is obtained in a state court by a creditor upon a claim provable under the bankruptcy act in an action begun prior to the commencement of the bankruptcy proceedings, the bankrupt is discharged from the judgment the same as from the claim upon which it was founded when it appears that the discharge in bankruptcy postdates the rendition of the judgment.
2. **Judgment**: RENDITION. A judgment is rendered when the court announces its decision upon the law and the facts in controversy as ascertained by the pleadings.
3. ———: ENTRY. The entry of a judgment upon the records is not an integral part of the judicial act of rendering a judgment, although the entry thereof may be required before it can become available for certain purposes.

APPEAL from the district court for Greeley county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

F. C. Radke, Clarence G. Miles and *Howard L. Holtzendorff*, for appellant.

Charles Dobry and *Taylor & Spikes, contra.*

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

CARTER, J.

The appellee, Oscar Haggstrom, filed a motion in this action in the district court after a judgment had been entered against him, applying for the entry of a record of a discharge in bankruptcy. Objections were filed thereto and

a hearing had. From the order of the district court sustaining appellee's motion, appellant appeals.

The record discloses that on November 17, 1931, E. H. Luikart, as receiver of the Farmers State Bank of Scotia, commenced an action against the appellee and others for the purpose of recovering the amounts due from them by virtue of their being stockholders in the insolvent bank. On April 25, 1932, the case was heard by the district court. The trial judge entered his notes in the trial docket which showed the default of appellee and the amount adjudged to be due. On April 27, 1932, the purported judgment was entered on the general index and judgment docket in the district court. The date of the signing of the formal journal entry by the trial judge cannot be determined from the evidence. It appears to have been filed on January 23, 1935, although the evidence discloses that it was in the possession of the clerk of the district court for a considerable time before that date. We conclude that the judgment was not entered on the district court journal until January 23, 1935.

On December 10, 1931, appellee filed a petition in bankruptcy in the United States district court and on June 19, 1933, he received his discharge in bankruptcy. Appellee made no attempt to stay the proceedings in the case at bar, nor did he plead the bankruptcy proceedings as a defense. That the claim upon which the judgment is based was scheduled and provable in the bankruptcy proceedings is admitted.

The question for our determination is whether the discharge in bankruptcy was, under the circumstances of this case, a discharge from the judgment entered by the district court for Greeley county. It is clearly the law that, if judgment be obtained upon a debt provable in a pending bankruptcy proceeding before the defendant is granted a discharge in bankruptcy, the judgment is discharged even though the proceeding was not stayed in the state court. In *Boynton v. Ball,* 121 U. S. 457, the court said: "If for any of these reasons, or for others, he permits the case to

proceed to judgment in the state court, by failing to procure a stay of proceedings under the provisions of this section of the bankrupt law, or the assignee in bankruptcy does not intervene as he may do (*Hill v. Harding*, 107 U. S. 631), he does not thereby forfeit his right to plead his final discharge in bankruptcy, if he shall obtain it, at any appropriate stage of the proceedings against him in the state court. And if, as in the present case, his final discharge is not obtained until after judgment has been rendered against him in the state court he may produce that discharge to the state court and obtain the stay of execution which he asks for now. See *McDougald v. Reid & Talbot*, 5 Ala. 810." In *Rogers v. Western Marine & Fire Ins. Co.*, 1 La. Ann. 161, the court said: "The proposition that Rogers should have pleaded the pendency of the bankrupt proceedings in the original suit, and cannot disturb the execution of a judgment which is final, is untenable. The discharge in bankruptcy was posterior to the rendition of this judgment, and operated with the same force upon the debt after it assumed the form of a judgment, as it would have done had the debt remained in its original form of a promissory note." A text-writer discusses the subject in apt language as follows: "A debt upon which a judgment has been rendered since the commencement of proceedings in bankruptcy may be proved. The debt is not extinguished. The instrument, contract, or obligation upon which the debt arose is extinguished, but not the debt. The debt remains. If this were not so, the judgment would destroy itself by extinguishing the very foundation upon which it is built. The debt was founded upon contract; it is now founded on judgment, but it is, nevertheless, the same debt. A judgment operates to extinguish a debt only when it produces the fruits of a judgment. It operates as a change of remedy merely. It is a security of a higher nature. It is still but a security for the original cause of action. The theory that the debt is so merged in the judgment as to be extinguished, has no applicability under the bankruptcy act." Bump, Bankruptcy (11th ed.) 468.

Therefore, if the judgment in the case at bar was rendered prior to June 19, 1933, the date appellee was granted a discharge in the bankruptcy proceeding, the judgment is barred. If it was rendered after that date, the judgment remains in full force and effect.

It is important in the case at bar that we distinguish between the rendition of a judgment and its entry of record. A noted text-writer, in discussing the difference between the rendition and entry of a judgment, says: "The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and the verdict. The entry of a judgment is a ministerial act, which consists in spreading upon the record a statement of the final conclusion reached by the court in the matter, thus furnishing external and incontestable evidence of the sentence given, and designed to stand as a perpetual memorial of its action. It is the former, therefore, that is the effective result of the litigation. In the nature of things, a judgment must be rendered before it can be entered. And not only that, but though the judgment be not entered at all, still it is none the less a judgment. The omission to enter it does not destroy it, nor does its vitality remain in abeyance until it is put upon the record. The entry may be supplied, perhaps after the lapse of years, by an order *nunc pro tunc*. But it must not be supposed that this proceeding is required to give existence and force, by retrospection, to that which before had none." 1 Black, Judgments (2d ed.) sec. 106. See, also, 15 R. C. L. 578, sec. 11. In *Ward v. Urmson*, 40 Neb. 695, 59 N. W. 97, this court quotes with approval the following: "Mr. Black, at section 106 of volume 1 of his work on Judgments, in discussing the distinction between rendition and entry of judgment, says: 'There are certain purposes, however, for which a judgment is required to be duly entered before it can become available or be attended by its usual incidents. Thus, as above remarked, this is a prerequisite to the right to appeal. And so a judgment must commonly be docketed be-

fore it can create a lien upon land, and in some of the states (though not all) the priority among different liens is determined by their respective dates of docketing. And again, the record entry of a judgment is indispensable to furnish the evidence of it, when it is made the basis of a claim or defense in another court. But with these exceptions, a judgment is independent of the fact of its entry. And in all cases, the distinction between rendition and entry is substantial and important.' " See, also, *Horn v. Miller,* 20 Neb. 98, 29 N. W. 260.

The general rule is that a judgment is rendered when the court pronounces its decision upon the law and facts in controversy as ascertained by the pleadings. There are, of course, certain purposes for which a judgment already rendered must be entered of record to be effective. A judgment must be entered before an appeal may be had. Also, in this state, a judgment must be docketed before it becomes a lien upon real estate, and, likewise, the entry of a judgment is necessary to furnish the evidence of it when it is made the basis of a claim or defense in another court. Appellant cites many cases showing that the entry of the judgment is necessary to an appeal and to create a lien upon real estate. These cases have no application to the case at bar. Under the facts and circumstances of the suit before us, the judgment was rendered on April 25, 1932, which is prior to the date that appellee obtained his discharge in bankruptcy. The judgment thus obtained is barred by appellee's discharge in bankruptcy.

Appellant contends that the court was without jurisdiction to consider appellee's application to have the records of the court show that the judgment was barred by the discharge in bankruptcy. We are of the opinion that a motion or application filed in the same action in which the judgment is rendered is a proper procedure to obtain the relief to which appellee is entitled. *Leonard v. Yohnk,* 68 Wis. 587, 32 N. W. 702; 3 R. C. L. 318, sec. 141.

The judgment of the trial court is correct and is

AFFIRMED.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT, V. OTTO J. BAUMAN, COUNTY TREASURER, ET AL., APPELLEES.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT, V. OTTO J. BAUMAN, COUNTY TREASURER, ET AL., APPELLEES.

271 N. W. 256

FILED JANUARY 25, 1937. NOS. 29938, 29939.

1. **Removal of Causes.** If a case be a removable one, upon the filing of a petition for removal, in due time, with a sufficient bond, the case is, in law, removed, and the state court in which it is pending will lose jurisdiction to proceed further, and all proceedings thereafter in that court will be void.
2. **Courts.** "It is a rule recognized alike by state and federal tribunals that the court which first acquires jurisdiction of the subject of an action will retain such jurisdiction until the final determination of the controversy." *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463, 62 N. W. 899.
3. **Statutes:** CONSTRUCTION. "The legislature must be presumed to have had in mind all previous legislation upon the subject, so that in the construction of a statute we must consider the preexisting law and any other acts relating to the same subject." *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 104 Neb. 93, 175 N. W. 531.
4. ———: ———. "That construction of a statute of doubtful meaning given it by those whose duty it is to enforce it, and which construction the legislature has by its continued noninterference for a number of years acquiesced in, will be approved, unless as thus construed it contravenes some provision of the Constitution, or is clearly wrong." *State v. Bryan*, 112 Neb. 692, 200 N. W. 870.
5. **Municipal Corporations:** TAXATION. Where the right to levy certain taxes by the municipal authorities of cities of the metropolitan class is clearly conferred, the power of the municipality, in an appropriate manner, to supply the details necessary for a full exercise of such power must be admitted.
6. ———: ———. The proceedings of the taxing authorities of the city of Omaha, embodied in the bill of exceptions in this case, reviewed, and *held* strictly consistent with the act of 1905 (Laws 1905, ch. 14) as the provisions of that act were continued in subsequent legislation and now remain in full force and effect.

7. **Affirmance.** The foregoing syllabi are equally applicable to, and controlling in, Chicago, St. Paul, Minneapolis & Omaha Railway Company v. Bauman, No. 29939, decided herewith.

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

Wymer Dressler, R. D. Neely and *H. J. Lutz,* for appellants.

James T. English, Jack W. Marer and *H. C. Linahan, contra.*

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

EBERLY, J.

These are companion cases in equity, in which identical issues are involved, and they differ only as to parties and amounts in suit. By stipulation of the parties, these cases were consolidated and heard as one case, upon a common record, though separate decrees were entered. The trial court denied plaintiffs any relief, and dismissed their actions, stating no reasons for his determinations, and plaintiffs have appealed upon a common record.

In this opinion we will consider the case of Chicago & Northwestern Railway Company (Charles P. Megan, Trustee, substituted) v. Otto J. Bauman, County Treasurer, et al., No. 29938. Our discussion here is applicable to case No. 29939, and the conclusion arrived at equally determinative thereof.

The petition before us challenges the correctness and regularity of certain proceedings taken by the city of Omaha in 1932-1933 in connection with the school districts thereof in the assessment, levy and collection of the respective taxes in suit for the benefit of each. The form in which these attacks of plaintiff are cast, as well as the reasons offered in support thereof, are varied and extended. However, analysis discloses that these objections all relate to, and grow out of, a course of official procedure which we infer has continued for a number of years past, and which may be illustrated by the following:

It appears that in August, 1932, the city of Omaha certified to the county clerk of Douglas county tax levies by the mayor and council approved, adopted in that year, and likewise certified certain school levies, approved and adopted by the school district board in 1932, to the same official. Thereafter an order was made and entered by the county board of equalization directing that the taxes so certified should be entered on the tax list of 1933, but computed and extended thereon upon the actual valuation and assessment as returned by the county assessor and as equalized by the county and state boards of equalization for the year 1932. The result of this procedure is that the city and school district taxes were placed on the county tax list of 1933 on the basis of the ownership and valuation as they existed and were shown by the county tax books of 1932, and the county and state levies were entered on this tax list of 1933 on the basis of the valuation and ownership as was determined by the county assessment and valuation of 1933.

Speaking generally, the prayer of the petition is for the recovery of the sum of $11,814.80 city and school district taxes, so placed on the assessment roll of 1933, heretofore paid by the petitioner under protest to the defendant county treasurer; for an injunction restraining further collection of certain city and school district taxes, in addition to those paid under protest, alleged to be thus illegally levied and assessed on plaintiff's property; and also for a mandatory injunction directed to the taxing officers involved requiring the correction of their taxing methods to comply with plaintiff's theory of the law governing that procedure.

As to the recovery by plaintiff of the sum of $11,814.80 alleged to have been unlawfully collected by the defendant county treasurer, the record discloses that this is the aggregate of payment of taxes made by plaintiff "under protest," as provided by section 77-1923, Comp. St. 1929. Within thirty days after each payment the plaintiff herein filed with the proper officer a statement in writing, duly verified, setting forth the amount of taxes thus paid under

protest, the grounds of such protest, etc. It further appears that thereafter the county board of Douglas county duly inquired into the matter and determined the same against the contention of the plaintiff. Thereupon plaintiff appealed from this decision then made to the district court for Douglas county in the manner provided by law, and caused a proper transcript on appeal to be filed in said court. Then plaintiff filed in said cause a petition for removal of said cause to the district court of the United States in and for the district of Nebraska, Omaha division, and tendered the required bond for such removal. Thereafter said bond was duly approved and an order duly made and entered in each of said causes by that court, adjudging that the cause of action "be and it is hereby removed from the said district court of Douglas county, Nebraska, into the district court of the United States in and for the district of Nebraska, Omaha division." A record of said cause was thereupon made up by the clerk of the district court for Douglas county, and transmitted to, and prior to the commencement of the present action was filed in, said district court of the United States in and for the district of Nebraska, Omaha division, in which court all of said causes of action thus removed are now pending.

These admitted facts invoke the application of the following controlling principles:

(1) The propriety of this removal is unchallenged by the parties to this cause. It has been actually accomplished. Under these circumstances this court does not see fit *sua sponte* to challenge the rightfulness of the proceeding, or to determine that these causes of action under consideration do not appear to be removable. Rather we will adopt the contrary view, and, for the purposes of this case, will assume but not determine that the causes of action were properly removed. Therefore, we are within the scope of the rule often announced, as stated in *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 244-245, viz.:

"If a case be a removable one, that is, if the suit, in its

nature, be one of which the circuit court could rightfully take jurisdiction, then upon the filing of a petition for removal, in due time, with a sufficient bond, the case is, in law, removed, and the state court in which it is pending will lose jurisdiction to proceed further, and all subsequent proceedings in that court will be void. *Railroad Co. v. Mississippi,* 102 U. S. 135, 141; *Railroad Co. v. Koontz,* 104 U. S. 5, 14; *Steamship Co. v. Tugman,* 106 U. S. 118, 122; *St. Paul & C. R. Co. v. McLean,* 108 U. S. 212, 216; *Crehore v. Ohio & M. R. Co.,* 131 U. S. 240, 243; *Kern v. Huidekoper,* 103 U. S. 485, 493; * * * *Marshall v. Holmes,* 141 U. S. 589, 595."

It follows that the district court of the United States in and for the district of Nebraska, Omaha division, has authority to hear, determine, and render judgment in the causes thus removed to it, to the exclusion of every other court. It also appears that this rule extends to and includes within it any independent suit commenced subsequent to such removal to the federal court. *Palmer v. Delaware, L. & W. R. Co.,* 222 Fed. 461.

(2) The record also affirmatively discloses that the jurisdiction of the district court of the United States for the district of Nebraska, Omaha division, had attached to the controversy, so far as the causes of action involving the recovery of the $11,814.80 were concerned, prior to the filing of the plaintiff's petition in the present case. These facts bring the case within the principle announced by this court in *Fitzgerald v. Fitzgerald & Mallory Construction Co.,* 44 Neb. 463, 62 N. W. 899, viz.:

"It is a rule recognized alike by state and federal tribunals that the court which first acquires jurisdiction of the subject of an action will retain such jurisdiction until the final determination of the controversy."

In *Taylor v. Taintor,* 16 Wall. (U. S.) 366, 370, the rule is stated in this language:

"Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is

fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to a person or thing, it is —unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

See, also, *Sharon v. Sharon*, 84 Cal. 424, 23 Pac. 1100; *Patterson v. Veasey*, 295 Fed. 163; *Burke Construction Co. v. Kline*, 271 Fed. 605; *Ward v. Foulkrod*, 264 Fed. 627; *State v. Chicago, R. I. & P. R. Co.*, 100 Neb. 268, 159 N. W. 410.

Therefore, it follows that this court will not entertain jurisdiction to determine plaintiff's right of recovery as to the taxes paid by it under protest, and that the action of the trial court in denying a recovery therefor is approved.

The other demands of plaintiff in this proceeding, not embraced in the recovery of the moneys so paid "under protest," must be determined by a proper construction of enactments applicable thereto.

It is a general rule: "In seeking to ascertain the legislative intent where the language of a statute is ambiguous, the courts will take into consideration all the facts and circumstances existing at the time of, and leading up to, its enactment, such as * * * the state of the existing law," etc. 59 C. J. 1014.

This court announced this principle in the following form: "The legislature must be presumed to have had in mind all previous legislation upon the subject, so that in the construction of a statute we must consider the pre-existing law and any other acts relating to the same subject." *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 104 Neb. 93, 175 N. W. 531.

With these principles in view, we note that, "An act entitled 'An act incorporating metropolitan cities, and defining, regulating, and prescribing their duties, powers, and government,'" was passed with an emergency clause, and was approved March 30, 1887. Laws 1887, ch. 10. This was the first creation of metropolitan cities in this state.

Section 79 of this act empowered the mayor and council to levy and collect general taxes to the extent therein specified. This section also provided: "The valuation of such property to be taken from the last previous assessment roll of the proper county, and it shall be the duty of the county clerk to permit the city clerk to make out from the assessment rolls of the county an assessment roll for the city of all property liable to taxation as above specified." By section 85 of this act, certain specific provisions were incorporated governing the year 1887, and this act then provided that the mayor and council should thereafter make the annual levy at the first regular meeting of the city council in February of each year. Section 86 provided that city taxes so levied should become delinquent on the first day of July next succeeding. Section 92 provided that "municipal taxes * * * upon real estate * * * are hereby made a perpetual lien thereupon from the day on which the same were levied."

By section 10, ch. 7, Laws 1891, as subsequently enacted, pertaining to metropolitan cities and as part of the laws controlling city assessments, it was provided: "The valuation of such property to be taken from the last previous assessment book or books of the assessor, assessing property for and within metropolitan cities, as by him returned and assessed. The city clerk shall annually make a copy of such assessment for the purposes of taxation as herein provided and said assessor shall permit the making of the copy hereby contemplated."

In *State v. Mayor and City Council of the City of Omaha*, 39 Neb. 745, 58 N. W. 442, this law of 1891 was construed as requiring estimates of metropolitan school districts to be filed with the city council, and it was held that the power to determine the amount necessary to be raised by taxation and the levy required for that purpose was left with the city council, and an injunction to control their discretion was denied.

The next act which substantially changed the tax laws of cities of the metropolitan class was chapter 10, Laws

1897, which was passed with an emergency clause and took effect on March 15, 1897. It provided for a tax commissioner, who should be the assessor of the city; for the assessment of property for municipal purposes to be made by the tax commissioner and his deputies, appointed and qualified, between the 15th day of September and the 15th day of November of each year; for the review and equalization of such assessments; and that (sec. 138) "The mayor and council shall have power, and it shall be their duty, at the first regular meeting of the council in February in each year, by ordinance to levy taxes for municipal purposes on all the real estate and personal property, moneys and credits, including all interests, bonds, capital stock, franchise and businesses within the corporate limits of the city not exempt from taxation under the laws of this state, based upon the assessment for the year in which the levy is made," etc. The taxes so levied became delinquent on July 1st next succeeding the levy, and municipal taxes upon real estate were "made a perpetual lien thereupon from the day on which the same were levied." It is thought that under this act of 1897 the metropolitan school district taxes were properly levyable by the mayor and council of Omaha.

The next important change in the municipal revenue laws occurred when chapter 14, Laws 1905, was passed, with an emergency clause, and which went into effect on the day of its approval, viz., April 3, 1905. It repealed the provisions of law providing for a city tax commissioner, the annual listing and assessment of property by that officer and his deputies, the review and equalization thereof by city officials, and the extension thereof in a separate city tax list, etc. Among the powers vested by it in metropolitan cities was: "In addition to the powers herein granted, cities governed by this act shall have power by ordinance: * * * To levy any tax or special assessment authorized by law." Section 144.

Section 143 provided in part: "When by this act the power is conferred upon the mayor and council to do and

perform any act or thing, and the manner of exercising such power is not specially pointed out, the mayor and council may provide by ordinance the details necessary for the full exercise of such power."

Section 144a provided: "The city council of such city is hereby authorized, directed and required to levy and collect the number of miles (mills) reported and demanded by the board of education of metropolitan school districts as now and heretofore required by the law governing such school districts and nothing herein contained shall be construed to in any manner repeal, amend or abridge such school law."

Section 145 reads in part: "It shall be the duty of the council to annually certify by resolution to the county clerk of the county in which such city is located, a gross sum to be raised by taxation for all municipal purposes for the ensuing calendar year upon all taxable property within the limits of the city. * * * The council shall certify such sums before the county board of equalization has made a levy for county taxes. The council shall also certify the levy required by the board of education of such metropolitan school district and any other sum to the said county clerk as may be required by this act or by general law."

In section 146 the following appears: "The city council shall annually, in the first week in January after the levy provided for in the above section, set aside the following funds to be designated specific funds."

Section 160 provided for the following powers: "All general taxes of the city on personal and real property in such city shall be levied and collected as follows: The city council shall annually certify to the county clerk the amount of general tax required for the ensuing year and shall so certify in the time and in the manner required by the general revenue law of the state. The county board shall fix the rate of levy necessary to raise said amount on said property as assessed by the county officers and the state board of equalization and returned to the county clerk. The general taxes of such city shall be entered and collected as a part of the consolidated tax of such county."

In section 161 it is provided: "After the passage of this act, all general taxes on personal and real property in such city levied under this act shall become due May 1st and delinquent on July 1st of the year following the levy and shall draw the same rate of interest as the general taxes of the county and state. All general taxes levied and unpaid prior to the passage of this act shall become delinquent on the first of July next succeeding the levy thereof and shall draw interest at the rate of one per cent. per month payable in advance, which interest shall be collected at the same time and as a part of the delinquent tax."

It is stated in section 163: "All general municipal taxes upon real estate shall be a first lien upon the real estate upon which it is levied and take priority over all other encumbrances and liens thereon."

Section 166 provides: "No warrant other than the warrant of the county clerk, issued to the county treasurer, under the general revenue law shall be necessary for collection of the general taxes levied for such cities."

Section 185 provided for the relevy of any tax which was rendered invalid by any defect, error or irregularity.

Section 216 reads as follows: "The provisions of this act shall not be so construed as to impair or affect the validity of any tax or special assessment heretofore made or levied under the acts by this act repealed, but all such taxes and special assessments shall be and remain as valid and binding as if this act had not been passed, and shall be collected and enforced in the manner provided, or which may hereafter be provided by law for collecting and enforcing the same. Nothing herein shall be so construed as to prevent further and additional provisions being made for the collection of any tax or special assessment heretofore levied or made."

It appears that these provisions were subsequently amended, but only in minor particulars. Thus, for instance, in 1921 the words, "the number of mills which the city desires to be levied on each dollar" valuation, were by chapter 116 of Laws 1921 substituted for the words, "a

gross sum to be raised by taxation," as first enacted in 1905.

In substance, the general scheme of municipal taxation established by the act of 1905 thereafter continued unchanged, and many of its special provisions hereinbefore set out were incorporated in the Compiled Statutes of 1929 as sections 14-110, 14-501, 14-514, 14-548, 14-549, 14-554.

It follows, therefore, that the facts and circumstances existing at the time and leading up to the enactment of chapter 14, Laws 1905, and the construction and interpretation thereof as made thereafter by the municipal authorities become important in the interpretation of the controlling statutory provisions in the instant case.

It seems we are committed to the view that the construction of statutory provisions of doubtful meaning given them by those whose duty it was to enforce them, and which construction the legislature has by its continued noninterference for a number of years acquiesced in, will be approved, unless as thus construed they contravene some provision of the Constitution, or are clearly wrong. *State v. Bryan,* 112 Neb. 692, 200 N. W. 870. See, also, 36 Cyc. 1140; *State v. Holcomb,* 46 Neb. 88, 64 N. W. 437; *State v. Sheldon,* 78 Neb. 552, 111 N. W. 372; *Rohrer v. Hastings Brewing Co.,* 83 Neb. 111, 119 N. W. 27; *Elmen v. State Board of Equalization and Assessment,* 120 Neb. 141, 231 N. W. 772.

The act of 1905, possibly for the purpose of effecting a saving of taxpayers' money, clearly evidences the legislative intent to completely dispense with the city tax commissioner, the listing and valuation of property for taxation for any purpose between the 15th day of September and the 15th day of November of each year, the review and equalization of such assessment by city officials, and the making of a city tax list, all at the expense of the city.

However, by this act the power to determine, levy and certify to the county commissioner the general taxes upon personal and real property was vested in the city council. The corresponding dates of required payment of such taxes

remained without change, as it had always been under all of the municipal charters, viz., due May 1st, and delinquent July 1st, "following levy." But no definite date for the making of the municipal levy by the mayor and council was prescribed. From the language appearing in section 146 of the 1905 act, viz., "the city council shall annually, in the first week in January after the levy provided for," set aside specific funds, it is obvious that the legislative intent is fairly expressed, that this levy to be made by the municipal authorities would be in or prior to January of the year in which the taxes so levied would become due and delinquent. Then, too, the language of the act of 1905 contains no express language identifying the particular county assessment or tax roll to which such levy was applicable, the words employed being, "on said property as assessed by the county officers and the state board of equalization and returned to the county clerk."

If it be conceded that the several provisions of the law of 1905, defining and vesting the right to levy taxes in cities of the metropolitan class, when construed together, create an ambiguity as to some details to be observed in carrying such powers into effect, such fact does not destroy the clear public duty to levy and collect such taxes. Express provisions in the statutes already quoted provide for that contingency. Therefore, we must conclude that, the right to levy the taxes by the municipal authorities being clearly conferred, the power of the municipality, in an appropriate manner, to supply "the details necessary for the full exercise of such power" must be admitted. Laws 1905, ch. 14, sec. 143, now Comp. St. 1929, sec. 14-110.

But, in the natural progress of events the interpretation of this 1905 law was presented to the municipal authorities in December, 1905. The saving clause thereof, above quoted (section 216), had continued the full force and effect of the levy made in February, 1905. This levy of February, 1905, so continued, was made on the listing and valuation as made by the city tax commissioner and deputies between September 15, 1904, and November 15, following. The pro-

visions of the 1905 act, heretofore quoted, construed together, in the light of the surrounding circumstances, fairly support the inference that they evidence the legislative intent that the first levy of municipal taxes thereunder was properly to be made not later than January, 1906. Laws 1905, ch. 14, sec. 146. In view of the power conferred upon the municipality, the duty to levy municipal taxes at some time in or prior to the month of January, 1906, and upon a proper valuation, was imperative. To levy these taxes prior to the last week in January on the listing and valuation thereafter to be made by the county assessors in 1906, which would not be final until reviewed and equalized by the board of equalization of Douglas county sitting in that year, and which might not be completed until after August, 1906, could certainly never have been intended. For the result of this interpretation would be that taxes levied in January, 1906, or prior thereto, on the valuation so arrived at, would, by the terms of the law controlling, be due May 1, 1906, delinquent July 1, 1906, and would bear penalties for sixty days prior to the time the basis of the assessment —the valuation of 1906—was available to the taxpayer for the determination of the amount of his taxes which the city was exacting in 1906. Then, too, particularly after the adoption of the amendment requiring taxes to be levied "by number of mills * * * on each dollar" valuation, such an interpretation would necessarily result in requiring a levy of taxes strictly limited by statute to be made prior to the possibility of ascertaining the "valuation," the limiting element on which such levy must be based. Obviously this result is so unreasonable that the construction of law upon which it must rest should not be adopted if another reasonable alternative is presented. This is afforded by the very terms of the act under consideration if the interpretation be accepted as requiring the levy in or prior to January, 1906, to be made on the last prior county and state listing and valuation of property for assessment, for such levy would then be applied to the assessment roll of 1905, with the result that all the calls of the statute would be met with-

out hardship or unreasonable exactions. It would be but recurring to, and adopting by the municipal authorities by construction, what was once expressly prescribed for this purpose by the act of March 1, 1887, viz., "the valuation of such property to be taken from the last previous assessment roll of the proper county." It would seem that this construction would be reasonable and substantially in harmony with all of the express terms of the act of 1905. In addition, it would also seem plain that, even if it be contended that it was essential that the municipal authorities exercise the powers on them conferred by section 143 of the act of 1905, they were not without full power so to do. It would seem to follow as a necessary conclusion that the acceptance of the county assessment roll as made in 1905, as determining the valuation and ownership of property for the purpose of the taxes assessed in or prior to January, 1906, must be deemed to have been contemplated by the act of 1905. The present record is silent as to what was actually done by the municipal authorities of Omaha between 1905 and 1933. Possibly we may not be justified in presuming that what was done in 1933, which is clearly established by the evidence in this record, represented the established course of procedure in Omaha continuously since 1905. But it must be admitted that the proceedings of the taxing authorities of Omaha in 1933, embodied in the bill of exceptions in this case, is strictly consistent with what is here presented as the proper interpretation of the act of 1905, as its provisions were continued in subsequent legislation and now remain in force and effect. In fact, the tax procedure then prescribed has continued and now remains substantially unchanged.

As to the questioned levies of city taxes which are not included in the causes of action removed to the federal district court, the procedure followed by the taxing authorities, so far as disclosed by the record and the facts as found in plaintiff's briefs, appears to have been in substantial conformity with the provisions of the act of 1905 as thereafter continued by subsequent amendments and reenactments, and which are now in force.

It would seem that the entire situation here presented is properly within the purview of the rule announced in *State v. Bryan*, 112 Neb. 692, 200 N. W. 870, hereinbefore referred to, which we are constrained to follow as the controlling principle applicable to the record before us.

The form of the action, as well as the issues as framed by the pleadings, imposed upon the plaintiff the burden of establishing the invalidity of the city taxes challenged, and this it has failed to do.

In this connection, we do not overlook the provisions of chapter 134 of the Laws of 1933. Assuming, but not determining, the validity of this enactment, its provisions are limited to dates of payment, dates of delinquency, and interest on city taxes, etc. Neither expressly nor by necessary implication does it in any manner alter the prescribed course of procedure in the determination of valuations, the securing of a listing of assessable property, and the making of the proper levy thereon. These remain unchanged, and since 1906 there has been provided by law but one annual levy of city and school district taxes. The effect of chapters 134 and 135 of the Laws of 1933, so far as applicable to the matters here under consideration, must be deemed as an act of grace on the part of the sovereign, extending the time for payment and delinquency of city levies of taxes to the respective dates expressed in these new enactments.

There being no proof in the record of the making of a double levy and assessment in any one year, this act of grace may not be made the basis of an attack on taxes in their origin properly annually levied and assessed.

Therefore, it follows that the actions of the district court for Douglas county in denying the relief prayed for and in dismissing this proceeding, as well as that of Chicago, St. Paul, Minneapolis & Omaha Railway Company v. Bauman, No. 29939, were, in all respects, correct and its judgments are

AFFIRMED.

LEO N. SWANSON, PETITIONER, V. STATE OF NEBRASKA ET AL., RESPONDENTS.

271 N. W. 264

FILED JANUARY 25, 1937. No. 30064.

1. **Constitutional Law**: AMENDMENTS. "The self-imposed limitations on the power of the people to amend their fundamental law should not be so construed as to defeat the will of the people, plainly expressed, on account of a slight and unimportant failure to comply literally with such limitations, if the requirements are substantially observed." *State v. Winnett*, 78 Neb. 379, 110 N. W. 1113.
2. ———: ———. Where the Constitution prescribes certain procedure for the giving and publication of notice, in the submission to the electors of a proposed constitutional amendment, there must be a substantial compliance only with such requirements in order to effect either a valid submission or adoption of the proposal.
3. ———: ———. Under the provisions of section 1, art. XVI, and section 4, art. III of the Constitution, the result of the vote upon a proposed constitutional amendment is to be determined by the state canvassing board, and, if it carries by the required majority, it becomes operative on the date of the governor's proclamation to that effect.
4. ———: ———. The proposed amendment to section 1, art. IV of the Constitution, as set out in chapter 188, Laws 1935, is held to have been properly submitted to and adopted by the electorate of the state and such amendment became effective on December 15, 1936, the date of the governor's proclamation.
5. ———: ———. A title is not necessary to an act providing for the submission of a proposed amendment to the Constitution, and if a title has been inserted it will be treated as null and void.
6. ———: ———: CONSTRUCTION. "A constitutional amendment becomes an integral part of the instrument and must be so construed. It must be harmonized, if possible, with all other provisions, and effect must be given to every section and clause as well as the whole instrument." *Luikart v. Higgins*, 130 Neb. 395, 264 N. W. 903.
7. ———: ———: ———. In construing a constitutional amendment for the purpose of ascertaining the intent of the people in adopting it, the courts must find such intent in the language of the amendment itself and they are not to hold that the people intended anything different from what the language employed imports.

8. ———: ———: ———. The intent of the people in adopting the amendment under consideration, as determined from the amendment itself, was to deprive the commissioner of public lands and buildings of his status as a constitutional officer and, to that extent, the amendment is self-executing.
9. ———: ———: ———. The amendment adopted does not expressly or by implication abolish the office of commissioner of public lands and buildings as an executive office of this state.
10. ———: ———: ———. The amendment under consideration does not expressly or by implication repeal existing statutes imposing duties and obligations upon the commissioner of public lands and buildings.
11. ———: ———: ———. The language of the amendment adopted is wholly ineffective to in any manner affect the lawful discharge of the official duties imposed by law upon the office of commissioner of public lands and buildings.
12. ———: ———: ———. All appropriations heretofore lawfully made for the support and maintenance of the office of commissioner of public lands and buildings remain as valid and subsisting appropriations after the adoption of the amendment in question.

Original action by Leo N. Swanson against the state and others to determine his legal rights and official status. *Judgment for petitioner.*

Crofoot, Fraser, Connolly & Stryker, for petitioner.

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

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

CARTER, J.

This is an action brought under our declaratory judgments act by Leo N. Swanson for the purpose of determining his legal rights and official status after the purported adoption of an amendment to the Constitution of this state affecting the office of commissioner of public lands and buildings which he formerly held and to which he now claims to be entitled.

The record discloses that petitioner, at the general election held in November, 1934, was elected commissioner of

public lands and buildings for a two-year term commencing the first Thursday after the first Tuesday in January, 1935, and, after qualifying, entered upon the discharge of the duties of that office. At the election held in November, 1936, petitioner was a candidate for reelection to the same office and received a majority of the votes cast for the candidates for the office.

It also appears that the 1935 session of the legislature passed an act, known as House Roll No. 404, providing for the submission of a proposed amendment to section 1, art. IV of the Constitution, to the electorate of this state. Laws 1935, ch. 188. That part of section 1, art. IV of the Constitution, that is material in the consideration of this case is as follows: "The executive officers of the state shall be the governor, lieutenant governor, secretary of the state, auditor of public accounts, commissioner of public lands and buildings, treasurer, attorney general, superintendent of public instruction and the heads of such other executive departments as may be established by law." The effect of the proposed amendment to the above section of the Constitution was to remove therefrom the words "commissioner of public lands and buildings." The proposal thus submitted was voted upon by the electorate of Nebraska at the general election held in November, 1936, and, after a tabulation and canvass of the votes cast thereon, the governor, on December 15, 1936, by proclamation formally declared that "said proposed amendment is now in full force and effect as a law of the state and as a part of the Constitution of the state of Nebraska from the date of this proclamation." Pursuant to this proclamation, the petitioner, so far as possible, was deprived of the exercise of the powers incident to the office of commissioner of public lands and buildings, all compensation denied him from and after November 3, 1936, the date of the general election, and all of his official acts performed subsequent to that date refused and denied as legal and official acts by other officials charged with the administration of the governmental affairs of the state.

The first contention made by petitioner is that provisions for the amendment of the Constitution are mandatory and must be complied with, and that there was no substantial compliance with the requirements of section 1, art. XVI of the state Constitution, which provides that "such proposed amendments shall be entered on the journals, with the yeas and nays." The stipulation of facts shows that the title of the bill appears in the journal of each house of the legislature. The journals of each house further show that the yeas and nays were noted therein and that the constitutional requirement of a three-fifths vote in each house had been obtained. In *State v. Winnett,* 78 Neb. 379, 110 N. W. 1113, a case involving the point being considered, the court said: "The self-imposed limitations on the power of the people to amend their fundamental law should not be so construed as to defeat the will of the people, plainly expressed, on account of a slight and unimportant failure to comply literally with such limitations, if the requirements are substantially observed." Under the authority of this case, the journals of the two houses of the legislature show a substantial compliance with section 1, art. XVI of the Constitution, in so far as they affect House Roll No. 404.

It appears that there was not a strict compliance with that part of section 1, art. XVI of the Constitution, which provides that the proposed amendment shall be "published once each week for four weeks, in at least one newspaper in each county, where a newspaper is published, immediately preceding the next election of members of the legislature." The record shows that in one county of the state publications of the notice were not made on the correct dates; in three others, publications were not run the required number of times. In *State v. Cline,* 118 Neb. 150, 224 N. W. 6, this court said: "Nevertheless, where the Constitution itself prescribes certain procedure relative to an important element, as the giving and publication of notice, in the submission to the electors of a proposed amendment, there must be a substantial compliance with such requirements in order to effect either a valid submission or adop-

tion of the proposal." See, also, *In re Senate File 31*, 25 Neb. 864, 41 N. W. 981; *Weston v. Ryan*, 70 Neb. 211, 97 N. W. 347; *State v. Winnett, supra*. We therefore conclude that, under the authorities cited, the requirements of section 1, art. XVI of the Constitution, as to publication and notice of the amendment to the electorate of Nebraska, were substantially complied with and the petitioner's contentions to the contrary are without merit.

The petitioner next contends that the official canvass of the votes cast for and against the proposed constitutional amendment must be made by the legislature when it convenes in 1937, and that until such canvass is made and the result determined the amendment cannot become effective.

The respondents insist that an amendment to a constitutional provision takes effect as of the date of the election at which it was submitted, regardless of the method, time or means of ascertaining the result of the election. In support of this contention the attorney general cites the following cases: *State v. Winnett, supra; State v. Dean*, 84 Neb. 344, 121 N. W. 719; *In re Senate File 31, supra; Tecumseh Nat. Bank v. Saunders*, 51 Neb. 801, 71 N. W. 779. It will be noted that *State v. Dean, supra*, was decided on May 7, 1909, and that the other decisions referred to were of an earlier date. Due to constitutional changes since 1909, a construction of section 4, art. III, and section 1, art. XVI of the Constitution, will be determinative of the proposition now under consideration, and, to the extent that the same may be in conflict with the doctrine announced in the cases cited, necessarily supersedes the same.

Section 1, art. XVI, reads as follows: "Either branch of the legislature may propose amendments to this Constitution, and if the same be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and published once each week for four weeks, in at least one newspaper in each county, where a newspaper is published, immediately preceding the next election of members of the legislature. At such election said amendments shall

be submitted to the electors for approval or rejection upon a ballot separate from that upon which the names of candidates appear. If a majority of the electors voting on any such amendment adopt the same, it shall become a part of this Constitution, provided the votes cast in favor of such amendment shall not be less than thirty-five per cent. of the total votes cast at such election. When two or more amendments are submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately."

Section 4, art. III, so far as applicable to the present question, was first adopted in 1912, and is as follows: "A measure initiated shall become a law or part of the Constitution, as the case may be, when a majority of the votes cast thereon, and not less than thirty-five per cent. of the total vote cast at the election at which the same was submitted, are cast in favor thereof, and shall take effect upon proclamation by the governor which shall be made within ten days after the official canvass of such votes. The vote upon initiative and referendum measures shall be returned and canvassed in the manner prescribed for the canvass of votes for president. *The method of submitting and adopting amendments to the Constitution provided by this section shall be supplementary to the method prescribed in the article of this Constitution, entitled, 'Amendments' and the latter shall in no case be construed to conflict herewith.*" (Italics ours.)

Webster's New International Dictionary defines "supplementary" as "Added as a supplement; additional; being, or serving as, a supplement."

In *McCleary v. Babcock,* 169 Ind. 228, 82 N. E. 453, that court, in discussing a supplemental act, says: "It is that which supplies a deficiency, adds to, or completes, or extends that which is already in existence, without changing or modifying the original. *State v. Board* (1897) 16 Ohio Cir. Ct. Rep. 218, 221; *Rahway Savings Institution v. Rahway* (1890) 53 N. J. Law, 48, 20 Atl. 756."

In *Rahway Savings Institution v. Rahway,* 53 N. J. Law,

48, 20 Atl. 756, Magie, J., says in part: "The ordinary meaning of the word 'supplement' doubtless is 'a supplying by addition of what is wanting.' A glance at our legislation from the time of the adoption of the constitutional provision will show that the word has constantly been used in a sense so broad as to possibly justify a claim that it has acquired thereby a special meaning broader than the ordinary one. But for the purposes of this case it is sufficient to say, that the ordinary meaning of the word will, under our construction of this clause, cover every species of amendatory legislation which goes to complete the legislative scheme."

So, also, "A supplemental act is one designed to improve an existing statute, by adding something thereto without changing the original text." *First State Bank v. Bottineau County Bank,* 56 Mont. 363, 185 Pac. 162, 8 A. L. R. 631.

The language of section 4, art. III, viz., "the method of * * * adopting amendments to the Constitution provided by this section shall be supplementary to the method prescribed in the article of this Constitution, entitled, 'Amendments,'" refers to section 1, art. XVI, already quoted herein.

In the constitutional provisions under consideration we have an example of a constitutional modification made by reference contained in a supplemental constitutional enactment. In principle, "legislation by reference" has been accorded unquestioned recognition by our precedents. *Richardson v. Kildow,* 116 Neb. 648, 218 N. W. 429; *Sheridan County v. Hand,* 114 Neb. 813, 210 N. W. 273; *State v. Moorhead,* 100 Neb. 298, 159 N. W. 412.

In dealing with cases of legislation by reference, it is obvious that the primary consideration to be kept in view is the general scope and object of the amending legislation. *Tracey v. Pretty & Sons* (1901) 1 Q. B. (Eng.) 444.

It is equally obvious that the proper rule of construction would be substantially the same when constitutional provisions of an identical nature are under consideration.

Therefore, it follows that the proper construction of the

above provision, already quoted from section 4, art. III of the Constitution, is, in legal effect, to supplement, to add to and incorporate in section 1, art. XVI, as though physically a part thereof, the following provisions contained in the former: That "the vote" on such amendment "shall be returned and canvassed in the manner prescribed for the canvass of votes for president," and "shall become a * * * part of the Constitution * * * when a majority of the votes cast thereon * * * are cast in favor thereof, and shall take effect upon proclamation by the governor which shall be made within ten days after the official canvass of such votes."

It will also be noted that the provisions quoted, essentially a constitutional mandate, supersede and set aside all conflicting legislative provisions.

It follows that the official canvass made by the board of canvassers properly determined the result of the election, and the amendment first became effective on the date and as proclaimed by the governor. Up to that time, the powers, privileges, rights and duties of the commissioner of public lands and buildings were, and could be, in no manner affected or modified.

The only question remaining is a determination of the effect of the constitutional amendment after it became a part of the Constitution of the state.

Preliminary to the consideration of the effect of the constitutional amendment before us, it is to be remembered, "In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is entrusted with the general authority to make laws at discretion. * * * 'It has never been questioned, so far as I know,' says Redfield,

Ch. J., 'that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written Constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American states. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several state legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular state in question.'" 1 Cooley, Constitutional Limitations (8th ed.) 175, 177.

The principles above enunciated have long been approved in this jurisdiction, and we are fully committed to the doctrine that the Constitution of this state is not a grant but a restriction on legislative power, and that the legislature may legislate upon any subject not inhibited by the Constitution. *Hallenbeck v. Hahn*, 2 Neb. 377; *State v. Lancaster County*, 4 Neb. 537; *State v. Dodge County*, 8 Neb. 124; *Shaw v. State*, 17 Neb. 334, 22 N. W. 772; *Magneau v. Fremont*, 30 Neb. 843, 47 N. W. 280; *State v. Moorhead*, 99 Neb. 527, 156 N. W. 1067.

This necessarily includes the proposition that, subject to limitations and restrictions expressly imposed by constitutional provisions, the power to create or continue an office is vested in the legislative department of government. 46 C. J. 933; 23 Am. & Eng. Ency. of Law (2d ed.) 328.

Prior to the adoption of the constitutional amendments of 1920, the executive department was strictly defined and the officers composing it strictly limited to those enumerated in section 1, art. V of the Constitution of 1875. Section 26, art. V, provided: "No other executive state office shall be continued or created, and the duties now devolving upon officers not provided for by this Constitution shall be performed by the officers herein created."

The conclusion of this court as to the effect of those provisions was that "the creation of an executive state office,

or the providing for the election or appointment of an executive state officer not provided for in said article, could not well have been more clearly inhibited." *In re Railroad Commissioners*, 15 Neb. 679, 50 N. W. 276.

However, the public policy established in these constitutional provisions was, in 1920, substantially and radically modified. The attempt to constitutionally define the executive department of the state, and definitely enumerate those who constituted it, was abandoned. Section 1, art. IV of the new Constitution, provided: "The executive officers of the state shall be (here follows enumeration) * * * *and the heads of such other executive departments as may be established by law.*" (Italics ours.)

By these amendments the inhibitory powers previously inherent in these constitutional provisions practically ceased to exist.

Taking up the consideration of the amendment here involved, in the light of the foregoing discussion, it will be noted that the amendment in question first appears as House Roll No. 404, adopted by both houses of the legislature of 1935, and approved May 27, 1935. Conforming to the form of an ordinary legislative enactment, it was drafted with a title, a purview, and an enacting clause, with the second paragraph of the enactment providing for its submission at the general election in November, 1936, to the voters for their approval or rejection. The restrictive title employed was "An act for a joint and concurrent resolution to amend section 1, art. IV, Constitution of the state of Nebraska, 1875, * * * and to abolish the office of commissioner of public lands and buildings." Considering it as a statute would be considered, in view of section 14, art. III of the Constitution, providing that no bill shall contain more than one subject, and that the same shall be clearly expressed in the title, the import of the amendment would be strictly restricted in its application to the section of the Constitution named therein, and thus would be necessarily limited by the form in which it was enacted.

However, while considering a similar question then be-

fore this court, in reply to an interrogatory relative to the effect of a claimed defective title of "A bill for an act to submit to the electors of the state, for rejection or approval, an amendment," Maxwell, J., in the case of *In re Senate File 31, supra,* stated: "In answer to the fourth interrogatory, we will say that no title is necessary to a proposed amendment or amendments to the Constitution, *and if a title has been inserted it may be treated as null and void.* A proposition to amend the Constitution, when adopted by the necessary three-fifths votes of all the members elected to each house, is in no sense a law. It is a mere proposal, based, it is to be presumed, upon a public demand for its submission, but it will possess no validity until ratified by a majority of all the votes cast at the election. If two or more propositions are submitted, they are to be submitted separately. There is a good reason why but one subject should be embraced in a bill designed to become a law by action of the legislature and governor, and that the subject should be clearly expressed in the title, as without such condition experience has shown that provisions of a very objectionable character, which there was no possibility of passing independently, were attached to meritorious bills and smuggled through, or knowingly voted for by members to prevent the defeat of meritorious measures. In other words, as said by this court in *White v. City of Lincoln,* 5 Neb. 505, the object 'is to prevent surreptitious legislation by incorporating into a bill obnoxious provisions which have no connection with the general object of the bill, and of which the title gives no indication.' No such reasons obtain, however, in submitting a proposition to amend the Constitution, and the provisions of the Constitution are not applicable thereto." (Italics ours.)

The conclusion follows that "the title" that accompanied House Roll No. 404, during its legislative existence, is "null and void" and surplusage, and formed no part of the proposed amendment ultimately submitted for adoption. It was evidently so properly considered by the authorities charged with the publication thereof, because the record

now here presented discloses that the title constituted no part of the amendment as actually published pursuant to section 1, art. XVI.

The text so actually submitted was as follows: "Section 1. The executive officers of the state shall be the governor, lieutenant governor, secretary of the state, auditor of public accounts, treasurer, attorney general, superintendent of public instruction and the heads of such other executive departments as may be established by law. The legislature may provide for the placing of the above named officers as heads over such departments of government as it may by law create. The governor, lieutenant governor, attorney general, secretary of state, auditor of public accounts, and treasurer shall be chosen at the general election held in November, 1922, and in each even numbered year thereafter, and their term of office shall be two years and until their successors shall be elected and qualified. The superintendent of public instruction shall be elected in November, 1922, and every four years thereafter, and his term of office shall be four years and until his successor shall be elected and qualified. The records, books and papers of all executive officers shall be kept at the seat of government, and such officers, excepting the lieutenant governor, shall reside there during their respective terms of office. Officers in the executive department of the state shall perform such duties as may be provided by law. The heads of all executive departments established by law, other than those to be elected as provided herein, shall be appointed by the governor, with the consent of a majority of all the members elected to the legislature, but officers so appointed may be removed by the governor. Subject to the provisions of this Constitution, the heads of the various executive or civil departments shall have power to appoint and remove all subordinate employees in their respective departments."

A careful examination of the amendment thus submitted and adopted discloses that what was actually done and accomplished was so clear and certain as to preclude construction, so far as the question here presented for con-

sideration is concerned. It effected the deletion of the words "commissioner of public lands and buildings" from section 1, art. IV of the state Constitution, as theretofore existing. The new section 1, art. IV, created by this amendment, upon its adoption became a new, complete section of the Constitution, as much so as if originally incorporated in the Constitution, and is to be construed accordingly. If possible, it must be harmonized with all the other provisions of the Constitution. 1 Cooley, Constitutional Limitations (8th ed.) 129. The well-recognized rule applicable is that effect must be given, if possible, to the whole instrument and to every section and clause, in the light of the historical development of the principle involved and contained therein. The Constitution as amended must be construed as a whole.

The following statement of the rule under discussion has received approval in this jurisdiction: "A constitutional amendment becomes an integral part of the instrument and must be so construed. It must be harmonized, if possible, with all other provisions, and effect must be given to every section and clause as well as the whole instrument." *Luikart v. Higgins,* 130 Neb. 395, 264 N. W. 903. See, also, *Hooper Telephone Co. v. Nebraska Telephone Co.,* 96 Neb. 245, 147 N. W. 674.

It will also be remembered that, while a clause in a constitutional amendment will prevail over a provision in the original instrument inconsistent with the amendment, "distinct constitutional provisions are repugnant to each other only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict." 12 C. J. 709.

So, also, it is a well-recognized canon of construction that, "when general and special provisions of a Constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control in cases where the special provisions do not apply." 12 C. J. 709.

It must also be remembered that, while it is the duty of

the courts to ascertain and carry into effect the intent and purpose of the framers of a Constitution, or of an amendment thereto, duly adopted, this intent must be that which they have embodied in the instrument itself. 12 C. J. 703.

In *State v. De Lorenzo,* 81 N. J. Law, 613, 79 Atl. 839, it is stated: "The existence of a constitutional limitation upon the legislative power is to be established and defined by words that are found written in that instrument, and not by reference to some spirit that is supposed to pervade it or to underlie it or to overshadow the purposes and provisions expressed in its written language."

Further, in *People v. City Council of Denver,* 60 Colo. 370, 153 Pac. 690, we find this language: "In other words, in construing a constitutional provision, for the purpose of ascertaining the intent of the people in adopting it, when its language is explicit, the courts are bound to seek for the intention in the words of the provision itself, and they are not to suppose or hold that the people intended anything different from what the meaning of the language employed imports."

The foregoing part of this opinion to a large extent states the expressed views of Mr. Justice Eberly.

The intent of the people in adopting the amendment before us will be determined in the light of the foregoing discussion. It must be borne in mind that, while the amendment is an integral part of the Constitution, the original provision actually remains as a part of the Constitution for purposes of construction. It is therefore possible to consider the original section as well as the amendment to determine the intent of the people in adopting the amendment. In the original section the name of "commissioner of public lands and buildings" was listed among the other executive officers of the state that were specifically named. The adopted amendment is in the exact language of the original section except that the name "commissioner of public lands and buildings" is left out. We are of the opinion that these facts indicate a clear intent to eliminate the commissioner of public lands and buildings as a consti-

tutional executive officer of this state. There certainly can be no presumption that the people of this state did not intend to accomplish something by adopting the amendment. It is the duty of this court, in construing the effect of what was done, to give the amendment the most favorable intendment that can be gleaned from a construction of all of the provisions of the Constitution after the adoption of the amendment. "A constitutional provision therefore should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation, and suppress the mischief at which it was aimed." 6 R. C. L. 50, sec. 45.

In *School District v. City of Pontiac*, 262 Mich. 338, 247 N. W. 474, the court in a like situation said:

"We are asked to construe in certain particulars this amendment to the Constitution. Unfortunately it is couched in language so ambiguous that able counsel after much study and reflection are far from being in accord as to its proper construction. Even some of those who were instrumental incident to initiating the amendment seem to differ widely as to what was to be accomplished thereby. Because of such ambiguity, it becomes the duty of the court to construe the amendment as worded in the light of established rules for the construction of constitutional provisions. Much has already been written concerning proper rules for such construction. Extended review of these rules would not be particularly helpful. Fortunately the pertinent fundamental guides for such construction have been clearly and concisely stated in former decisions of this court:

" 'It is a maxim that the object of construction, as applied to a written Constitution, is to ultimately ascertain and give effect to the intent of the people in adopting it. * * *

" 'In construing constitutional provisions where the meaning may be questioned, the court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished.' *Kearney v. Board of State Auditors*, 189 Mich. 666."

We conclude therefore that the intent of the people, as shown within the four corners of the Constitution itself, was to remove the commissioner of public lands and buildings from the list of executive state officers named in the Constitution. Such an intent being apparent, other provisions of the Constitution in conflict with the latest expression of the public will, under recognized rules of construction hereinbefore expressed, must be treated as superseded by the amendment and harmonized with it in order to accomplish the intent of the electorate as determined from an examination of the Constitution and the adopted amendment. We necessarily conclude that, on and after the governor's proclamation of December 15, 1936, the office of commissioner of public lands and buildings ceased to be a constitutional office in this state.

The question immediately arises whether the office of commissioner of public lands and buildings was completely abolished by the constitutional amendment. It will be noted that the amendment contains no specific words purporting to abolish the office. We fail to find any language from which such an intent can be implied. The removal of the name of "commissioner of public lands and buildings" from the list of constitutional executive officers of the state certainly cannot of itself amount to an abolition of the office unless reasonable intendments of that nature can reasonably be drawn from what was done.

It is quite apparent that executive officers of the state can exist without being specifically named in the Constitution. The very section amended, section 1, art. IV, specifically provides for other executive state officers when it states "and the heads of such other executive departments as may be established by law." It must be presumed that the people of the state had this provision in mind when they voted upon the amendment. At the time the amendment was voted upon, the commissioner had many duties to perform that were impressed upon him by legislative action. Section 84-401, Comp. St. 1929, provides: "The commissioner of public lands and buildings shall perform

such duties as may be devolved upon him by law and as provided by section 1 of article VII of the Constitution." Sections 84-402 to 84-411, inclusive, Comp. St. 1929, place duties and burdens upon the office of commissioner of public lands and buildings, all as a result of legislative action only. Section 72-201, Comp. St. Supp. 1935, provides for a secretary of the board of educational lands and funds and specifically states that the commissioner of public lands and buildings or some other member of the board may be such secretary. By this statute, the legislature clearly designates the commissioner of public lands and buildings as a member of the board of educational lands and funds. Section 72-707, Comp. St. 1929, makes and constitutes the commissioner of public lands and buildings the custodian of the state capitol and capitol grounds, including numerous official duties therein enumerated, all of which was done by legislative action. Many other sections of our statutory law impose duties upon the commissioner of public lands and buildings that we will not mention. We fail to find any logic in the argument that the mere removal of the name of the commissioner of public lands and buildings from the list of constitutional officers would, under the circumstances of this case, viewed in the light of the provisions of the Constitution itself after the amendment was adopted, by implication repeal all of the acts of the legislature hereinbefore mentioned.

It is true that the legislature never has, so far as we can determine, by express terms created the nonconstitutional office of commissioner of public lands and buildings. However, it has been held in many jurisdictions that, "in creating an office no particular language is necessary, it being sufficient if the intent of the legislature is manifested by the language used." 46 C. J. 934. In *Childs v. State*, 4 Okla. Cr. 474, 113 Pac. 545, the court said: "It is not necessary to the creation of an office that the legislature declare in express words that such office is created. The use of any language which shows the legislative intent to create the office is sufficient." We must presume that the

people, in amending the Constitution, had in mind the fact that many existing statutes were in force placing duties and obligations upon the commissioner of public lands and buildings. In view of the fact that the amendment contained no language from which an intent can be drawn to abolish the office in its entirety or to repeal existing statutory law pertaining to the office, which said statutory law standing alone is sufficient to create the office of commissioner of public lands and buildings, we must necessarily conclude that the office is still existent as an executive office of the state with the duty imposed of performing all functions required of him by the statutes of this state. The amendment under consideration is clearly self-executing to the extent of depriving the office of its constitutional character. But, to accomplish the complete abolition of the office, further legislative action in that direction will be required subject only to constitutional limitations placed upon the legislature with reference thereto.

We therefore conclude that the amendment was properly submitted and adopted as a part of the Constitution by the electorate of Nebraska; that, by virtue thereof and the proclamation of the governor, the office of commissioner of public lands and buildings ceased to be a constitutional office on and after December 15, 1936; that a construction of the Constitution after the adoption of the amendment in question requires this court to hold that the office of commissioner of public lands and buildings continued as an executive state office thereafter; that the official acts of the petitioner since November 3, 1936, are those of a regularly elected and qualified executive officer of the state; that petitioner is entitled to his salary for the term for which he was elected, as fixed at the time of his election; and that the appropriation of funds for carrying out the duties of his office is a valid and subsisting appropriation.

JUDGMENT ACCORDINGLY.

ROSE and EBERLY, JJ., dissenting.

Not being in agreement with that part of the opinion adopted by the majority of this court which adjudges that

the amendment to section 1, article IV of the Constitution, adopted in 1936, was effective to totally abolish the constitutional existence of the office of commissioner of public lands and buildings, we respectfully dissent therefrom, and, in support of our position, submit the following:

The text of section 1, article IV of our Constitution, as now amended, is set forth in the majority opinion and will not be repeated here. This section was the only section submitted to the electorate for the purpose of amendment, and, so far as here involved, the sole amendment attempted was the deletion therefrom of the words, "Commissioner of Public Lands and Buildings." It was a repeal by omission, and no more. *State v. McCafferty*, 25 Okla. 2, 105 Pac. 992; *Adams County v. Scott*, 117 Wash. 85, 200 Pac. 1112; *Spokane & Eastern Trust Co. v. Hart*, 127 Wash. 541, 221 Pac. 615.

The following sections of our Constitution were never submitted to the people at the election of 1936 for the purpose of amendment, and never expressly repealed, and still remain an integral part of our fundamental law, viz.:

"The governor, secretary of state, treasurer, attorney general, and commissioner of public lands and buildings shall, under the direction of the legislature, constitute a board of commissioners, for the sale, leasing, and general management of all lands and funds set apart for educational purposes, and for the investment of school funds, in such manner as may be prescribed by law." Const. art. VII, sec. 1.

"If the office of * * * commissioner of public lands and buildings, * * * shall be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified in such manner as may be provided by law." Const. art. IV, sec. 21.

Sections 3, 4, and 5, of article XVII, provide for the salary of the "Commissioner of Public Lands and Buildings," for his biennial election, and for his term of office. In ad-

dition, section 6 of this article provides: "The legislature shall pass all laws necessary to carry into effect the provisions of this Constitution."

The rule this situation invokes we quote from the opinion of the majority, which they approve but fail to follow, viz.:

"A constitutional amendment becomes an integral part of the instrument and must be so construed. It must be harmonized, if possible, with all other provisions, and effect must be given to every section and clause as well as the whole instrument." *Luikart v. Higgins,* 130 Neb. 395, 264 N. W. 903. See, also, *Hooper Telephone Co. v. Nebraska Telephone Co.,* 96 Neb. 245, 147 N. W. 674; Cooley, Constitutional Limitations (8th ed.) 129.

It is obvious that there is nothing in section 1, article IV, as amended, which is in any manner in conflict with or repugnant to the several sections of the Constitution already quoted herein.

If, then, we fairly apply the rule above quoted to the situation now confronting us, the conclusion inescapably follows that the commissioner of public lands and buildings remains a constitutional officer within the terms of the definition, viz., "Any of those officers whose tenure and term of office are fixed and defined by the Constitution." 12 C. J. 1294. See, also, *Foster v. Jones,* 79 Va. 642, 644. His office, therefore, still remains a constitutional office. Constitutional offices are "offices which, as contradistinguished from legislative or statutory offices, are denominated constitutional, such as are governmental in their nature, as for example the executive, judicial, or legislative offices of the state or any political division thereof. All these are either created by or provided for in the Constitution." 12 C. J. 1294. See, also, *People v. Scheu,* 60 App. Div. 592, 69 N. Y. Supp. 597.

In this connection, this court has construed section 1, article VII, in the following language: "By section 1, article 8, of the state Constitution (now Const. art. VII, sec. 1) the sole power to manage, loan, and invest the perma-

nent school funds of the state is lodged with a board composed of the governor, secretary of state, treasurer, attorney general, and commissioner of public lands and buildings; and said board cannot be deprived of its functions by legislative enactment, nor can the legislature confer authority upon a single member of said board, or any other person, to invest any portion of said trust funds." *State v. Bartley,* 40 Neb. 298, 58 N. W. 966. See, also, *State v. Bartley,* 41 Neb. 277, 59 N. W. 907.

Thus, there are vested in the members of this board constitutional functions of a special nature, not subject to termination by legislative action, which they as members of the board are constitutionally required to carry out and perform. In view of the constitutional duties thus entailed on them, and the capacities in which they are performed, they must be deemed constitutional officers. The nature of the duties so imposed confers the distinction which their performance involves. The principle here involved is illustrated in *People v. Hogan,* 214 N. Y. 216, 108 N. E. 459. The following excerpt therefrom discloses the situation and the controlling application of this principle as made by the highest court of review of that state, in answer to the question:

"Is a member of the board of aldermen of the city of New York a constitutional officer? We think he is, and for reasons which can be briefly stated.

"In the city of New York the power of apportioning the counties thereof into assembly districts is vested in 'the common council, or if there be none, the body exercising the powers of a common council.' Const. art. III, sec. 5. That the board of aldermen is the body exercising the powers of a common council cannot be doubted. The Greater New York charter provides: 'The legislative power of the city of New York, except as otherwise herein provided, shall be vested in one house to be known and styled as the "Board of Aldermen of the City of New York."' Laws of 1901, ch. 466, sec. 17. In the absence of boards of supervisors—and there are no such boards in the counties making up

the city of New York—there *must* be a 'body exercising the powers of a common council' to perform the mandate of the Constitution in respect to legislative apportionment. This function is one of supreme importance in the government of the state. Its importance is emphasized by the introduction into the Constitution itself of a provision for the judicial review thereof, requiring that 'any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same.' Const. art. III, sec. 5. The board of aldermen of the city of New York, thus being the body upon which the Constitution has devolved this most responsible duty, so far as assembly districts are concerned, is a constitutional body, so long as it remains vested with this power of apportionment, and the aldermen who constitute the board are necessarily constitutional officers. The fact that they may cease to be such if the legislature should transfer the powers of a common council from them to some other body does not affect the question before us."

It was accordingly adjudged that, as to election and tenure of office, the rights involved were determinable as of constitutional officers of the state of New York.

So, too, we believe the majority opinion correctly proceeds on the basis that, since the amendments of 1920 to sections 1 and 27 of article IV, the language of the section 1 here under consideration may no longer be deemed exclusionary. It also clearly appears that the constitutional powers vested in the commissioner of public lands and buildings, as a member of the board of commissioners for educational lands and funds, and the constitutional capacity created thereby, are vested exclusively by the terms of section 1, article VII, and in no manner derived from, or find their source in, section 1, article IV. It follows, therefore, that the repeal of all or a part of the latter section in no manner affects the powers created and vested by the terms of the former.

Furthermore, we are unable to accept the contention set forth in the majority opinion that all the constitutional provisions heretofore referred to herein as necessitating the continuance of the office of commissioner of public lands and buildings as a constitutional office were, though not within the express terms of the purview of the amendment, repealed by implication.

The maxim *"leges posteriores priores contrarias abrogant"* is one that has come to us as part of our heritage of English law. That it is equally controlling as applied to conflicting statutory or conflicting constitutional enactments may be conceded. But the facts in the instant case do not bring it within the scope of the maxim. So far as involved in the present case, what was submitted to and voted on by the electorate was a proposition to repeal a portion of section 1, article IV, by omission of the words "Commissioner of Public Lands and Buildings." The proposition was carried and the deletion was made and the repeal accomplished.

Now, as two bodies may not occupy the same space at the same time, so the force of the controlling maxim is that two affirmative inconsistent or repugnant acts covering the same subject may not coexist. But an amendment solely by omission is in substance a simple unconditional repeal of that which the omission discloses. A simple repeal is not affirmative. It terminates an affirmation. When this is accomplished, its function is performed. It ceases to be. There can be nothing inconsistent or repugnant to what is absolutely repealed. Therefore, a repeal by simple, express and definite omission affords no basis for other or further repeals by implication. This conclusion is in harmony with the true interpretation of the controlling maxim, as disclosed by the precedents of centuries. Assuming it to be equally applicable to constitutional enactment, and as limited to the question presented in this case, the proper statement of the rule is: "Every affirmative statute is a repeal by implication of a precedent affirmative

statute, so far as it is contrary thereto." Beal, Cardinal Rules of Legal Interpretation (2d ed.) p. 471.

The essential basis of affirmative law or enactment, as a prerequisite to a repeal by implication, was recognized by the English courts as early as *Dr. Foster's Café,* 6 Coke Rep. 56. Indeed, the principle finds still earlier approval. See, 7 Bac. Abr. Statute (D) p. 442. See, also, *Ex parte Warrington* (1853) 3 D. M. & G. *159, at p. *171; *Hill v. Hall* (1876) 1 Ex. D. 411, at pp. 413, 414; *Garnett v. Bradley* (1878) 3 App. Cas. 944, at pp. 965, 966. The American authorities, while not emphasizing the principle, disclose no substantial departure from it.

It follows that, both in form and substance, the proposed amendment was wholly insufficient to sustain any further or additional repeals by implication, and the several sections of the Constitution heretofore enumerated, and not expressly repealed, remain in full force and effect.

Indeed, the better view, therefore, seems to be that a proposition to so amend the Constitution as to abolish the office of commissioner of public lands and buildings should submit to the voters a definite, understandable provision. It should not require a voter to discern in advance an effect which, if the proposition is adopted, would confound lawyers, lawmakers, executive officers and courts. The proposition to change the Constitution by abolishing the office of commissioner of public lands and buildings was directed solely to a single section thereof, and the proposal was limited to the elimination of that office. There was no expressed purpose in the text submitted to the voters to change any other provision of the Constitution. Unchanged sections thereof left the office of commissioner of public lands and buildings and the substantial constitutional duties of the commissioner undisturbed. If these are the better views, it follows that the abolishing proposal submitted to the voters November 3, 1936, was ineffective for any substantial purpose whatever, and the judgment should so declare.

E. H. LUIKART, RECEIVER OF THE BANK OF GRETNA, APPELLANT, V. JERRY S. MILES, APPELLEE.

271 N. W. 160

FILED JANUARY 25, 1937. No. 29794.

1. **Evidence.** The burden of proof to maintain an alleged accord and satisfaction is upon the party who seeks to enforce it. *McKinnon v. Holden*, 85 Neb. 406, 123 N. W. 439.
2. **Accord and Satisfaction.** An offer by a debtor of part payment in satisfaction of a judgment debt, which was rejected by the creditor, is unavailing to the debtor and constitutes no defense against an execution on the judgment. Completion of accord and satisfaction depends on the intent of the parties and creditor must accept accord and satisfaction as such.
3. **Homestead.** A claim of homestead of part of premises which was advertised for sale under an execution but no appraisal or set-off was made does not bar confirmation of sale under the execution, where there is no objection to the sale for that reason, and the record shows that none of the property claimed as homestead was sold at the execution sale.

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

F. C. Radke, H. V. Noland and *Clarence G. Miles*, for appellant.

Joseph E. Strawn, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and RAPER and CHAPPELL, District Judges.

RAPER, District Judge.

E. H. Luikart, receiver of the Bank of Gretna, Gretna, Nebraska, recovered judgment against Jerry S. Miles in Sarpy county in the sum of $480.18, which was duly transcripted to the district court on April 29, 1935, and on August 23, 1935, an alias execution thereon was issued to the sheriff, who advertised certain property for sale to satisfy the execution. The first publication was had September 6, and the last on October 4, the day of sale was fixed for October 7, 1935, at 10 o'clock a. m. On or about September 19, Jerry S. Miles gave written notice to the

sheriff claiming as his homestead a part of the premises which were described in the notice of sale. Plaintiff filed an application in the district court October 7 for appraisers. It is not shown whether this was before or after the hour fixed for the sale. No action was taken to appoint appraisers. The notice of sale contained the lots claimed as exempt; the sheriff's return discloses that none of the premises claimed as a homestead was sold. The sheriff's return was made on same day of sale.

Mr. Miles filed motion on October 14 to quash the sale, for these reasons: (1) That plaintiff is without right to proceed with the execution and sell the property of defendant, because the indebtedness was paid and satisfied prior to the sale; (2) that on September 9, 1935, plaintiff through his attorney accepted $200 in full settlement and satisfaction of the judgment; (3) that because of said settlement the sheriff was without authority to proceed with said sale; (4) that because of said settlement said sale has been illegally made, and the execution was void; (5) that the sale is an attempt on the part of plaintiff to cheat and defraud defendant.

To these objections plaintiff filed answer and motion to confirm sale. Plaintiff admits that on September 9 defendant paid to H. V. Noland, attorney of Ashland, $200, but which was tendered by defendant as an offer of compromise settlement of the judgment, but that said offer of compromise and settlement was subject to approval of the depositors' committee of the Bank of Gretna, and the order of the court, which defendant knew.

The offer was rejected by the depositors' committee, and on or about September 20, 1935, the defendant personally appeared at the office of the receiver of said bank and was advised that the offer of settlement would not be accepted by him, that there was no consideration for the satisfaction of the judgment, the payment by him being only a part of the debt due, and plaintiff, in order to do equity, tenders to the court the $200. On October 25 a hearing was had to the court and testimony taken.

At the opening of the hearing plaintiff by his attorney tendered to defendant the $200. Defendant objected to the tender and the court sustained the objection. The court asked counsel why the money was not returned sooner, to which counsel replied: "No demand was ever made." The court remarked: "They don't have to make a demand."

The defendant testified that the title to a part of the lots that were sold was in his son's name; that he had talked about a settlement and it was satisfactory to the committee except one member; that he paid $200 to Mr. Noland who gave defendant a "receipt," which was received in evidence and is as follows:

"September 9, 1935

"Received of Jerry S. Miles the sum of $200 as an offer in settlement of judgment of $486.93 upon notes due the Bank of Gretna, Gretna, Nebraska, the judgment being in the name of E. H. Luikart, receiver. In the event the settlement offer is not accepted and approved by the banking department, the above sum will be returned to the said Jerry S. Miles, otherwise the same will be retained in full settlement of his liability to said bank and due releases and receipts issued therefor.

"H. V. Noland,
"Attorney for Bank of Gretna,
"E. H. Luikart, Receiver."

Defendant testified he had no property out of which to pay the judgment and had procured the $200 by a loan on his household goods and clothing. This was for the purpose of showing that he was insolvent. And further that neither the banking department nor Mr. Luikart nor Mr. Noland had offered to return the money to him.

On cross-examination defendant was asked if, at the time the receipt was given, there was any further explanation about the final approval of the settlement. Objection was made, and the court said: "What the court has in mind is if they just took this $200 and held it up until they got a bigger price at the sale." Again defendant was asked if he understood that the offer was subject to the approval

of the depositors' committee, Mr. Luikart and an order of the court. An objection to this was sustained. When asked if he had any knowledge that the offer had been rejected, he answered, "Not very much. Q. Did you have any? A. Not permanent." He admitted he had received a letter from Mr. Noland to Mr. C. G. Miles, counsel for receiver, which defendant was to take to Lincoln, in which letter Mr. Noland asked C. G. Miles to discuss the proposed settlement with Mr. Luikart and defendant. The court rejected this letter with the statement, "Why didn't you return his money to him." The letter should have been admitted. Defendant admitted he took the letter to Lincoln and presented it to Mr. C. G. Miles, and said they discussed the matter for about fifteen minutes. The letter set out a fair statement of the offer of settlement and stated that defendant feels it is the best he can do at present, although he thinks he could pay $100 more in monthly instalments, and requested Mr. C. G. Miles to give defendant every consideration. The defendant in Lincoln met Mr. C. G. Miles and Mr. Luikart and Mr. Downing, who was in the receiver's employ, but he did not testify to anything that was said at that conference.

Mr. Downing, chief of receivership division, testified that defendant came to Lincoln and presented to him and to Mr. C. G. Miles the letter from Mr. Noland, on September 19 or 20, and Mr. Downing told defendant they could not accept the offer of $200 and a note for $100 payable at $25 a month, and that the receiver would proceed with the execution unless he desired to further try to raise money, and offered, if defendant desired to do so, to permit him to pay this $200 as a partial payment on the judgment and give him an extension of time to pay balance, and that, inasmuch as his offer could not be accepted, he was entitled to have his money back and he could go and get it from Mr. Noland or he could leave it with Mr. Noland while he attempted to get more money. Mr. Luikart was not present then, but came in, and defendant was asked to tell his story to Mr. Luikart, and defendant briefly reviewed the

conversation that he had had with Mr. Downing, and Mr. Luikart informed defendant that he could not accept the settlement. Mr. Luikart verified the statements of Mr. Downing. The defendant did not deny these conversations.

From the statements made by the trial judge, he evidently drew the inference that the receiver held the $200 so that, if the property did not bring the amount of the judgment, the $200 would be applied on the judgment, and, further, because the $200 was not at once repaid to defendant it amounted to an acceptance of the offer. There is nothing in the situation that warrants such conclusions.

The receipt that was given on its face is plainly only an offer, which, to become effective, must have the approval of the banking department. The depositors' committee and the receiver both rejected the offer and the defendant knew of such rejection. The reason why the $200 was not at once returned to him is shown in the testimony of Mr. Luikart and Mr. Downing, and they were justified in waiting to see if defendant would be able to pay more on the judgment, or if the defendant found he could not raise more funds that he would so inform them, and ask for return of the money. Furthermore, neither the plaintiff nor his attorney had authority to accept the offer without the order of the court.

Under the terms of the offer he was entitled to a return of his money. That was tendered to him at the time of the hearing. It is evident from the receipt and the letter of Mr. Noland and the conversations at the state house that defendant knew the deposit was only an offer which was not to be binding unless accepted by the receiver. Neither party considered it a settlement and satisfaction of the judgment. The defendant let the sale be made without any objection; he did not inform plaintiff or his attorneys that he could not or would not undertake further to effect a settlement, did not demand return of his money, and, so far as the record shows, the first knowledge plaintiff had of defendant's claim that the judgment debt was satisfied was on October 14 when he filed objections to

the sale. This money was tendered on October 21, and the tender was timely. The retention by plaintiff of the money for a few days, in the absence of a demand or request for its repayment, does not evince an acceptance of the sum as satisfaction of the judgment. Defendant suffered no harm by the short delay.

In appellee's brief it is asserted that notice of homestead was given, and a sale made prior to setting aside of the homestead was void. There are two reasons why that claim cannot be now considered. Such claim was not raised in the objections filed, and the record shows that none of the premises claimed as a homestead was sold.

Appellant asserts that, even if he had accepted the offer, he would have the right to apply the sum as part payment on the judgment, on the principal that there was no consideration for the full satisfaction. In view of the conclusion reached, this claim is not passed on.

The judgment of the district court is reversed, with direction to confirm the sale, and plaintiff to pay $200 into court for the benefit of the defendant.

REVERSED.

IN RE ESTATE OF ANNA ENRIGHT. PATRICK ENRIGHT ET AL., APPELLANTS, V. FRANCIS ENRIGHT, ADMINISTRATOR, APPELLEE.

271 N. W. 152

FILED JANUARY 25, 1937. No. 29799.

1. Wills: UNDUE INFLUENCE. Where the objections to the probate of a will allege that it was procured by the undue influence of a particular person named, and that it was his will and not the will of the testator, it is proper for the court to instruct the jury, on that issue, that the burden was upon the contestants to prove by a preponderance of the evidence that the will was the result of undue influence exerted upon the testator by such beneficiary.
2. ———: ———. The evidence reviewed and *held* insufficient to establish mental incapacity or undue influence.

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

Bruce Fullerton, for appellants.

Herbert W. Baird, contra.

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

RAPER, District Judge.

A document purporting to be the last will of Anna Enright, deceased, was duly offered for probate in the county court of Lancaster county by Francis Enright, a son, the principal beneficiary, as proponent. Objections were filed by Patrick Enright, Catherine Sullivan, John Enright, Martha E. Young and Betty Enright Davis, all of whom are children of deceased. Three grounds of objections were stated: (1) The instrument not executed as required by law; (2) lack of mental capacity of Anna Enright by reason of old age, infirmity and illness; (3) undue influence exerted on her by Francis Enright. The county court admitted the will to probate, from which judgment the contestants appealed. The cause was tried to a jury in district court on the same pleadings. The court directed the jury that the will was executed in all respects as required by law, and submitted to the jury the issue as to mental capacity and undue influence. Verdict was given for proponent sustaining the will.

Mrs. Enright, a widow, died in January, 1935, leaving surviving eight children, all of whom are of full age. In addition to proponent and contestants, the two other children are Mary Ann Walsh, since deceased, and Margaret Shea. Contestants' testimony, in substance, is that the testatrix, at and before the time the will was executed, was in feeble health, 80 years old; her leg and arm were paralyzed, but she was able to walk and "get around," slightly deaf, could not write, but could read, and daily read newspapers; at times slow to respond in conversations; did not seem to understand about her bond transactions with her son Patrick; would sometimes ask that statements

to her be repeated; she had said the children were making it so miserable for her (about Patrick's bonds) that she did not know whether to go on with it or not; had at a former time stated she wanted all her children to share equally; suggestions by Mr. Ledwith and some of the children that she ought to have a guardian; that she did not know what property she owned because her home and lots in Denton were omitted from the will. These features, in the main, are the testimony presented by and upon which contestants base the claim that testatrix was mentally incompetent to execute the will. The proponent's evidence is that testatrix had known Mr. John J. Ledwith (and Mr. Ledwith's father) a great many years, and she had prior to that time frequently consulted with him about business matters, and in June she had called him to her home. At that time they were alone in her home. She told him she wanted him to make her will and gave him the names of her children, and stated the amount she desired they severally should receive, and gave reasons with deliberate consideration for the amounts she was to give each. At that time she indicated that Patrick was to receive nothing; "that he had discount." She mentioned her home in Lincoln, which had been the property of her deceased husband, and said: "Leave that, I don't want that in it. Leave that as it is." Mrs. Enright, testatrix, telephoned Mr. Ledwith on the day the will was executed, July 5, 1934, that she could come to have her will made. He telephoned to Francis asking him to bring his mother. Francis and Mrs. Shea came with her, but both left at once, and Mrs. Enright told Mr. Ledwith the several provisions she wanted in the will, and Mr. Ledwith dictated the will to his stenographer, Gladys Farquar, who transcribed in typewriting, and when it was written, Mr. Ledwith called Mr. Edwin H. Hammond, an attorney whose office was near, and in the presence of the stenographer and Mr. Hammond, Mr. Ledwith questioned the testatrix about her chilren, her early-day recollections of Mr. Ledwith's family, her property, the specific bequests, and other

matters, to all of which she gave intelligent and correct response, and also stated that she did not want to devise her home. She said: "Leave it alone; leave it alone." Mr. Ledwith understood and was justified in concluding that she did not want the home to pass by will, so no residuary clause was made. After the conversation between Mr. Ledwith and testatrix, she signed the will and stated that the instrument was her last will and testament and asked the three to sign as witnesses, which they did in her presence and in the presence of each other. Each of these three persons testified that Mrs. Enright was of sound mind and in possession of full mental faculties. The responses she made to the questions asked her of themselves indicate that she was competent. The will states that her estate consists almost entirely of $9,000 first mortgage bonds plus accrued interest which were a lien on Patrick's farm, and she was willing and had agreed to accept $7,200 in settlement, and because of such discount Patrick should not receive any interest in her estate. She gave Francis $2,500, Mrs. Walsh $500, Margaret Shea $750, John Enright $300, a granddaughter $200, Martha Young $200, Betty Davis $100, Catherine Sullivan $100. She stated to Mr. Ledwith that she gave Betty and Martha the amounts she named because they were addicted to a habit she did not approve of, and gave Catherine only $100 because "she is rich." The testimony further shows that Catherine's husband is a very "well to do" farmer and that the reason for Betty's and Catherine's small legacies were well founded. There was a bequest of $200 to the pastor of her church. Taken as a whole, the evidence is overwhelming, if not, indeed, conclusive, that she was competent to execute the will.

Much of the evidence concerns the $9,000 mortgage bonds on Patrick's farm and it is about these that the claim of undue influence arises. Patrick and Francis had each bought a farm from their father's estate. Patrick gave a mortgage to a loan company for about $14,000, and a second mortgage to his sister Catherine for $2,500. His mother purchased $9,000 of those bonds in 1926, and Pat-

rick did not know of her owning them until 1929. He was unable to pay interest for three years and the mortgage company began foreclosure. Patrick applied for a loan to a federal loan agency, but was unable to procure a new loan for enough to pay the mortgages that were due. He asked his mother, probably some time in 1933 or early part of 1934, to make a reduction of her bonds to $7,200 which would reduce his indebtedness in an amount sufficient to enable him to procure a new loan and stop the foreclosure proceeding. His mother refused the offer and he said he told her she could have the farm if she would pay the indebtedness. She said she would rather have the money. She talked at various times with all the children, except possibly Francis and Patrick. The children at first were opposed to the settlement and later it seemed they thought that if she accepted Patrick should sign a waiver of his right in the mother's estate. Patrick refused, and the matter was held in abeyance for a period of several months, during which time she consulted Mr. Ledwith about it. She did accept the offer, but it is not definitely shown just when her acceptance was made. The daughter Catherine testified that she talked with her mother about it, and that was about six weeks before her mother went to the country. That probably was about the time Mr. Ledwith was called to the home of testatrix and talked to her about the will. At that conversation Mrs. Enright asked Catherine to go to Patrick and tell him she would accept the $7,200 settlement and she did not want any hard feelings between Patrick and Francis after she was gone, and Catherine delivered the messages as requested. Catherine released her second mortgage without payment so that Patrick could save his farm. There is much evidence as to the negotiations and the conversations about the bonds, but it was only after long deliberation that Mrs. Enright agreed to accept Patrick's offer. The inference may fairly be drawn that some of the children felt that the difference between the full amount of the bonds and the accepted offer should bar Patrick from further inheritance so that their shares

would to that extent be enhanced, and suggested that to their mother. Betty Davis testified that she thought she and all the other children exercised undue influence over her mother to leave Patrick nothing, and that she now felt it was wrong. The testimony of any acts of Francis in regard to the transaction is very meager. There is testimony that once he said that Patrick should check in or check out. Betty Davis testified that he was present when it was talked about Patrick relinquishing his share. Francis denies that. The evidence does not disclose any acts, outside of the last-mentioned incident wherein he advised or consulted with his mother about the bonds, or about Patrick's right to share in the estate. It may further be said that the evidence does not disclose that undue influence was exerted by any of the children. The objector, Betty Davis, has placed herself in an anomalous position, claiming that she exercised undue influence on her mother and now seeks to benefit from her wrongful acts.

The bond transaction was completed some time after the will was executed, and after Mrs. Enright left her home and went to Francis' home, which was July 19, 1934; the $9,000 in bonds were surrendered and $7,200 in government bonds received by testatrix. The conversations, statements, suggestions and conferences between the children and their mother fall far short of proving undue influence of Francis or of any other person in procuring the will. The evidence shows that the lots in Denton were of no value.

The contestants allege error in the court giving instructions which placed the burden on contestants to prove by a preponderance of the evidence that the will was the result of undue influence exerted upon testatrix by Francis Enright. The objection is that the instructions limited all the evidence except what related to Francis, and contestants assert that the jury should have been instructed that they might find that undue influence of others induced the will. That undue influence may be exercised by a person other than a beneficiary under certain circumstances may

be conceded, but in view of contestants' pleading and the evidence, it cannot apply in this case.

One of the objections filed by contestants is as follows: "That said instrument was executed by the said Anna Enright, deceased, by reason of improper and undue influence exercised and exerted upon her by Francis Enright, her son, who is a legatee and chief beneficiary thereunder and said instrument is, not the last will and testament of Anna Enright, deceased, but of the said Francis Enright." The contestants having thus pleaded, the court properly instructed the jury, upon that issue, that the burden was upon the contestants to prove that the will was procured by the undue influence of Francis.

Complaint is made of instruction No. 6, in which the court directed the jury that they take into consideration certain acts of the testatrix in considering her mental competency. The things set forth are a fair reflection of the evidence, and did not prejudice the contestants.

Contestants assert that instruction No. 9 is erroneous. That instruction told the jury that as a matter of law Mrs. Enright was not bound either in law or morals to scale down or reduce Patrick's indebtedness to her because of the fall in value of the real estate security. She was under no obligation to bear the loss. Under the circumstances shown by the evidence, this instruction was proper.

Another assigned error is that there was testimony by John Enright that Mrs. Enright on June 18, 1934, told Mr. Ledwith that she wanted the children treated alike. Mr. Ledwith did not deny this catagorically, but his testimony of his visit about that time refutes it. The testimony of John is not very clear.

Contestants offered an instruction which was refused, to the effect that, if testatrix, before the will was executed, had expressed a fixed intention to dispose of her property at variance with the will, the jury might consider that in determining her mental soundness. The mere omission of that feature of the testimony was not prejudicial and the court did not err in refusing the instruction.

A careful consideration of all the evidence shows that the testatrix was competent and that no undue influence was exerted by Francis or any one else. The trial court would have been justified in directing a verdict for proponent.

The judgment of the district court is

AFFIRMED.

ALEXANDER LAVERTY, APPELLANT, V. ROBERT L. COCHRAN ET AL., APPELLEES.

271 N. W. 354

FILED JANUARY 30, 1936. No. 30029.

1. **Constitutional Law**: DIVISION OF GOVERNMENTAL POWERS. The legislature may not impose judicial power upon the executive officers or delegate to them legislative power.
2. ———: JUDICIAL POWER. Generally, judicial power is the authority to hear and determine a controversy as to rights and upon such determination to render a judgment binding upon the disputants.
3. ———: ———. The authority to hear and determine controversies between public officers, the state, counties, cities and other municipal corporations, subdivisions of the state and the state bonding board is a judicial power.
4. **States**. The board of the state bonding fund is the board of educational lands and funds, composed of the governor, the treasurer, the secretary of state, the attorney general, and the commissioner of public lands and buildings, all executive officers of the state, and is purely administrative in character.
5. **Officers**: REMOVAL. A constitutional officer can only be removed by impeachment as provided in the Constitution. Const. art. III, sec. 17.
6. ———: ———. It is beyond the power of the legislature to provide for the removal or suspension of a constitutional officer, where the Constitution creates the office, fixes its terms, and the grounds and manner of removal.
7. ———: BOND. The bond required of public officers by the Constitution may be defined as a contractual obligation that such officer will faithfully discharge the duties of his office.
8. ———: ———. An official bond is an obligation to pay upon a breach of the conditions thereof.

9. ———: ———. The Constitution requires all constitutional state officers to give a bond for the faithful performance of official duties, and the legislature is without power to nullify this plain mandatory provision of the Constitution.
10. Statutes: VALIDITY. Although a statute may be invalid or unconstitutional in part, the other part will be sustained where it can be separated from the part which is void.
11. ———: ———. The parts of the statute which are valid must be capable of being executed independently of the invalid parts in order to be operative.
12. ———: CONSTRUCTION. The statutory provision expressing legislative intent as to the separability of the various parts of a statute is merely an aid to judicial interpretation.
13. ———: VALIDITY. Where sections constituting an inducement for the passage of an act are invalid, the entire act must fall, notwithstanding the saving clause.
14. ———: ———. Where the connection between the invalid parts and the other parts of a statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative.
15. ———: ———. The state bonding act was a scheme of legislation to accomplish a particular purpose, and when said purpose fails because of invalid provisions, the entire act is unconstitutional.
16. Appeal. Questions presented on appeal but not necessary to a decision need not be determined.

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

Peterson & Devoe, for appellant.

John J. Ledwith and *Ginsburg & Ginsburg, contra.*

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

DAY, J.

In 1935 the legislature enacted what is commonly known as the state bonding act (Laws 1935, ch. 23) for the purpose of bonding public officials and employees of the state and its subdivisions. The validity of this act is challenged by a taxpayer of Lancaster county in this suit to enjoin the proper state officials from putting its provisions into operation. Although the trial court held that certain pro-

visions contravened constitutional provisions, it also held that they were separable and did not constitute an inducement to the passage of the remainder of the act. It sustained most of the provisions of the law. From this judgment, the plaintiff appeals.

The trial court properly determined that section 12 of the act (Comp. St. Supp. 1935, sec. 12-213), in so far as it undertook to vest the governor of the state with power to remove or suspend constitutional state officers without trial, was unconstitutional for the reason that it attempts to delegate judicial power to the governor of the state. A brief consideration of the fundamental and basic law of the state confirms this judgment. Section 1, art. II of the Constitution, states:

"The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted."

This section, common to the state Constitutions of the United States, has an historical background. Governments without this division of powers had been generally oppressive. The political philosophy of Montesquieu in his Spirit of Laws probably influenced early framers of American Constitutions. "There is no liberty," he wrote, "if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislature, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

Nebraska's Constitution contains an absolute prohibition upon the exercise of the executive, legislative and judicial powers by the same person or the same group of persons. It has remained a part of the Constitution unchanged since 1875. It is more certain and positive than the provisions of the federal Constitution and those of some of

the states, which merely definitely divided the three powers of government.

Not only does the foregoing constitutional provision require the separation, but another section, section 1, art. V of the Constitution, places the judicial power in the courts:

"The judicial power of the state shall be vested in a supreme court, district courts, county courts, justices of the peace, and such other courts inferior to the supreme court as may be created by law; but other courts may be substituted by law for justices of the peace within such districts, and with such additional civil and criminal jurisdiction as may be provided by law."

The question presented here is of vital importance and challenges our serious consideration. There is, of course, a very strong presumption that a legislative act is valid. There is also a strong inclination of a court not to criticize or interfere with the acts of another department. However, the Constitution is still recognized as the supreme law of the state and as a limitation of power of all departments and all officials. At present, it is the recognized function of the court to trace the line which marks the limits of power. Otherwise, there would be a conflict and overlapping of the various powers of government. This question frequently has been before the court. It is the law of this state that the legislature may not impose either upon the executive or the judiciary duties which do not properly belong to it. *Searle v. Yensen,* 118 Neb. 835, 226 N. W. 464. See, also, *In re Opinion of Justices* (1935) 87 N. H. 492; *Fugate v. Weston,* 156 Va. 107, 157 S. E. 736; *State v. Taylor,* 27 N. Dak. 77, 145 N. W. 425. As applicable to the case at bar, the rule is that the legislature may not impose judicial power upon the executive officers or delegate to them legislative power.

It has been stated that the phrase "judicial power" is not capable of precise definition applicable to all cases and all circumstances. 34 C. J. 1183. An examination of the cases demonstrates the difficulty of judicial definition. A sufficient definition for the purposes of this case is that

generally judicial power is the authority to hear and determine a controversy as to rights and upon such determination to render a judgment binding upon the disputants. *Horbach v. Tyrrell,* 48 Neb. 514, 67 N. W. 485; *State v. Blaisdell,* 22 N. Dak. 86, 132 N. W. 769.

The judicial power which this act seeks to confer upon administrative officers is mentioned in sections 12-213 and 12-214, Comp. St. Supp. 1935. Section 12-213 provides that the board may bring an action against a bonded official where it "shall be of the opinion that the interests of the state bonding fund are jeopardized by the misconduct or inefficiency of any public employee. * * * During the pending of such proceedings, such public employee may by the governor be suspended from performing the duties of his office."

Section 12-214 provides: "The board may after due investigation at any time, if in its judgment the interests of the state bonding fund require such action, cancel the liability of the bonding fund for the acts of any public employee, to take effect thirty days after written notice of such cancelation. In such case the official whose insurance is canceled shall be deemed temporarily suspended, as provided in the preceding section, until such time, if any, as the order of cancelation shall be rescinded by the board, or by order of court as hereinafter provided."

The authority to hear and determine controversies between public officers, the state, counties, cities and other municipal corporations, subdivisions of the state and the state bonding fund is a judicial power.

The administrative board of the state bonding fund is the board of educational lands and funds, composed of the governor, the treasurer, the secretary of state, the attorney general, and the commissioner of public lands and buildings, all executive officers of the state of Nebraska. Laws 1935, ch. 23, sec. 2.

It is for the board to determine when and how the best interests of the bonding fund are jeopardized by misconduct and inefficiency of a public employee and render its

judgment accordingly, with the power to remove the public official from office and cause the office to be vacant. True, section 12-215, Comp. St. Supp. 1935, provides for an appeal to the courts but does not provide the criterion for reversal, and since the discretion is vested solely in the board as to whether the official misconduct and inefficiency jeopardized the fund, it would seem that a reversal of its judgment would require a finding of the appellate court that there was a clear abuse of discretion on the part of the board. The mere fact that an appeal is provided does not remedy the attempt to delegate judicial power to an administrative board. An inferior court exercises judicial power although there is an appeal from its judgment.

There is, however, a more serious objection to this delegation of judicial power. The act uses the words public employee and public official interchangeably, and each in the act has the same apparent meaning. These terms include the constitutional officers of the state. The record reveals that it was the difficulty in securing a bond for a constitutional officer, the state treasurer, in 1935, which motivated the legislature in the passage of this act. A constitutional officer can only be removed by impeachment as provided in the Constitution. Const. art. III, sec. 17. See *Conroy v. Hallowell*, 94 Neb. 794, 144 N. W. 895. In this cited case it was sought to remove a county judge for a statutory cause. The cause was an additional one to those provided by the Constitution. In this respect it was similar to the case at bar. It was held invalid as transgressing the constitutional limitation on the powers of the legislature. This act proposes the removal of constitutional officers for the reason that the state bonding board is of the opinion that the misconduct or inefficiency of an official jeopardizes the fund.

Another authority discusses the question and states the rule as follows: "The Constitution of a state may, however, place beyond the reach of hostile legislation the method and grounds for removing incumbents of public offices; and where the Constitution prescribes the method of re-

moval and the causes for which public officers may be removed the method and grounds established by this instrument are exclusive and it is beyond the power of the legislature to remove them for any other cause or in any other manner." 22 R. C. L. 561, sec. 265.

In *Commonwealth v. Williams* (1880) 79 Ky. 42, it was held: "The Constitution has designated the offenses for which certain public officers, including county judges, may be removed from office, and the legislature has no power to prescribe removal from office as a penalty for offenses not so designated." In this case the legislature had attempted to provide an additional ground for removing a constitutional officer to those prescribed by the Constitution and attempted to define it as misfeasance in office, which was a constitutional ground of removal. This followed an earlier case, *Lowe v. Commonwealth* (1860) 3 Met. (Ky.) 237, wherein it was said: "Wherever the Constitution has created an office and fixed its terms, and has also declared upon what grounds and in what mode an incumbent of such office may be removed before the expiration of his term, it is beyond the power of the legislature to remove such officer or *suspend* him from office for any other reason or in any other *mode* than the Constitution itself has furnished." In another case it is stated that, where the Constitution provides the method of removing an officer from his office, such method is exclusive. *State v. Gravolet,* 168 La. 648, 123 So. 111. Where the office is especially provided for by the Constitution itself, the constitutional provision for removal must control. In *Georges Township School Directors,* 133 Atl. 223 (286 Pa. St. 129) it is held: "The constitutional method of removal of officers prescribed by Const. art. 6, sec. 4, must be resorted to, where applicable, for it is exclusive and prohibitory of any other mode which the legislature may deem better or more convenient."

Let us now examine the provisions of the law under consideration. Section 4, ch. 23, Laws 1935, provides: "Failure to report and remit premium to the board shall

automatically create a vacancy in the office of such public employee; and such vacancy shall be filled in the manner provided by law." Section 13, ch. 23, Laws 1935, provides: "The board may * * * if in its judgment the interests of the state bonding fund require such action, cancel the liability of the bonding fund for the acts of any public employee. * * * In such case the official whose insurance is canceled shall be deemed temporarily suspended."

Other sections provide for the removal or suspension of constitutional officers upon the judgment of the state bonding board. It is beyond the power of the legislature to provide for the removal or suspension of a constitutional officer where the Constitution creates the office, fixes its terms, and the grounds and manner of removal.

The trial judge reached substantially the same conclusion as this court upon the questions heretofore discussed. However, the district court held that the provisions were separable, and that these provisions were not an inducement to the passage of the act. The severability of the provisions and the effect as an inducement to the passage of the act will be discussed later in this opinion.

In the meantime, let us consider the constitutional requirement that constitutional executive state officers give a bond. Section 26, art. IV of the Constitution, provides: "The officers mentioned in this article (relating to executive state officers) shall give bond in not less than double the amount of money that may come into their hands, and in no case less than the sum of fifty thousand dollars, with such provisions as to sureties and the approval thereof, and for the increase of the penalty of such bonds as may be prescribed by law." Bonds are commonly required of public officers conditioned upon the faithful performance of the duties of their offices. The duties are prescribed by law, and the obligation of the bond is thus fixed. The bond required of public officers by the Constitution may be defined as a contractual obligation that such officer will faithfully discharge the duties of his office. Const. art. IV, sec. 26. An official bond is an obligation to pay upon a breach

of the conditions thereof. Sureties on official bonds are liable for acts done by their principal by virtue of his office. *State v. Porter*, 69 Neb. 203, 95 N. W. 769. The very nature of an official bond implies an absolute obligation to pay upon the occurrence of certain conditions, such as a breach of duty of said official. Who, then, is the obligor on the bonds provided for under the state bonding act? The state is, of course, the obligee, but even if it could also be denominated the obligor, the very provisions of the act negative such an assumption. The act provides (Comp. St. Supp. 1935, sec. 12-202) that a claim under the proposed bond shall never be construed as an obligation of the state and that no tax shall ever be levied for the payment thereof. Even if the legislature had attempted to require the state to pay the losses on the official bonds, it would encounter legal difficulties.

The Constitution requires all constitutional state officers to give a bond for the faithful performance of official duties, and the legislature is without power to nullify this plain mandatory provision of the Constitution. If the state were to pay the losses, the practical effect would be to abolish bonds to indemnify the state for losses caused by a failure of state officials to faithfully perform their duties.

On the other hand, if the legislature substitutes for a bond, with an obligor who is required to pay, one without such an obligor, dependent solely for payment from funds when and if collected as premiums for such bonds, it likewise nullifies the constitutional provision. The fund starts insolvent, and one of the first obligations imposed upon it was that of the state treasurer for a million dollars. In fact, that bond created the emergency which caused the legislature to pass the bill in what is termed the furtherance of a public purpose. It seems to be elementary that a bond without an obligor is not such a bond as required by the Constitution for constitutional executive state officers.

But there is a severance clause, section 12-224, Comp. St. Supp. 1935, which provides: "Should any section or

provision of this act be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the act as a whole or any part thereof, other than the part so decided to be unconstitutional." The rule is that, although a statute may be invalid or unconstitutional in part, the other parts will be sustained where they can be separated from the part which is void. *Muldoon v. Levi,* 25 Neb. 457, 41 N. W. 280. But the parts of the statute which are valid must be capable of being executed independently of the invalid parts in order to be operative. *State v. Ure,* 91 Neb. 31, 135 N. W. 224. The statutory provision expressing legislative intent as to the separability of the various parts of a statute is merely an aid to judicial interpretation. *Hubbell Bank v. Bryan,* 124 Neb. 51, 245 N. W. 20.

Where sections constituting an inducement for the passage of an act are unconstitutional, the entire act must fall, notwithstanding the saving clause. *Moeller, McPherrin & Judd v. Smith,* 127 Neb. 424, 255 N. W. 551; *State v. Price,* 129 Neb. 433, 261 N. W. 894.

Considered in connection with the history of its enactment as disclosed by the record in this case, an unquestioned inducement to the passage of the act was to secure a bond for the state treasurer for a million dollars. In 1935 the state treasury was closed for about 22 days because the treasurer elect could not procure a bond under the then prevailing statutory conditions. It is alleged in the pleading, evidenced by the testimony, and argued both orally and in the briefs filed in this court that an emergency confronted the state in the matter of the state treasurer, and in furtherance of a public purpose this act was passed to the end that the activities of the state might continue. The provision for the bonding of the state treasurer under such conditions was not only an inducement but was the principal inducement for the passage of the act. The state treasurer is a constitutional state officer required by the Constitution to give a bond. Since the provisions are invalid which relate to the treasurer's bond and other con-

stitutional executive officers, and that provision was the inducement for the passage of the act, the entire act must fall.

But there are additional invalid provisions which were an inducement to the passage of the act. The provisions relating to the removal from office by the board of constitutional officers were held invalid by the trial court. They are clearly so. But these provisions were an integral part of the plan of bonding public officials. The bonding fund was safeguarded from loss by these provisions. The act provided for a bond cancelable whenever the board was of the opinion that the fund was jeopardized by the official acts of an officer. A cancelation of the bond removed the officer from his office. In the case of constitutional officers, this was violative of the provisions of the Constitution. The bonds of officials written by private sureties are not cancelable. The rest of the act was dependent upon these provisions for a workable plan. These provisions were integral parts of the entire scheme. The legislative plan was to provide a cancelable bond. To invalidate these provisions and let the rest stand would thereby create an uncancelable bond. Clearly, the legislature had no such intention, and these provisions were an inducement to the passage of the act.

Where the connection between the invalid parts and the other parts of a statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative. *Smith v. Thompson,* 219 Ia. 888, 258 N. W. 190; *State v. Henry,* 218 Wis. 302, 260 N. W. 486; *Searle v. Yensen,* 118 Neb. 835, 226 N. W. 464.

We are constrained to hold that the state bonding act was a scheme of legislation to accomplish a particular purpose, and when said purpose fails on account of invalid provisions, the entire act is unconstitutional.

It is definitely stated that other sections of the act which have been assailed are not judicially determined hereby to be valid. Sufficient provisions have been discussed to

demonstrate that the act is invalid because it contravenes constitutional provisions. But this is not to be understood to be the only respects in which the act may violate constitutional provisions. It is, however, sufficient for a proper decision of this case. A court is neither required nor permitted to do more.

However, this opinion would not be complete without a reference to the two statutes establishing a state bonding fund in North Dakota. Our attention has been directed to them and the decisions of the supreme court of that state thereunder.

The first state bonding act was passed by that state in 1913, Laws 1913, ch. 194. This act was invalidated by the supreme court of that state in *State v. Taylor*, 27 N. Dak. 77, 145 N. W. 425, decided December 29, 1913. Two years later, the legislature passed another bill providing for a state bonding fund, Laws 1915, ch. 62. This latter act was upheld by the court in *State v. Taylor*, 33 N. Dak. 76, 156 N. W. 561, decided February 5, 1916. It has been frequently asserted that the act under consideration here was similar to that of North Dakota. A casual examination reveals that there is little similarity between the acts. The last act of North Dakota had for its purpose the creation of a state bonding fund in the office of the commissioner of insurance, whose duty it was made to issue official bonds for all county, city, town, village, school district and township officials required by law to furnish official bonds. It did not undertake to bond state officials, including the extremely large bond of the state treasurer. It did not authorize any bond for more than $50,000. An avowed purpose of the Nebraska act was to assume liability on the bond of the state treasurer for a million dollars. It is further noted that the North Dakota act fixes the premium rate, sets out in detail the form of the bond to be issued, and provides that the officials may procure a bond elsewhere, if they desire. The bond is not cancelable, and the insurance commissioner cannot remove an officer from his office. It also provides that the commissioner may employ additional

clerical help and incur incidental office expenses made necessary by the additional work caused by the act, not to exceed $1,500 to be reserved for the purpose from the premiums paid. On the other hand, the Nebraska act appropriates $100,000 for expenses, to be repaid from the fund, and places no limit on the amount the board may spend from the premiums for expenses of administration. It specifically provides for a secretary at an annual salary of $3,000 and an attorney at an annual salary of $3,600. The Nebraska act does not set out the form of the bond, fix the premiums, or regulate the part of the premiums which may be spent for expenses. This comparison refers to a number of things which the appellant asserts invalidate the act which are not discussed or decided by the court for the reason that a discussion of these issues is unnecessary to a decision of this case. Questions presented on appeal but not necessary to a decision need not be determined. *Goergen v. Department of Public Works*, 123 Neb. 648, 243 N. W. 886. The sole purpose of the comparison was to demonstrate that there is such a difference between the state bonding act of North Dakota and that of Nebraska that the decision of the court of our sister state is scarcely applicable as an authority in the solution of our problem. It has not been called to our attention that any other state has entered the field of bonding public officials.

It is, therefore, the conclusion of this court that the trial court correctly held that the provisions conferring upon the board of the state bonding fund and the governor the power to remove constitutional officers are contrary to the fundamental law. But we conclude that the invalid provisions are not separable so that the remainder of the act can stand as a complete act, and that such invalid provisions were an inducement to the passage of the entire act. In this last particular, the judgment of the trial court cannot be followed.

REVERSED.

SAMUEL MCCLENEGHAN, APPELLEE, V. LONDON GUARANTEE & ACCIDENT COMPANY, LTD., APPELLANT.

271 N. W. 276

FILED FEBRUARY 5, 1937. No. 29678.

1. Insurance: POLICY: CONSTRUCTION: "TOTAL DISABILITY." A literal interpretation of the term "total disability," in an accident insurance policy implying by its terms utter mental and physical helplessness as a condition of liability, will not be adopted, where it would result in an unreasonable and unjust forfeiture of the accident insurance.
2. ———: ———: ———: ———. As a general rule, the term "total disability," in an accident policy, is, in insurance law, such a disability as renders insured unable to perform the substantial and material acts of his business or occupation in the usual way.
3. ———: ———: ———: ———. Where a total disability clause, purporting to make physical and mental helplessness essential to liability of insurer, if enforced literally, would result in an unreasonable and unjust forfeiture of accident insurance, it should be liberally construed to mean such a disability as renders insured unable to perform the substantial and material acts of his business or occupation in the usual way.
4. ———: ———: ———: ———. In an action for accident insurance, policy provisions making liability of insurer to an insured physician conditional on total and continuous disability from the date of the accident, *held* not to forfeit the insurance for failure of compliance with that condition, where the evidence proved that insured had a latent accidental injury which he first considered trivial, temporary and attributable to indigestion; that he continued to practice medicine from the date of the accident in October, 1933, until April, 1934, when he first discovered by means of X-rays he had a diaphragmatic hernia—an injury caused by the accident; that thereafter he promptly underwent an operation in a hospital and was totally disabled as a result of the accident from April 1, 1934, to August 1, 1934; that proper care and necessary surgery would have required an operation immediately after the accident and confinement in a hospital, if the real nature of the injury had then been known.
5. ———: ———: ———. A 300-dollar benefit for necessary surgery under the terms of an accident insurance policy *held* properly allowed on the facts stated in the opinion.

6. ———: ———: ———: NOTICE. An insurance policy providing for notice of an accident within 20 days, which is not given, does not necessarily bar a recovery on the contract for failure of notice, where the evidence proves that insured considered his accidental injury trivial and temporary for several months; that he first discovered by means of X-rays that the injury was latent, causing a hernia which required his confinement in a hospital and a surgical operation; that he gave insurer notice promptly upon discovery of the real nature of his injury.
7. Appeal. The failure of the trial court to reserve for the jury issues of fact, as requested by defendant in a motion for a peremptory instruction, in the event of an adverse ruling on the motion, is not erroneous, where the evidence is insufficient to support a verdict in favor of defendant on any of such issues.
8. Insurance: APPLICATION. The failure of insured to state in his application for accident insurance that he had been previously examined and treated by a physician for acidosis did not invalidate the insurance, where neither the omission nor the acidosis contributed to the accident or the injury or deceived insurer to its prejudice.
9. Costs: ATTORNEY'S FEES. Where insured recovers on a policy of accident insurance a judgment which is affirmed on an appeal by insurer, a reasonable fee, taxable as costs, is authorized by statute for the services of insured's attorneys in the supreme court.

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

Kennedy, Holland, De Lacy & Svoboda and *Edson Smith*, for appellant.

Spittler & Nicholson and *Johnsen, Gross & Crawford, contra.*

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

PER CURIAM.

This is an action to recover insurance for total disability under an accident policy issued March 22, 1932, to Dr. Samuel McCleneghan, insured, plaintiff, by London Guarantee & Accident Company, insurer, defendant.

In the sum of $22,500, plaintiff, a physician and surgeon, was insured "against loss resulting from bodily injuries effected within the period of this policy through accidental means, directly and independently of all other causes," subject to all contractual provisions and limitations. The policy provided for indemnity for total disability as follows:

"Within thirty days from the date of the accident, wholly and continuously disable the insured to the extent that he can perform no kind of duty pertaining to his occupation, the company will pay, for so long as the insured suffers said total disability, indemnity at the rate of seventy-five and no-100 dollars ($75.00) per week."

For partial disability the provision was in this form:

"Within thirty days from the date of the accident, or shall from the date of the termination of total disability under part 1 of this clause B, continuously disable the insured to the extent that he is unable to perform work essential to the duties pertaining to his occupation, the company will pay weekly indemnity at one-half the rate specified in part 1 of this clause B for the period, not exceeding fifty-two consecutive weeks, of such disability."

The liability for indemnity is doubled, where injury is sustained while insured is driving an automobile. Other provisions follow:

"Written notice of injury on which claim may be based must be given to the company within twenty days after the date of the accident causing such injury."

"Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible."

In the petition it is alleged in substance that, while plaintiff was driving his automobile north on Florence Boulevard in Omaha, October 20, 1933, a car was suddenly backed out of a private driveway in front of him; that, in attempting to avoid a collision, he swerved his automobile

to the right against and over the curb; that he was thrown violently forward when his automobile struck the curb, striking the midsection of his abdomen against the steering wheel; that from the time of the accident until the latter part of April, 1934, he had occasional pains in his stomach, which were severe only at intervals; that, by means of a radiograph, it was discovered in April, 1934, he had a diaphragmatic hernia; that immediately upon the discovery he went to a hospital at Rochester, Minnesota, where an operation therefor was performed shortly after April 27, 1934; that notice of the accident and of resulting injury was given to insurer pursuant to the terms of the policy; that plaintiff was totally and continuously disabled as a result of the accident; that he waives benefits from October 20, 1933, until April 1, 1934; that he claims benefits at the rate of $150 a week from April 1, 1934, to August 1, 1934, in the sum of $2,400 and surgical benefits of $300, making a total claim of $2,700. He demanded also attorney's fees authorized by statute.

Defendant admitted the execution of the policy but denied liability thereunder and pleaded in substance the following defenses:

Plaintiff was not, within 30 days from the date of the accident, wholly and continuously disabled to the extent that he could perform no kind of duty pertaining to his occupation.

Written notice of the injury was not given within 20 days after the accident.

In the application for the policy, insured fraudulently failed to state that his last physical examination was made by Dr. Adolph Sachs in 1930, and that he was then treated for acidosis.

Details relating to the defenses outlined were pleaded in the answer which alleged defendant tendered back the premium.

In a reply plaintiff stated that he gave notice of the accident as soon as reasonably possible and he put in issue the other facts pleaded in defense.

At the close of plaintiff's evidence, defendant moved for a peremptory instruction in its favor. There was also a motion for a directed verdict in favor of plaintiff. On these motions the district court excused the jury, found the issues in favor of plaintiff and rendered a judgment against defendant for $2,700. Plaintiff was also allowed an attorney's fee of $300. Defendant appealed.

It was strenuously argued at the bar and in the brief that total disability of defendant under the policy was not proved, because there was no evidence that within 30 days from the accident plaintiff was totally and continuously disabled to the extent that he could "perform no kind of duty pertaining to his occupation." It is insisted by defendant that the total disability clause is reasonable, unambiguous and valid and that the testimony of plaintiff himself shows that he continued to perform the duties of his occupation for months from the date of the accident, October 20, 1933, and did not claim benefits for total disability for the period prior to April 1, 1934. There is a demand by defendant for strict observance of the literal terms of the total disability clause in connection with other terms of the policy.

Defendant asserts: "To come within the clause providing for total disability the accident must, 'within 30 days,' wholly and continuously disable the insured to the extent that he can perform no kind of duty pertaining to his occupation."

In support of this view defendant cited cases from other jurisdictions. Those cases and the following ruling in Nebraska have not escaped attention:

"Where there is no uncertainty as to the meaning of an insurance contract and the same is legal and not against public policy, it will be enforced as made." *Shambaugh v. Great Northern Life Ins. Co.*, 131 Neb. 415, 268 N. W. 288, following *Rye v. New York Life Ins. Co.*, 88 Neb. 707, 130 N. W. 434; *Omar Baking Co. v. Employers Liability Assurance Corporation*, 130 Neb. 365, 264 N. W. 873.

The better view seems to be that this doctrine does not

apply to a case where it would violate public policy or require an unreasonable forfeiture, accident insurance being affected with a public interest. There are some circumstances under which the courts do not literally enforce a total disability clause because insured, after an accident, performs some duty pertaining to his occupation. If plaintiff, a physician, instead of the injury received, had been accidentally injured to such an extent that he could not have moved a hand or a foot, and had been carried into a hospital, where a patient of his had called, had related symptoms to and received from the injured physician medical advice pertaining to the latter's professional duties, would a court of justice say that the physician was not totally disabled? The total disability clause, enforced literally under the circumstances assumed, would make the provision a reproach to honest insurance. As applied to the assumed accident it would be an unreasonable and unjust provision condemned by public policy. No sensible applicant for accident insurance would ever intend to bind himself by such a clause considered in a strict, literal sense. Accident insurance is not a method of procuring premiums conditioned on unreasonable phrases preventing recovery for accidental injuries. There should be honesty and fair dealing on both sides. Integrity and common sense should be factors in application, policy and performance. The diversity of phraseology in total disability clauses drawn by insurers and the interpretations thereof have been prolific sources of litigation. The decisions are not entirely harmonious. Many courts are inclined to look into the purpose of the insurance as disclosed by the entire contract and the facts of each particular case. The weight of modern authority is that utter physical and mental helplessness of insured as the result of an accident is not necessarily the test of his right to recover accident insurance for "total disability," that term meaning generally, in insurance law, such a disability as renders insured unable to perform the substantial and material acts of his business or occupation in the usual way. The cases on this

subject are annotated in 24 A. L. R. 203; 37 A. L. R. 151; 41 A. L. R. 1376; 51 A. L. R. 1048; 79 A. L. R. 857. As illustrating the trend of modern authority the following expressions are copied from a recent opinion:

"It has always been obvious that an absurdly literal construction could be put upon such words as 'any and every duty pertaining to my occupation' which would reduce the coverage for total disability to the state of coma or absolute mental and physical helplessness. But the fact that money is paid and accepted for accident insurance under these policies compels attributing good faith to the parties and a construction of the words used in the policy conformable to an honest intention to indemnify against total inability to practically carry on the occupation specified." *United States Fidelity & Guaranty Co. v. McCarthy*, 50 Fed. (2d) 2.

The better view seems to be that, where a total disability clause, purporting to make physical and mental helplessness essential to liability, if enforced literally, would result in an unreasonable and unjust forfeiture of accident insurance, it should be construed to mean such a disability as renders insured unable to perform the substantial and material acts of his business or occupation in the usual way.

Did plaintiff prove total and continuous disability? He paid the premium and received his policy. It was in force at the time of the accident. When he was thrown against the steering wheel of his car he had an acute pain in the midsection of his abdomen and was temporarily short of breath. From time to time thereafter he had an uncomfortable feeling like that caused by indigestion; occasionally had distressing pains in his stomach, which were relieved by vomiting; felt all right most of the time; had stomach trouble occasionally until April, 1934; practiced his profession in the meantime with capacity somewhat limited; thought he had acidosis or indigestion not attributable to the accident; first discovered in April, 1934, by means of X-rays that he had a diaphragmatic hernia;

promptly notified insurer of the accident and the injury; immediately went to the Mayo clinic where he underwent an operation for the hernia; was confined to the hospital; returned to Omaha from Rochester, Minnesota, May 26, 1934; was at home in Omaha for a time; went to New Mexico and returned to Omaha in September, 1934; was totally disabled as a result of the accident from April 1, 1934, to September 1, 1934.

There is evidence of the foregoing facts which were established for the purpose of the appeal by the findings of the district court. Plaintiff made no claim for benefits from the date of the accident until the hernia was discovered, while he practiced medicine in ignorance of his real condition as a result of the accident. It is a fair inference from the evidence that the accident immediately caused the hernia and that the injury was continuous until the operation. The evidence proves that the accident, injury, proper care and necessary surgery would have immediately, totally and continuously disabled plaintiff within the meaning of the policy, if the real nature of the case had been known from the first. In a somewhat analogous situation, it was said in a former opinion:

"In such a case it cannot be said that the injury is not continuous and from the date of the accident, nor can it fairly or justly be said that the disability is not continuous and from date of the accident, because the injured party enjoys a brief respite from pain and suffering, only to be endured to a greater degree when perverted nature again asserts itself. Occurring then under the circumstances stated, to hold that a brief respite from the conscious ill effects of an injury during which respite the insured was able to transact the most, if not all, of his ordinary business should bar recovery, seems to us neither reasonable nor just." *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18, 31, 184 N. W. 903.

Though insurer's right to a strict, literal enforcement of the total disability clause is made the subject of a formidable argument and is recognized by some of the deci-

sions of courts, the liberal interpretation permitting a recovery under the circumstances of the case at bar is more reasonable and just. On this feature of the appeal, therefore, error is not affirmatively shown.

It is next insisted that the item of $300 for surgical benefits was erroneously allowed. The policy provides in substance that $300 for surgical benefits will be allowed if an operation as a result of the injury is necessary within 90 days from the date of the accident. The evidence proves that an operation was necessary immediately after the accident, though the latent hernia was not discovered nor the operation performed until more than 90 days had elapsed. Plaintiff was entitled to benefits for total disability, as already determined, and the 300-dollar fee for surgery was properly allowed under the terms of the policy in view of the established facts.

The judgment below is also attacked as erroneous because plaintiff did not give insurer notice of the accident within 20 days after it occurred. At first plaintiff did not attribute his immediate and occasional irritating symptoms to the accident. For some time he regarded them as temporary and trivial. During that period he made no claim for insurance but continued to practice his profession under the delusion that the pains in his stomach were due to indigestion or acidosis. His real injury was latent. Months after the accident the hernia was first discovered by means of a radiograph or a fluoroscope. Notice was promptly given after the true nature of the accidental injury became known. Lack of knowledge of an injury covered by the insurance accounts for the failure to give notice within 20 days. The giving of notice as soon as reasonably possible is fairly inferable from the evidence. The evidential facts bring this defense within the following doctrine announced in a recent case:

"Where a health and accident policy requires written notice of injury or of sickness on which a claim may be based to be given the insurer within 20 days after the accident causing such injury or within 10 days after the

commencement of disability from such sickness, it is sufficient compliance therewith on the part of an insured, who has received an injury apparently trivial in its nature but which thereafter causes an illness resulting in total disability, that he gives such notice when a condition developed such as would warn a person of ordinary and reasonable prudence that a disability had occurred or might occur therefrom which would entitle him to indemnity under his contract of insurance." *Ross v. First American Ins. Co.*, 125 Neb. 329, 250 N. W. 75.

A ruling of the trial court in refusing to recognize the asserted right of defendant to reserve questions for the jury in its motion for a directed verdict, in the event of an adverse decision on the motion, is assailed as erroneous. The record shows that both parties rested at the close of plaintiff's evidence. In defendant's motion thereafter for a peremptory instruction, there was no request for permission to adduce evidence. The motion was based on the assumed insufficiency of the evidence of plaintiff to sustain a verdict in his favor. As the record then stood, the evidence on behalf of plaintiff would not have sustained a verdict in favor of defendant on any of the issues included in the reservations, in view of the rules of law herein announced. There was therefore no error in the failure of the trial court to reserve questions for the jury in passing on defendant's motion for a directed verdict, regardless of proper procedure, whatever it may be.

Did plaintiff forfeit his insurance on the ground that he fraudulently failed to state in his application for insurance that his last physical examination was made by Dr. Adolph Sachs in 1930 and that he was then treated for acidosis? This is not a defense where, as shown by the record, the omission or the acidosis did not contribute to the accident or the loss or deceive the insurer to its prejudice. Comp. St. 1929, sec. 44-322. The law has been stated thus:

"The mere failure or omission to state the name of a physician and a treatment by him for some temporary in-

disposition or ailment will not avoid the policy." *Ross v. First American Ins. Co.*, 125 Neb. 329, 250 N. W. 75.

Upon a review of the record the assignments of error are overruled. For services of attorneys for plaintiff in the supreme court, he is allowed a fee of $200 to be taxed as costs pursuant to statute.

AFFIRMED.

DAY, J., concurs in result.

FIRST TRUST COMPANY OF LINCOLN, TRUSTEE, APPELLEE AND CROSS-APPELLANT, V. EDWARD R. DANIELSON ET AL., APPELLEES: HELEN SCHOPPE ET AL., APPELLEES AND CROSS-APPELLEES: L. A. RICKETTS, TRUSTEE, APPELLANT AND CROSS-APPELLEE.

270 N. W. 680

FILED FEBRUARY 5, 1937. No. 29791.

1. Mortgages: PAYMENT. Where a collecting trustee for the holders of bonds secured by mortgage individually owns and holds some of them, his own may be canceled in equity, in a proper case, as paid, if he received and retained proceeds of mortgaged property in excess of the amount of his bonds.
2. ———. The purchase of land subject to a mortgage does not obligate the purchaser to pay secured bonds canceled in equity as paid.
3. ———. In a suit to foreclose a mortgage securing bonds, a defendant pleading payment as an affirmative defense has the burden of proving payment.
4. ———. Payment of negotiable bonds secured by mortgage without obtaining possession of them may be at the risk of the debtor.
5. Estoppel. "Where one of two innocent persons must suffer a loss occasioned by the wrongful act of a third person, the one who made it possible for the third person to commit the wrongful act should bear such loss." *Nebraska State Bank v. May*, 117 Neb. 262, 220 N. W. 276.

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

Boehmer & Boehmer, for appellant.

Beghtol, Foe & Rankin, B. Frank Watson, R. O. Williams, I. D. Beynon and *Willis R. Hecht, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and RAPER and CHAPPELL, District Judges.

ROSE, J.

This is a suit in equity to foreclose a mortgage on 9.15 acres of land adjacent to the city of Lincoln.

When the property was owned by Edward R. Danielson and E. Maude Danielson, they executed, December 28, 1928, a mortgage thereon in favor of the Lincoln Safe Deposit Company for $42,500, payable June 26, 1929, securing bonds aggregating that sum and naming the Lincoln Trust Company as trustee for holders of secured bonds, if subsequently sold. By renewal, payment of the bonds was extended to December 26, 1933. Mortgagors deeded the land to the Danielson Floral Company June 2, 1933, and the latter, subject to the unpaid principal debt of $10,000, conveyed the title to Helen Schoppe. Bonds evidencing the unpaid principal debt of $10,000 with interest were in the hands of different holders.

Both the Lincoln Trust Company, trustee, and the Lincoln Safe Deposit Company, mortgagee, were adjudged bankrupts July 9, 1932, and for them L. A. Ricketts became trustee in bankruptcy July 21, 1932. The First Trust Company of Lincoln was appointed trustee to succeed the bankrupt, Lincoln Trust Company, as trustee for unpaid bondholders.

The First Trust Company, successor-trustee, plaintiff, declared the entire unpaid debt due on account of defaults and sued to enforce by foreclosure of the mortgage, payment of two 500-dollar bonds; seven 1,000-dollar bonds and two 1,000-dollar bonds, the latter of which had fallen into the hands of the trustee in bankruptcy, a total of $10,000 and interest or that part of the principal debt remaining unpaid.

The 42,500-dollar mortgage, in addition to the Lancaster

county property, was a lien on 240 acres of farm land owned by the Danielsons in Polk county. Out of the net proceeds of part of the Polk county land, the Lincoln Trust Company, now bankrupt, received March 2, 1932, $5,850.78, money never received by any bondholder, unless the holder of the two 1,000-dollar bonds now in the hands of the trustee in bankruptcy is excepted. His plea is that these two bonds are unpaid, are assets of the bankrupt estate of the Lincoln Trust Company and are secured by the mortgage in the course of foreclosure herein.

In partial defense to the claims of plaintiff and the trustee in bankruptcy, Helen Schoppe and Leon N. Schoppe, who are in possession of the mortgaged land adjacent to Lincoln under the deed from the Danielson Floral Company, alleged that the payment of the $5,850.78 was payment of the two 1,000-dollar bonds in the hands of the trustee in bankruptcy and that the remainder, or $3,850.78, was payment to other bondholders and as such should be credited on the unpaid bonds.

The district court had before it the parties, the pleadings and the evidence necessary to the determination of the following questions:

Was the payment of $5,850.78 out of the proceeds of the Polk county land to the Lincoln Trust Company a payment of the two 1,000-dollar bonds now in the hands of the trustee in bankruptcy? If so, was the remainder, or $3,850.78, a payment to which the Schoppes were entitled to have credited on the mortgage indebtedness?

The district court answered the first of these questions in the affirmative and decreed cancelation of the bonds in the hands of the trustee in bankruptcy. The other question was decided in favor of the Schoppes who were allowed credit *pro rata* for $3,828.45 on the remainder of the bonds.

The trustee in bankruptcy appealed from that part of the decree canceling the two bonds in his possession as paid and plaintiff took a cross-appeal from the allowance of $3,828.45 as a credit on the mortgage indebtedness.

The appeal of the trustee in bankruptcy is clearly without merit. The bonds claimed by him as unpaid and as part of the bankrupt estate were found in the assets of both bankrupts. The managing officer of both was the same. Proceeds of the sale of part of the Polk county land was received in the form of a bank draft payable to the Lincoln Trust Company. It was indorsed by that company and also by the Lincoln Safe Deposit Company. The indorsements were made by the managing officer of both indorsers. Both became responsible to the owner of that fund for the custody and disposition of it. They used the proceeds of the draft in their own business with knowledge of all the facts. They knew the draft represented proceeds of real estate which had been mortgaged to pay outstanding bonds. They had sold and repurchased these two identical bonds. They had possession of them when they received the draft. In dealing with their own bonds in their own possession while accepting and using funds created by security for payment, they acted for themselves. They were not entitled to both the bonds and money in their hands to pay them. They took the money. Neither trusteeship under the mortgage nor subsequent bankruptcy justifies their claim. The trustee in bankruptcy is in no better position. In equity the bonds should be treated as paid. Helen Schoppe, by taking title subject to the mortgage, did not bind herself to pay bonds satisfied by payment. Facts proved without dispute show conclusively that the district court ruled correctly on this branch of the case.

The traversed plea of Helen Schoppe, that the remainder of the proceeds of Polk county land, or $3,850.78, should be credited on the mortgage indebtedness, presents a different situation. It is a plea of payment. There is a familiar rule of law that a party pleading payment as a defense has the burden of proving it. *Farmers Cooperative Mercantile Co. v. Shultz,* 113 Neb. 801, 205 N. W. 288. Payment of negotiable bonds secured by mortgage without obtaining possession of them may be at the risk of the debtor. *Davis v. Polak,* 126 Neb. 640, 254 N. W. 246; *John-*

son v. Kindig, 127 Neb. 360, 255 N. W. 236. The unpaid bondholders never received any part of this fund. They did not know of its existence. They had no part in wrongdoing of any kind. They kept possession of their bonds and still hold them. Edward R. Danielson, mortgagor, and the companies bankrupt now were dealing with each other and were familiar with the facts. It was the sale of part of the Danielson land that produced the proceeds. Danielson did not demand the surrender of any bonds when he entrusted the proceeds to companies now bankrupt, though he knew some of the bonds were outstanding. There is nothing to show he demanded credit on the mortgage indebtedness or on the bonds. The proof is that he was negotiating with the companies now bankrupt for an additional loan with a view to using his proceeds in his own business. Regarding the Lincoln Trust Company as trustee for the bondholders for the purposes of collection, Danielson did not evince an intention to devote his proceeds to payment of bonds, but on the contrary, with the consent of that company, allowed the fund to remain in its possession. He had at hand the means of protecting himself and the bondholders from a loss by demanding a surrender of bonds in the amount of his proceeds or a return of his money. He pursued neither course. He trusted the companies now bankrupt. The other bondholders did not.

Where funds have been diverted from proper channels by trustees or others, courts sometimes find it impossible to protect all innocent parties from loss and are compelled to resort to the following rule of equity:

"Where one of two innocent persons must suffer a loss occasioned by the wrongful act of a third person, the one who made it possible for the third person to commit the wrongful act should bear such loss." *Nebraska State Bank v. May*, 117 Neb. 262, 220 N. W. 276.

Failure to prove a course of dealing which shows that payment to the Lincoln Trust Company was payment to other bondholders distinguishes the case at bar from *Conroy v. Garries*, 126 Neb. 730, 254 N. W. 262.

When the entire record is considered with the rules of law and equity applicable, the evidence preponderates in favor of plaintiff on the issue under consideration. That part of the judgment crediting $3,828.45 *pro rata* on the outstanding bonds is therefore reversed and the cause remanded, with directions to the district court to correct its decree accordingly as the record now stands.

AFFIRMED IN PART AND REVERSED IN PART.

SECURITIES INVESTMENT CORPORATION, APPELLANT, V. M. A. KREJCI, APPELLEE.

271 N. W. 287

FILED FEBRUARY 5, 1937. No. 29846.

1. Replevin: DEFENSES. The defendant in a replevin action may, under a general denial, prove any fact which amounts to a defense.
2. ———: ———. In a replevin action to foreclose a mortgage on chattels, the defendant under a general denial may prove damages resulting from a breach of warranty in the sale thereof, as an offset to show that plaintiff at the commencement of the action was indebted to her in an amount at least equal to the amount due on the note.
3. Appeal. A verdict unsupported by any competent evidence, but based solely upon speculation and conjecture, cannot stand.
4. ———. Where the defense in a replevin action to foreclose a chattel mortgage is that the plaintiff is indebted to defendant, the failure of the court to instruct the jury that the amount so due must be at least equal to that due on the mortgage note to defeat plaintiff's cause of action is prejudicially erroneous.

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

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

Dwyer & Dwyer, contra.

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

DAY, J.

A second appeal of this replevin action comes to this court. For the former opinion, see 128 Neb. 763, 260 N. W. 396. The case was tried the second time in the district court on the petition and the general denial of the defendant. The judgment entered on the verdict of the jury was that the defendant was entitled to the truck or its value of $375.

This case was tried and submitted to the jury on the theory that the note secured by the chattel mortgage on the truck had not been paid in cash, but under the general denial of the defendant evidence was offered of a breach of warranty and misrepresentation in the sale which, it was claimed, damaged her in a sum sufficient to offset the amount due the plaintiff. In this jurisdiction, the defendant in a replevin action may, under a general denial, prove any fact which amounts to a defense.

Certainly, if the plaintiff is indebted to the defendant for damages resulting from a breach of warranty or misrepresentation in the sale of the truck involved in the transaction, which damages are at least equal to the amount due upon the note, it is a valid defense in a replevin action. Such defense is provable under a general denial. In a replevin action to foreclose a mortgage on chattels, the defendant under a general denial may prove damages resulting from a breach of warranty in the sale thereof as an offset to show that plaintiff at the commencement of the action was indebted to her in an amount at least equal to the amount due on the note. *Davis v. Culver*, 58 Neb. 265, 78 N. W. 504.

The evidence is undisputed that there was an unpaid balance due on the note secured by this chattel mortgage at the time this replevin action was instituted. Therefore, the plaintiff was entitled to the possession unless the plaintiff was indebted to the defendant for damages in an amount at least equal to that due on the note. The amount of such damages must be established by a preponderance of the evidence. A critical examination of the evidence re-

veals that the defendant did not establish by a preponderance of the evidence that she was entitled to any such amount as damages. The witnesses for the defendant do retail a story of the trials and tribulations of a truck operator. But it must be noted that this truck was four years' old. The plaintiff, or its assignor, made many repairs to the truck without expense to the defendant. Only some minor repairs were made by the defendant, and the evidence does not conclusively establish that these were necessary because of the misrepresentation or breach of warranty. However, assuming that these repairs were necessary to put the truck in condition to meet the representation or the warranty, the expense amounted to only $50, a sum far less than the amount due on the note. There is no evidence in the record to sustain the claim that there was any other amount of damage sustained by the defendant. No witness testifies as to the amount of any damage. It is a circumstance that the defendant did not attempt a rescission of the contract, but in this action is contending for the possession of the truck. In the state of the record, the verdict of the jury that the defendant was entitled to the possession of the truck was based wholly upon speculation and conjecture. In order to return such a verdict, it was necessary for the jury to find that the defendant was damaged by the misrepresentation and breach of warranty in an amount of at least $279.65. A verdict unsupported by any competent evidence, but based solely upon speculation and conjecture, cannot stand.

No doubt the jury were misled by the erroneous submission of the case. The court should not have submitted the case to the jury upon issues which had no support in the evidence. Although not requested, the court must instruct on the issues presented by the pleadings and evidence. *Hall v. Rice,* 117 Neb. 813, 223 N. W. 4; *Blue Valley State Bank v. Milburn,* 120 Neb. 421, 232 N. W. 777. But there was not sufficient evidence to sustain the contention of the defendant that she had been damaged more than the amount due on the note by the alleged misrepresentation

and breach of warranty. Even if there were evidence to sustain defendant's damage, the instruction is erroneous because, in accordance with the law as heretofore stated, the court should have instructed the jury that the plaintiff was entitled to a judgment for possession unless the plaintiff was indebted to the defendant in a sum at least equal to the amount due on the note.

Where the defense in a replevin action to foreclose a chattel mortgage is that the plaintiff is indebted to defendant, the failure of the court to instruct the jury that the amount so due must be at least equal to that due on the mortgage note to defeat plaintiff's cause of action is prejudicially erroneous.

Under the record, the plaintiff was entitled to have its motion, made at the close of all the evidence, for a directed verdict sustained. This action was commenced March 3, 1933, nearly four years ago. It has been tried twice to a jury. There is no merit in the defense. Upon the record, the plaintiff is entitled to a directed verdict. Therefore, the judgment is reversed, and the cause is remanded to the district court, with directions to enter a judgment for possession and costs in favor of the plaintiff.

REVERSED.

SECURITY MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. HERPOLSHEIMER BUILDING COMPANY, APPELLANT.

271 N. W. 343

FILED FEBRUARY 5, 1937. No. 29792.

1. **Mortgages: FORECLOSURE: MORATORIUM: VACATION.** In a case where a large business block is greatly in need of repairs, where taxes have accumulated in the sum of $19,027.18, and the receiver has been unable to rent the property, even after expending $7,258.18 in preserving the property, an application to set aside a moratorium and confirm the foreclosure sale may be considered by the court.
2. ———: ———: ———: ———. If, under the conditions shown in the evidence, a moratorium would not now be granted

under the law, then the court may be justified in setting aside and vacating a moratorium granted in the past.

3. ———: ———: ———: ———. Moratorium stays are at all times under the control of the court, and may be reexamined, and upon good cause being shown may be modified or vacated at any time.

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

John H. Comstock, for appellant.

Fred C. Foster, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and RAPER and CHAPPELL, District Judges.

PAINE, J.

This is a foreclosure action, in which the district judge entered a decree on December 18, 1933, finding the amount due upon the mortgage that day to be $121,229.84, with interest at 6 per cent. from that date, together with costs. It was agreed by the parties that the issuance of the order of sale should be stayed for nine months.

The defendants had made application for a moratorium until March 1, 1935, under House Roll No. 600, ch. 65, Laws 1933. On October 25, 1934, plaintiff filed motion to confirm the sale made by the sheriff on October 23, 1934, and that sheriff's deed issue.

On November 8, 1934, after a hearing on the application for a moratorium, it was ordered by the district judge that the foreclosure proceedings be stayed until March 1, 1935; further, that the property remain in the possession of the receiver, E. B. Stephenson, appointed June 8, 1933, and that the rents and income from said premises be applied (1) to cost of repairs, (2) to cost of operation of the building, (3) to the payment of the taxes, and that the proceeds above such sums be paid the Herpolsheimer Building Company to the extent of $100 a month, and any net rentals above those amounts be applied on the plaintiff's mortgage, first to the payment of the interest, and then to principal.

On June 26, 1935, the plaintiff filed a motion to set aside the moratorium and to confirm the sale, alleging that House Roll No. 600, ch. 65, Laws 1933, had expired, and that House Roll No. 1, ch. 41, Laws 1935, was unconstitutional and void.

On September 23, 1935, the defendants filed objections to, and a showing in resistance of, the motion to set aside the moratorium, supporting the same by the affidavits of many parties, and the cause came on for hearing September 30, 1935, before the district judge, who entered an order finding that there was then due upon the decree $134,161.03, and that, in addition thereto, there were unpaid taxes and special assessments aggregating the sum of $19,027.18. The court further found that the receiver had spent $7,258.18 in preserving the property, which amount was advanced by the plaintiff, and that the total amount due from the defendants was $160,446.39, and that the property did not exceed in value the sum of $100,000; that of the collateral security put up with the plaintiff, $7,500 of second mortgage bonds of the Lincoln Improvement Company were in default in the payment of interest, and a real estate mortgage of $12,000, also held as collateral, was in foreclosure, and taxes were unpaid on the security therefor in the amount of $2,000. The court further found that the receiver had received rents of only $1,360, and that the bid of $110,000 made at the sale of said premises was regular, and that said sum was more than the property was worth, and that said sale should be confirmed. The court decreed that the moratorium order, which had been continued in force by a general order of the district court without any hearing, should be set aside and held for naught; that said sale be confirmed and the sheriff directed to place the plaintiff in possession. The motion for a new trial was overruled.

The defendants set out a number of errors for reversal of the judgment of the lower court, the principal ones being that the judgment entered is contrary to law, and is against the weight and preponderance of the evidence. The

defendants' evidence disclosed that the H. H. Herpolsheimer Company, while operating a department store in this property some years ago, did at one time a gross business in the neighborhood of $600,000 a year, and members of the Herpolsheimer family testified that the mortgaged real estate was now of a value of from $200,000 to $250,000.

Affidavits of six real estate men, introduced in evidence by the defendants, placed the value of the property at the present time from $140,000 to $160,000, but none of these affiants took the witness-stand for cross-examination.

The plaintiff's first witness was E. B. Stephenson, chairman of the board of directors of the plaintiff corporation and receiver of this property, who testified that the building was two stories and a basement in height, that it was 186 feet by 142 feet, located at the corner of N and Twelfth streets in Lincoln; that the building was about 45 years old and in bad condition, being of an old type of construction, with flat roof; that the basement floor was almost entirely rotted out, and was mouldy and damp because the sidewalk was cracked and the water ran through it into the basement; that the heating plant would have to be replaced, and that the elevator was in a dangerous condition; that the sprinkler system was out of order; that the cornice around the roof was dangerous and had to be removed; that after the Herpolsheimer Mercantile Company became bankrupt the property was leased to J. H. Eller & Company, who closed up in this location in a few months; that the receiver has been unable to rent it to any permanent tenant since that time. The receiver admits that certain governmental agencies have in the last few years opened extensive offices in Lincoln, but that he was unable to lease this property to any governmental agency because of the physical condition of the building; that the business district of the city has steadily grown away from this property; that to the south of it there is a large church property, which does not attract retail trade; that across the street east there is a one-story building through the entire block,

with little storerooms, changing tenants often and renting for as low as $35 each. To the north of this property there is the blank wall of the Walsh building, and west of that is the King Grocery, which does not attract large numbers of people, for the greater part of its business is done by telephone orders from well-to-do customers. Farther to the east is the Lincoln Theatre building, and traffic experts declare that a theatre does not draw retail trade. Mr. Stephenson testified that in his opinion the property was worth in its present condition only $75,000. Of the other witnesses called by the plaintiff, George M. Christian had been in the real estate business for 24 years in Lincoln; C. W. Roe had been in that business for 15 years; Curtis C. Kimball had lived in Lincoln for 40 years and been in the real estate business for 15 years; Charles A. Herman had been in the real estate business for 22 years in Lincoln. These four experienced real estate men were each subjected to cross-examination, and the fair and reasonable value of this property as fixed by the testimony of these four men gave, when averaged, a value of $85,000. Their evidence disclosed an accurate knowledge of rental values of business properties, together with all of the elements entering into such values.

It is quite evident that the trend of retail trade is away from the location of this property, as is shown by the traffic counts; that this building, to be rented to any advantage, will have to be rebuilt from top to bottom; that there is no more likelihood that a renter could be found in the future than in the past; and that the interest, taxes, and other expenses are piling up each day without any possibility of any returns to the receiver.

After considering all of the evidence in the case, the court has reached the opinion that the mortgaged property in its present condition is worth much less than the amount bid at the sale by the plaintiff.

In *Clark v. Hass*, 129 Neb. 112, 260 N. W. 792, it was held that it was not an abuse of discretion for the trial court to deny an application for a moratorium when it ap-

peared that the amount of the mortgage lien exceeds the value of the lands secured by the mortgage. To the same effect was the holding of this court in *Luikart v. Graf*, 130 Neb. 736, 266 N. W. 641. It was held that, where the applicant has no valuable interest to protect, good cause is thereby shown for a denial of an application for a moratorium. *First Trust Co. v. Stenger*, 130 Neb. 750, 266 N. W. 642. See, also, *Srajhans v. Mares*, 130 Neb. 924, 267 N. W. 82.

However, the defendants insist that, a moratorium stay having once been granted, it cannot now be set aside unless the plaintiff mortgagee can prove that the mortgagor has violated the order. This brings before us for consideration the purpose of such laws.

Moratorium laws are not new. In an article in 46 Harvard Law Review, 1061, we find the moratorium laws of all ages and the various countries discussed, and the statement: "For some 1,400 years western civilization has made use of extraordinary devices for saving the credit structure, devices generically known as moratoria. The moratorium is a postponement of fulfilment of obligations decreed by the state through the medium of the courts or the legislature. Its essence is the application of the sovereign power." But such laws do not apply automatically under certain conditions, but the application depends upon the direction of the court.

This court has said in *First Trust Co. v. Airdale Ranch & Cattle Co.*, 131 Neb. 475, 268 N. W. 362: "Such postponement was not intended to enable the debtor to realize some speculative value out of the real estate securing the debt or to delay indefinitely the day of reckoning where the mortgage indebtedness was excessive."

This court has held repeatedly that, if the amount of mortgage liens on real estate exceeded its value, a moratorium should be denied. *State Life Ins. Co. v. Heffner*, 131 Neb. 700, 269 N. W. 629.

It does not appear to us that, even if a stay has once been granted, the court is thereby foreclosed from a re-

examination into all the facts upon a proper showing, and if it is proper the order for the moratorium can be vacated, as was done in the case at bar.

It is now evident that, after months of effort, a renter cannot be secured; that there is no possibility of the debtors being able to save their property, and that the loss to mortgagee is increasing daily. We hold that under these facts the moratory stay heretofore granted was properly vacated and set aside, and such decree of the district court confirming the sale was right, and is hereby affirmed.

AFFIRMED.

IDA WHITE, APPELLANT, V. NATIONAL WINDOW CLEANING COMPANY ET AL., APPELLEES.

271 N. W. 341

FILED FEBRUARY 5, 1937. No. 30032.

1. Master and Servant: WORKMEN'S COMPENSATION LAW: ELECTION. An employee who has properly elected not to come under Part II of the workmen's compensation act cannot recover compensation from "owner," and owner does not become "employer" under the provisions of section 48-116, Comp. St. 1929, even though owner does not require immediate employer to carry compensation insurance.
2. ———: ———: ———. The act of an employee in electing not to come under Part II of the workmen's compensation act is binding on his dependents.
3. ———: ———: ———. Under particular facts in this case, election of employee not to come under Part II of workmen's compensation act *held* not restricted to immediate employer.

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

Leon & White and *Louis E. Lipp*, for appellant.

Gaines, McLaughlin & Gaines and *Kennedy, Holland, De Lacy & Svoboda, contra.*

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

KROGER, District Judge.

This is an appeal from an order of the district court for Douglas county denying plaintiff's claim for compensation under the workmen's compensation law, based upon the death of her husband. The facts are not in dispute.

The National Window Cleaning Company is a corporation organized in the year 1924 by the deceased and two others, and was engaged at all times in the business of washing and cleaning windows in offices, store buildings and dwellings in the city of Omaha. The deceased, Joe White, was president of said company and, in addition to his duties as president and stockholder, he did actual washing of windows, for which he was paid a weekly wage of $25 by the company.

In the spring of 1933 the J. C. Penney Company, Inc., was preparing to open a store in Omaha, and during the latter part of January or the forepart of February its local manager contacted the National Window Cleaning Company by telephone and the deceased, Joe White, came to see him and, on behalf of his company, negotiated a contract, which was verbal, for the cleaning of the windows of the building occupied by the J. C. Penney Company store, for an agreed compensation of $20 a month. At that time the local manager of the J. C. Penney Company inquired of deceased if the National Window Cleaning Company carried compensation insurance and was informed by deceased that they did have such insurance.

On March 14, 1933, deceased was washing a window on the second floor of the J. C. Penney Company building and while so employed fell to the sidewalk, sustaining injuries from which he died on March 16, 1933. He left surviving him the appellant, Ida White, his widow, and three children, who were dependent upon him for support.

It further appears from the evidence that the National Window Cleaning Company did have a standard workmen's compensation insurance policy, issued by a company licensed to do business in this state, but this policy had attached to it an indorsement showing that the three officers

and stockholders of the National Window Cleaning Company, of which the deceased Joe White was one, had rejected the provisions of the workmen's compensation act of the state of Nebraska. The deceased had also filed an election and notice of rejection of the terms, conditions and provisions of Part II of the Nebraska workmen's compensation act with the National Window Cleaning Company and the Nebraska compensation commissioner, which notice had not been revoked at the time of the fatal accident.

It is the contention of appellant that the J. C. Penney Company was an employer of the deceased under the provisions of section 48-116, Comp. St. 1929, and that the election of the deceased not to be bound by the provisions of the workmen's compensation law applied only to his relationship with the National Window Cleaning Company, his immediate employer.

Appellant's claim that the J. C. Penney Company was an employer of the deceased at the time of the fatal accident is based on the contention that, at the time of entering into the contract, the J. C. Penney Company did not require the National Window Cleaning Company to carry compensation insurance for its employees. Inquiry was made as to whether such insurance was carried, and answered in the affirmative; the National Window Cleaning Company did carry compensation insurance for all of its employees excepting those who had filed an election not to come under the act. The workmen's compensation law does not contemplate that an employee be forced to come under its provisions, but, by its express terms, provides means whereby the employee may elect not to be bound thereby and be left to his common-law action for damages arising from actionable negligence. The deceased had made this election and his action is binding upon his dependents. Under the particular circumstances in this case, it is not necessary to determine whether or not the inquiry made by the J. C. Penney Company amounted to a requirement that the National Window Cleaning Company carry compensation insurance for its employees, because the deceased, in any

event, would not have benefited by such a requirement, he having filed his election not to be bound by the workmen's compensation law.

Under the facts in this case, we hold that the J. C. Penney Company was not an employer within the meaning of section 48-116, Comp. St. 1929.

Appellant argues that the election of deceased not to come under Part II of the compensation act was restricted to the National Window Cleaning Company, his immediate employer, and therefore could not affect the liability of the J. C. Penney Company. The notice was addressed to the National Window Cleaning Company and the Nebraska compensation commissioner and refers to personal injuries "which the undersigned may receive, if any, arising out of and in the course of employment *with the employer above named.*" (Italics ours.)

This court is committed to the rule that the compensation act is to be liberally construed and the act itself provides that all contracts of employment are presumed to be subject to the provisions of Part II thereof, unless the employer or employee expressly rejects the same.

In the light of the statutory provisions and the decisions of this court, what was the intention of the deceased when he executed the notice of election and what was the legal effect of the same?

From the very nature of their work the employees of the National Window Cleaning Company were, at all times while employed, on the premises of and technically executing work for some other person, firm or corporation. This was well known to the deceased when he executed the notice of election. For this court to say that under those conditions and circumstances it was the intention of the deceased to reject the compensation act so far as the National Window Cleaning Company was concerned, but not as to any person, firm or corporation for whom the work was being done, would be giving the deceased a protection he, as an officer of the National Window Cleaning Company, did not desire to pay for, and which, as an employee, he

had rejected. Logic compels us to the conclusion that it was the intention of the deceased to reject Part II of the compensation act as to any injuries sustained by him while employed by the National Window Cleaning Company and that the waiver also extended to those for whom the work was being done.

The judgment of the trial court was correct and is

AFFIRMED.

HENRY HEINEMAN, APPELLEE, V. GEORGE WILSON, APPELLANT.

271 N. W. 346

FILED FEBRUARY 11, 1937. No. 29833.

1. Trial: RULE OF PRACTICE. Where a rule of practice, promulgated by this court under its constitutional authority, is later abrogated and a new rule in effect promulgated effective on a certain date, the new rule is not retroactive and applicable to cases tried under the former rule.
2. ———: INSTRUCTIONS. Before a court is required to instruct the jury, in any case, that they may disregard the testimony of any witness who they believe from the evidence has wilfully testified falsely, there must be evidence tending to prove that the witness so testified.
3. ———: ———. Where the court in stating the issues raised by the plaintiff's cause of action neglects to use the words "the plaintiff alleges" or those of similar import, the omission is not prejudicial where the entire instruction and the instructions as a whole are such as not to mislead the jury to infer that the court stated the allegations as facts proved.
4. Appeal: INSTRUCTIONS. Where an instruction correctly states the law applicable to the issues in a case in clear and intelligible language, so that ordinary men and jurors understand it, error cannot be predicated thereon.

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

Beghtol, Foe & Rankin, for appellant.

John H. Comstock and *Ira D. Beynon, contra.*

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

DAY, J.

In this, an action for damages resulting from injuries occurring in an automobile collision between the parties, the defendant appeals from a judgment entered upon a verdict by a jury.

The trial court refused to permit the defendant to testify that there was a dispute between him and his insurer as to the coverage in question. In response to an inquiry as to whether he carried insurance, he answered that he did not know whether it covered this litigation. Even under the former rule of practice, promulgated by this court under its constitutional authority in *Jessup v. Davis*, 115 Neb. 1, 211 N. W. 190, and many subsequent cases decided under the rule, the objection to the question was proper because it called for a conclusion of law and was not within the issues in this case.

In this connection, the appellant cites *Fielding v. Publix Cars, Inc.*, 130 Neb. 576, 265 N. W. 726, but it is not apparent what conclusion can be drawn from it which is applicable to this case. In the *Fielding* case, this court abrogated the rule of practice promulgated in the *Jessup* case. In effect, a new rule was established, but with the positive provision that it should not be retroactive. It annulled by an authoritative act and abolished the rule of practice that a plaintiff could establish by appropriate inquiries on cross-examination whether defendant was indemnified from loss by insurance. This rule was abrogated by the *Fielding* case as of April 1, 1936. This case was tried in the district court about December 20, 1935. So the new rule was clearly not applicable to this case.

The defendant requested the court to give an instruction based upon the legal maxim *falsus in uno, falsus in omnibus*, which was refused. The testimony of the plaintiff was not such as to require the giving of such an instruction in any case. Upon cross-examination, plaintiff testified that he had not been able to do harvesting work. Later, the evi-

dence developed that he had done threshing, in that he took care of the separator by "keeping the machine oiled, looking after it so that everything is all right, no loose bolts or something like that." This testimony indicated a quibble over the meaning of the words "harvesting" and "threshing" between the plaintiff and defendant's counsel. The accident occurred October 15, 1933, and there was no harvesting or threshing until at least the following July. Special findings were returned by the jury, in addition to the general verdict, in which the jury fixed the damage of the plaintiff on account of personal injuries to himself, loss of time, and medical and surgical expenses at $250. The general verdict was for $4,000, including damages to plaintiff for his own injuries, the injuries to his car, and the injuries to his wife. The largest item as determined by the special findings was the damage resulting from injuries to his wife in the sum of $3,725. A large part of this last item was made up of nursing, hospital care, and medical services, which were alleged to represent an expense of $2,500.

The testimony in question related to the physical condition of the plaintiff nine months after the accident. It appears that the verdict only remunerated the plaintiff moderately for his damages. There could well have been an honest difference of opinion as to plaintiff's physical condition so long after the injury. The threshing work which was done by him was such light work that any one could have done it, as it required so little physical exertion. The true state of facts was placed before the jury. It does not appear that there was sufficient evidence that the plaintiff as a witness wilfully testified falsely upon a material issue before the court. Before such an instruction is required to be given in any case, there must be evidence that a witness wilfully testified falsely upon a material issue before the court. 6 Jones, Commentaries on Evidence, sec. 2473; *Miller v. State,* 139 Wis. 57, 119 N. W. 850; *Judge v. Jordan,* 81 Ia. 519, 46 N. W. 1077; *Markiewicz v. State,* 109 Neb. 514, 191 N. W. 648.

The first instruction given by the court to the jury is subject to some criticism. It is said to assume as facts things which were issues for the determination of the jury. Certain statements relating to the negligent acts and omissions of the defendant alleged to have caused the injury, taken out of the context, might well be said to assume facts in dispute. However, in the context of the instruction and considered with all the other instructions in the case, they would not mislead the jury. An instruction upon the burden of proof correctly instructed the jury that the burden of proof rested upon the plaintiff to establish all these allegations. The appellant usually greatly underrates the mental capacity of the jury. It is an attribute of human nature to underrate the capacity of those who entertain opposite views on any subject.

In a similar situation, *Kuhlman v. Schacht*, 130 Neb. 511, 265 N. W. 549, it was held: "Where the court, in starting to give the issues in the first instruction, neglected to state that 'the plaintiff alleges' or words of similar import, but states plaintiff's cause of action without such words, such omission may not be prejudicially erroneous when the whole instruction and others were such as to not mislead the jury into inferring that the court stated plaintiff's allegations as facts proved." In this same case, Raper, District Judge, made the following pertinent statement so applicable here that we repeat: "We assume the jury were at least men of ordinary intelligence, and that alert and able counsel had stated and argued to the jury on whom was the burden of proof, and what the plaintiff had or had not proved; so, even before the instructions were read, the jury had acquired the knowledge, in a general way, as to what the plaintiff alleged in her petition and what she was under obligation to prove."

While the instruction might have stated the issues in a manner clearly indicating that they were controversial, yet it is apparent that the entire instruction and the instructions as a whole could not mislead the jury. The correct rule is held to be that, where the court states the

issues of the plaintiff's cause of action, but neglects to use the words "the plaintiff alleges" or words of similar import, the omission is not prejudicial, where the entire instruction and all the instructions are such as not to mislead the jury into thinking that the court stated the allegations as facts proved.

The court in the instruction relating to the various elements constituting the damages claimed by plaintiff failed to qualify the statement by the words, "if any." The same general rule is applicable here as in the other instruction discussed. If the meaning of the instruction is clear and not misleading to the jury, there is no prejudicial error. The appellant would have the trial judge required to qualify every phrase by the words "if any," lest the jury conclude that the court was instructing them that the fact had been established by the evidence. No precise form of expression is necessary in giving instructions, and the ultimate test of soundness is whether under the pleadings and evidence ordinary men and jurors would understand them. 64 C. J. 629; *Osborne v. Montgomery*, 203 Wis. 223, 234 N. W. 372; *Oliver v. Nelson*, 128 Neb. 160, 258 N. W. 69; *Sweeney v. Midwest Life Ins. Co.*, 129 Neb. 521, 262 N. W. 47.

The instruction which causes appellant's complaint, when subjected to this test, and particularly when considered with all the other instructions, was not misleading to or misunderstood by the jury. Where an instruction correctly states the law applicable to the issues in a case in clear and intelligible language, so that ordinary men and jurors understand it, error cannot be predicated thereon. Sometimes extreme care in inserting such words as are omitted here ("if any") does not clarify the meaning but rather adds to the confusion. When the court had concluded the instructions to the jury in this case, the jury could not have understood from them that the plaintiff had been damaged by the negligence of the defendant and that they were only required to determine the amount.

An examination of the record, including the pleadings,

the evidence, the instructions to the jury, and the assignments of error argued in the brief and orally, does not reveal any prejudicial error.

AFFIRMED.

LEBRON ELECTRICAL WORKS, INC., APPELLEE, V. CHARLES M. PIZINGER, APPELLANT.

270 N. W. 683

FILED FEBRUARY 11, 1937. No. 29855.

1. **Appeal.** Where a motion for a new trial and a motion for judgment notwithstanding the verdict are both overruled, error cannot be predicated upon the sequence of the orders.
2. **Judgment.** A judgment notwithstanding the verdict can be rendered only upon the pleadings without a consideration of the evidence.
3. **Pleading.** Where the allegations in an answer and counterclaim are tried and submitted as though denied by a proper pleading, it is too late after judgment to assert that said averments are admitted by the pleadings.

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

James E. Bednar, for appellant.

Gerald M. Vasak, contra.

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

DAY, J.

In a replevin action to try the right of possession to certain machinery, the trial court at the conclusion of all the evidence sustained the plaintiff's motion for a directed verdict, found the right of possession to be in the plaintiff, valued the property at $602.45, and fixed the damages for the wrongful detention at one cent. Thereafter, the defendant filed at the same time both a motion for new trial and a motion for a judgment notwithstanding the verdict.

The trial court overruled the motion for a new trial first and a few days later overruled the other motion. It is asserted that the priority should have been reversed upon the authority of *Kafka v. Union Stock Yards Co.*, 87 Neb. 331, 127 N. W. 129. The cited case holds that a motion for judgment on special findings notwithstanding the general verdict and one for a new trial may be filed at the same time, but that the decision on the former does not waive the latter. The *Kafka* case is not analogous to the case at bar and is not decisive of the question presented.

On the other hand, *Hamaker v. Patrick*, 122 Neb. 688, 241 N. W. 537, is not decisive of this point. True, there is some language quoted from authorities as argument for deciding another question. In the case at bar, the trial court overruled both motions. Under such a situation there could be no prejudice to the defendant arising from the priority between orders. It does not present a debatable issue for our determination. The rule of reason requires that, where a motion for a new trial and a motion for judgment notwithstanding the verdict are both overruled, error cannot be predicated upon the sequence of the orders.

Did the trial court err in overruling the motion of the defendant for a judgment notwithstanding the verdict? This jurisdiction is committed to the rule that a judgment notwithstanding the verdict can be rendered only upon the pleadings without a consideration of the evidence. *Bielfeldt v. Grand Island Transit Co.*, 123 Neb. 368, 243 N. W. 76; *Hamaker v. Patrick, supra;* Comp. St. 1929, sec. 20-1315.

The pleadings did not require a judgment notwithstanding the verdict at the time the appellant filed his motion. The plaintiff filed a petition for replevin, the defendant an answer and counterclaim. There was no reply or answer to the counterclaim. Assuming, but not deciding, that a counterclaim for damages for breach of warranty and misrepresentation is a proper pleading in a replevin action, this case was tried twice to a jury upon the theory that the allegations were denied. Where the allegations in an answer

and counterclaim are tried and submitted as though denied by a proper pleading, it is too late after judgment to assert that said averments are admitted by the pleadings. *In re Estate of Cheney,* 78 Neb. 274, 110 N. W. 731; *Moore v. Moore,* 104 Neb. 122, 175 N. W. 665.

This effectually disposes of the assignments of error. It does not appear that there is any substantial reason requiring a reversal of the judgment.

AFFIRMED.

STATE, EX REL. WILLIAM H. WRIGHT, ATTORNEY GENERAL, PLAINTIFF, V. ROBERT A. BARLOW, DEFENDANT.

271 N. W. 282

FILED FEBRUARY 11, 1937. No. 29868.

1. **Attorney and Client:** CONTEMPT. A person who engages in the practice of law in this state, without first procuring a license to so do, may be prosecuted for criminal contempt.
2. **Contempt.** A contempt action is *sui generis*, neither civil nor criminal, but in the nature of a criminal proceeding.
3. ———. A prosecution for criminal contempt is governed by and in accordance with the strict rules applicable to criminal prosecutions.
4. **Witnesses.** Section 12, art. I of the Constitution, providing that "no person shall be compelled, in any criminal case, to give evidence against himself," has no application to one charged with contempt of court, and one so charged may be required to testify the same as any other competent witness.
5. **Depositions.** That part of section 11, art. I of the Constitution, providing "In all criminal prosecutions the accused shall have the right * * * to meet the witnesses against him face to face" has no application in a contempt proceeding and does not prevent the use of depositions in such an action.
6. **Contempt:** PROOF. To sustain a finding of guilt in an action charging criminal contempt, the evidence must show the guilt of the defendant beyond a reasonable doubt.
7. ———: INFORMATION: AMENDMENT. Where the issues in an original action are formulated in this court, and the case then referred to a referee to take the evidence and make findings of fact and conclusions of law thereon, the ruling of the referee

refusing the state permission to amend the information by adding a new count thereto is in all respects proper.

8. **Limitation of Actions.** The period in which an action for criminal contempt can be brought is not limited by statute in this state, and, in the absence of a showing of special circumstances by which delay in instituting the suit has prejudiced the rights of the defendant, such an action is not barred by lapse of time.
9. **Witnesses.** The privilege of a witness of refusing to answer on the ground that such answer may tend to incriminate him or expose him to public ignominy must be timely made or it will be deemed to have been waived.
10. **Evidence** examined and *held* to sustain a finding of guilt for criminal contempt on three counts of the information.

Original action by the state, on the relation of the attorney general, citing defendant for contempt for practicing law without a license. *Defendant found guilty on three counts of the complaint.*

William H. Wright, Attorney General, Milton C. Murphy and *Lester A. Danielson,* for plaintiff.

Ginsburg & Ginsburg and *R. P. Kepler,* for defendant.

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

CARTER, J.

This is an original action brought by the attorney general charging the defendant with contempt of court for practicing law in this state without a license. The issues were made up in this court and the case then referred to M. M. Maupin, as referee, to take the evidence and make findings of fact and conclusions of law thereon. The case is now before the court on the report of the referee and the exceptions of the defendant thereto.

The information, as originally filed in this court, contained 10 counts. A general demurrer to counts 7 and 8 was sustained by this court in a former opinion. *State v. Barlow,* 131 Neb. 294, 268 N. W. 95. The referee found for the defendant on counts 1, 2, 4 and 9. The referee further found that the defendant was proved guilty beyond a rea-

sonable doubt on counts 3, 5 and 10, and by a preponderance of the evidence on count 6. The exceptions filed by the defendant question the sufficiency of the evidence to sustain the findings of the referee on counts 3, 5, 6 and 10, and the correctness of the conclusions of law as determined by the referee.

That this court has the inherent power to punish by contempt proceedings those persons who engage in the practice of the law unlawfully cannot now be questioned. *State v. Barlow, supra.* The proceeding in the case at bar is one charging a criminal contempt. In *Maryott v. State,* 124 Neb. 274, 246 N. W. 343, this court said: "Generally speaking, contempts are either direct, those committed in the presence of the court while in session, or constructive, consisting of those not committed in the presence of the court. Properly speaking, constructive contempts should be divided into two classes—criminal and civil. Those contempts which are prosecuted to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders are, ordinarily, termed criminal contempts, while those instituted to preserve and enforce the rights of private parties to the suit and to compel obedience to orders and decrees made to enforce the rights and to administer the remedies to which the court has found them to be entitled are, ordinarily, civil contempts."

The defendant contends that a prosecution for a criminal contempt is a criminal proceeding. With this we cannot agree. A proceeding for contempt is *sui generis* and summary in its nature. Its nature is aptly stated in the case of *Re Gompers,* 40 App. D. C. 293: "The action is *sui generis,* in a class by itself, partaking of some of the elements of both civil and criminal proceedings, but, strictly speaking, it is neither. It belongs to a class of proceedings inherent in the court, and deemed essential to its existence. It would hardly be held that a disbarment proceeding is criminal, although a severe penalty may be imposed; or that the power of a court to reprimand its officers for misconduct is a criminal proceeding, though the penalty im-

posed is humiliating and severe. These belong to a class of proceedings essential to the self-preservation of a court, and inherent in all courts, irrespective of their constitutional and statutory jurisdiction. Contempt, therefore, is without any particular form of action, and not subject to the limitations of procedure prescribed for the conduct of either civil or criminal actions." See, also, *State v. Baker*, 270 N. W. (Ia.) 359.

While it is true that this court has said many times that a contempt action is in the nature of a criminal proceeding, strictly speaking it is not such. We conclude that it is an action *sui generis*, neither civil nor criminal, but in the nature of a criminal proceeding. We have examined the case of *Connell v. State*, 80 Neb. 296, 114 N. W. 294, and have concluded that the first syllabus thereof is wrong and it is hereby overruled.

This court has held that a prosecution for criminal contempt is governed by and in accordance with the strict rules applicable to criminal prosecutions. In *Hydock v. State*, 59 Neb. 296, 80 N. W. 902, we said: "We have repeatedly held that proceedings in contempt are in their nature criminal, and no intendments will be indulged to sustain a conviction for contempt of court. See *Hawes v. State*, 46 Neb. 149; *Wilcox v. State*, 46 Neb. 402; *O'Chander v. State*, 46 Neb. 10; *Zimmerman v. State*, 46 Neb. 13." See, also, *Bee Publishing Co. v. State*, 107 Neb. 74, 185 N. W. 339; *McCauley v. State*, 124 Neb. 102, 245 N. W. 269; *Maryott v. State, supra*. Under the above authorities, we hold that a prosecution for criminal contempt is governed by the strict rules applicable to prosecutions by indictment.

While a prosecution for criminal contempt has many of the attributes of a criminal proceeding, one so charged is not entitled to a trial by jury. *Gandy v. State*, 13 Neb. 445, 14 N. W. 143; *Hanika v. State*, 87 Neb. 845, 128 N. W. 526. Neither is one so charged required to be arraigned before a hearing is held. *Nebraska Children's Home Society v. State*, 57 Neb. 765, 78 N. W. 267; *Kopp v. State*, 124 Neb.

363, 246 N. W. 718; *Hanika v. State, supra.* Nor may one convicted of a criminal contempt seek a review thereof by appeal; his remedy is by the institution of error proceedings. *Hanika v. State, supra.*

The record shows that the state called the defendant as a witness in its behalf over his objection that he was within the purview of section 12, art. I of the Constitution of Nebraska, providing: "No person shall be compelled, in any criminal case, to give evidence against himself, or be twice put in jeopardy for the same offense." Clearly, a person cannot claim the benefits of this section of the Constitution unless it be in a case charging him with the commission of a crime. A contempt proceeding not being a criminal case, a person charged with contempt of court cannot invoke any benefit or privilege from this provision of the Constitution. The defendant in a contempt proceeding, therefore, may properly be called as a witness by the state and be required to testify the same as any other competent witness. This holding is sustained by the following cases: *O'Neil v. People,* 113 Ill. App. 195; *People v. Seymour,* 191 Ill. App. 381; *State v. Reilly,* 40 Wash. 217, 82 Pac. 287.

The defendant complains of the action of the referee in permitting the state to place in evidence the depositions of sundry witnesses for the reason that it deprives the defendant of his constitutional right to meet the witnesses against him face to face. That part of section 11, art. I of the Constitution, that is material on the point under consideration provides: "In all criminal prosecutions the accused shall have the right * * * to meet the witnesses against him face to face." It will be noted that the constitutional provision cited applies to criminal prosecutions only, and the defendant in the suit at bar therefore cannot avail himself of its provisions. If the witnesses whose depositions were received in evidence come within the provisions of section 20-1246, Comp. St. 1929, and the record shows that they do, the use of depositions was entirely proper. *State v. Priest,* 118 Neb. 47, 223 N. W. 635.

The record discloses that the defendant was found guilty by the referee on count 6 of the information by a preponderance of the evidence. Defendant contends that the proof of guilt must be beyond a reasonable doubt. In *Hydock v. State, supra,* the court stated that proceedings in contempt are in their nature criminal and that "it is therefore necessary to establish guilt beyond a reasonable doubt." In *State v. Lovell,* 117 Neb. 710, 222 N. W. 625, a suit for criminal contempt, Rose, J., speaking for the court, said: "The evidence establishes the guilt of defendant beyond a reasonable doubt." The action is in its nature criminal. Upon a finding of guilt, a fine or imprisonment may be imposed. We are convinced that reason and logic, as well as the former expressions of this court on the subject, demand that, in order to find a person guilty of a criminal contempt, it must be by evidence showing his guilt beyond a reasonable doubt. We therefore find that the conviction of the defendant on count 6 of the information cannot be sustained and it is hereby dismissed.

It appears from the record that the state asked leave, during the hearing before the referee, to amend the information by adding thereto an additional count. The referee ruled that he was without jurisdiction to permit the amendment. The strict rules of procedure in actions of this kind require that the defendant should have notice before the trial of each and every charge against him. We conclude that new counts may not be added to an information after this court has referred the case to a referee for findings of fact and conclusions of law thereon. There are, of course, certain kinds of amendments that a referee can permit in the furtherance of justice, but the addition of an entirely new count is something more than an amendment. It is, in fact, the inclusion of a new cause of action. The referee was correct in refusing to permit the state to add the additional count.

The defendant contends that the prosecution was barred on counts 3 and 10 for the reason that the acts charged as a criminal contempt occurred more than 18 months before

this suit was commenced, it being the statutory period in which a person may be prosecuted for a misdemeanor or an indictable offense below the grade of a felony. Comp. St. 1929, sec. 29-110. This theory is based on the proposition that the legislature has provided that any person violating the statutory requirements for admission to the bar, as provided in section 7-101, Comp. St. 1929, shall be deemed guilty of a misdemeanor. It must be borne in mind, however, that an act denounced by statute as a crime may constitute a contempt of court even if the offender could be prosecuted under a criminal statute. Comp. St. 1929, sec. 20-2123; *State v. Barlow, supra.* We have searched in vain for any statute limiting the time in which an action charging criminal contempt can be maintained. Therefore, unless there is a showing of special circumstances by which delay in instituting the suit has prejudiced the rights of the defendant, the action is not barred by lapse of time. There is no evidence in the record of any such special circumstances and the contention of the defendant is therefore without merit.

Defendant contends that the referee erred in requiring him to answer questions which tended to incriminate him or expose him to public ignominy contrary to section 20-1210, Comp. St. 1929. The record covering the point in question is as follows: "Q. What is your occupation? A. County judge of Cheyenne county, Nebraska. Q. How long have you been in that office? * * * Mr. Kepler: I make the further objection that wherein the defendant is accused of committing acts that would subject him to punishment, either fine or imprisonment, or both, in the discretion of the court, that therefore he should, by the court, be permitted to refuse to testify, because it might on other matters incriminate him or bring him and his reputation in ill repute. The referee: The objection is overruled."

The privilege of a witness at a trial of refusing to answer on the ground that the answer may tend to incriminate him or expose him to public ignominy is a personal privilege and the proper time to claim it is upon the asking of the

question which the witness fears may incriminate him if answer is made. In the case at bar the question asked clearly shows that a question of privilege was not involved. Defendant contends, however, that it was raised by a motion to strike. This the defendant cannot do. The privilege must be claimed at the time the question is asked which the witness fears might incriminate him, and if he fails to so do the privilege is waived. We find no error in the record on this point.

The referee found that defendant was guilty as charged, beyond a reasonable doubt, on counts 3, 5 and 10. Defendant contends that the evidence is insufficient to sustain the findings of the referee.

The defendant admits that he has never been licensed to practice law in the state of Nebraska. The record shows, as to count 3, that one John McCleneghan died at Sidney, Nebraska, on April 7, 1934; that shortly thereafter his widow, Rena H. McCleneghan, called at the office of this defendant relative to the probate of her husband's estate. The evidence shows that defendant undertook to handle the administration of the estate as an attorney; that he filed a petition for the probate thereof in his own court and caused notice of hearing thereon to be published; that he advised with the said Rena H. McCleneghan relative to the payment of debts and the collection of accounts of the estate and the procedure to be followed in probating the estate. This clearly constitutes the practice of law.

As to count 5, the evidence shows that one John Scharrel of Lodgepole, Nebraska, about 78 years of age, was the owner of 22 quarter-sections of land in Cheyenne county and of personal property of the value of $60,000; that, on or about February 15, 1936, the defendant conferred and advised with the children and relatives of John Scharrel relative to the mental condition of Scharrel and the advisability of having a guardian appointed for him. The evidence shows that defendant advised the appointment of a guardian; that he drew and prepared a petition for the appointment of such guardian; that he prepared an order for

hearing and notice of hearing thereon; that he caused said notice to be delivered to the sheriff for service; that he subsequently appointed a guardian and prepared a bond for said guardian and caused the same to be executed; that he approved and filed the bond he had himself prepared, although it did not comply with the requirements of the law. This evidence is clearly sufficient to sustain the finding of the referee that defendant was engaged in the practice of the law.

The evidence relating to count 10 of the information shows that one Peter J. Lenzen, on or about September 11, 1933, was the guardian of his four children; that he counseled and advised with the defendant relative to his loaning as guardian the sum of $1,194.92, belonging to his wards, to himself personally; that upon the advice and consent of this defendant such loan was made; that defendant prepared a note and mortgage from Lenzen to Lenzen as guardian and caused it to be executed; that Lenzen borrowed the money to be used in a land transaction that he was making; that defendant drew the application for the order to invest the funds of the wards and the order granting the application; that defendant advised with Lenzen on the land transaction and prepared certain papers in connection with it. Lenzen testifies that he paid Barlow $5 for his services. The referee was clearly right in holding that defendant was practicing law as charged in count 10.

The evidence sustains the charges in counts 3, 5, and 10 that defendant was practicing law without a license. The record is replete with other transactions indicating that this defendant was holding himself out to the public as willing and able to do the work of a licensed lawyer. The record shows also that he had been warned of his unlawful actions without effect. The record as a whole is convincing to us that the unlawful practice of the law by this defendant was wilfully, contumaciously and knowingly done. Under such circumstances, the defendant is in contempt of this court and subject to punishment by this court for such contemptuous acts.

In view of the fact, however, that this case was brought not only to punish this defendant for and protect the public from his contemptuous conduct, but also for a determination by this court of what constitutes the practice of law, we are inclined to be lenient in the instant case. A small fine is also warranted because of the large amount of costs that have been incurred in the case. A fine of $25 on each of the three counts on which defendant was found guilty is hereby imposed.

JUDGMENT ACCORDINGLY.

FARMERS SECURITY BANK, APPELLANT, V. CHARLES L. WOOD ET AL., APPELLEES.

271 N. W. 349

FILED FEBRUARY 11, 1937. No. 29772.

1. Execution: SALE. When lands are sold by the sheriff upon execution, the sale must be conducted substantially in the manner prescribed by the notice and in accordance with the decree in order that the rights of the parties in interest may not be prejudiced thereby.
2. ———: ———: CONFIRMATION. The court should refuse to confirm a sale of lands under execution where it is evident from the notice, return of the sheriff and the decree, upon proper objections filed by parties in interest entitled to raise the question, that the sale was not conducted substantially in the manner prescribed by the notice and in accordance with the decree.

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

F. J. Schroeder, for appellant.

H. A. Bryant, contra.

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

CHAPPELL, District Judge.

On October 12, 1931, judgment was rendered by the district court for Saunders county, Nebraska, on a mandate from this court wherein the original action was reversed

with directions. The opinion being one by the commission is not reported. The judgment on the mandate vacated and set aside a certain deed and mortgage and gave appellees herein, Lelah A. Sutton and Harry E. Sutton, a money judgment as a first lien, and appellant herein, Farmers Security Bank, a money judgment as a second lien on defendant Charles L. Wood's adjudicated interests in certain real estate in Saunders county, Nebraska. Appellant was then given the right to sell his interests and equity of redemption to satisfy the second lien. This judgment was never appealed from or modified thereafter.

In March, 1935, appellant and appellees both levied executions to satisfy their respective judgments. Notice was published as provided by law to the effect that on April 15, 1935, at 3 p. m. at the east door of the courthouse in the city of Wahoo, Nebraska, the sheriff would sell a one-third interest and the life estate of Charles L. Wood in and to the real estate to the highest bidder for cash to satisfy the executions and costs. The sale was had, and the return of the sheriff to the executions was, "I sold the same to Farmers Security Bank, Maywood, Nebraska, for the sum of $2,000 subject to lien of Lelah A. Sutton and Harry E. Sutton, it being the highest bidder therefor. Dated at Wahoo, Nebraska, this 15th day of April, 1935." Objections to motion for confirmation of sale were filed, to wit: "(1) That the bid of the judgment creditor made at said sale was made subject to the lien of these objectors, and that said sale was had for the satisfaction of the lien of the plaintiff and objectors; (2) that the lien of these objectors is prior to the lien of plaintiff, and that said sale could not be confirmed without the payment and satisfaction of the lien of these objectors." Upon hearing, the court overruled the motion to confirm and sustained the objections to confirmation because the sale was erroneous in that it should have been as advertised and sold for the satisfaction of both of the liens set forth in the executions and in accordance with the published notice, and ordered a new sale thereof. The plaintiff bank appeals. Defendant Charles L.

Wood filed no objections in the district court and is not a party to this appeal.

It would be a distinction without a difference for this court to say that the court's order was not in response to the objections filed. We think they go farther and even challenge the proposition that the sale did not conform to the decree. Appellant concedes, and the record shows, that the sale was not made in the manner prescribed by the notice, but contends that it was made in conformity with the judgment on the mandate; therefore, it should have been confirmed. There seems to be no dispute as to the facts. The transcript sets out the respective executions, motion for confirmation, objections thereto, and order setting aside the sale. The bill of exceptions contains the former opinion on appeal and the judgment on the mandate. Clearly, there remains for our determination only a question of law under admitted facts or facts of which the trial court was bound to take cognizance.

Section 20-1531, Comp. St. 1929, provides: "If the court, upon the return of any writ of execution, or order of sale for the satisfaction of which any lands and tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity to the provision of this title * * * direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale."

The power to correct errors in their own proceedings is inherent in all courts of general jurisdiction, and in the exercise of that discretion they are governed not alone by their solicitude for the rights of litigants, but also by the considerations of justice to themselves as instruments provided for the impartial administration of the law. *Baldwin v. Burt*, 54 Neb. 287, 74 N. W. 594. The court would be authorized to confirm the sale only after having carefully examined the proceedings of the officer and being satisfied that such sale was in all respects made in conformity with the law. *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.*, 54 Neb. 228, 74 N. W. 583; *Roberts v. Robin-*

son, 49 Neb. 717, 68 N. W. 1035. If the sale is set aside, it must be because of some vice or irregularity in the proceedings either appearing on the face of the record or disclosed by proper proceedings. The statute makes it the duty of the court in every case upon execution to see that it appears *prima facie* that the process of the law has not been abused by the ministerial officer charged with its execution. *Bachle v. Webb,* 11 Neb. 423, 9 N. W. 473. It must be made to affirmatively appear that all statutory provisions have been fully complied with or the sale will be set aside. The only way the officer having the order of sale can be heard to speak is through his return which must affirmatively show that he complied with the law. *Gundry v. Brown,* 1 Neb. (Unof.) 877, 96 N. W. 610; *Nye v. Rogers,* 55 Neb. 353, 75 N. W. 854. When there is some irregularity in the sale, or when the sale is conducted in violation of the decree or in disregard of the rights and interests of some of the parties, it becomes the duty of the court on settled principles to vacate the sale. *Omaha Loan & Building Ass'n v. Hendee,* 77 Neb. 12, 108 N. W. 190. It is the rule that such sale must be made in accordance with the decree. *Omaha Loan & Building Ass'n v. Hendee, supra; Nebraska Loan & Trust Co. v. Hamer,* 40 Neb. 281, 58 N. W. 695; *Hooper v. Castetter,* 45 Neb. 67, 63 N. W. 135.

Appellant contends that in the judgment on the mandate appellees had a mortgage which they must foreclose and which could not be satisfied by execution because the court used the words "equity of redemption." The answer to this is that the judgment obtained by appellees is plainly a money judgment which the equity court had the power to give (*Tomsik v. Tomsik,* 78 Neb. 103, 110 N. W. 674; *Knotts v. Crossly,* 1 Neb. (Unof.) 730, 95 N. W. 848) and for which execution may be awarded. *Cochran v. Cochran,* 1 Neb. (Unof.) 508, 95 N. W. 778. The equity of redemption or right of redemption is the interest of defendant Charles L. Wood remaining after payment of appellees' judgment lien. Comp. St. 1929, sec. 20-1530. This interest appellant had the right to sell upon execution and satisfy

its lien. The law is well settled that inquiry cannot be made into the merits of the judgment on the mandate in this proceeding. *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900, 65 N. W. 1059; *Hoover v. Hale*, 56 Neb. 67, 76 N. W. 457; 23 C. J. 663.

We conclude that the notice conforms to the decree, but that the sale conforms to neither. The object of a notice of sale is to inform the public of the nature and conditions of the property to be sold and of the time, place and terms of the sale. They are given for the purpose of securing bidders and to prevent a sacrifice of the property. Notice is requisite by reason of positive statutory enactment, section 20-1529, Comp. St. 1929, and by reason of the policy of the law. 10 R. C. L. 1291, sec. 87. If the sale must conform to the decree, then the notice must conform to the decree. *A fortiori*, the sale must conform to both. When lands are sold by the sheriff upon execution, the sale must be conducted substantially in the manner prescribed by the notice and in accordance with the decree in order that the rights of the parties in interest may not be prejudiced thereby. The court should refuse to confirm a sale of lands under execution where it is evident from the notice, return of the sheriff and the decree, upon proper objections filed by parties in interest entitled to raise the question, that the sale was not conducted substantially in the manner prescribed by the notice and in accordance with the decree.

Appellees having a first lien and an execution for the satisfaction thereof were entitled to have the property sold to satisfy the same, and appellant was entitled to have any interest remaining thereafter sold for the purpose of satisfying its lien under its execution. In other words, the property should have been sold on the executions as provided in the notice and decree in order that appellees could first be paid and appellant might apply the amount remaining upon its judgment.

The judgment of the district court was right and it is

AFFIRMED.

PAINE, J., dissents.

FRED W. LENNON ET AL., APPELLANTS, V. ED T. KEARNEY ET AL., APPELLEES.

271 N. W. 351

FILED FEBRUARY 11, 1937. No. 29813.

1. **Attorney and Client.** Where an attorney appears in an action and purports to represent one of the parties, the presumption is that he has authority to so act.
2. ———. The burden of proof of want of authority of an attorney appearing in an action is upon the party asserting the same.
3. **Quieting Title:** ADVERSE POSSESSION. Where the court has quieted title to land in plaintiffs against claims of defendants, the subsequent possession by the defendants, without reentry, is presumed to be in subordination to plaintiffs' title, unless express notice is given that defendants are claiming adversely.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Affirmed in part and reversed in part, with directions.*

William P. Warner, Sidney T. Frum and *Robert B. Pike,* for appellants.

W. V. Steuteville, contra.

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

KROGER, District Judge.

This is an action to enjoin repeated trespasses upon and to quiet the title to certain lands in Dakota county, Nebraska. The land involved is a tract of about 35 acres described as the north 25 acres of the south half of the southeast quarter and 10 acres off of the south side of the north half of the southeast quarter, all in section 28, township 29, range 8, east of the sixth principal meridian in Dakota county, Nebraska, as shown by Hall's survey and subdivision of Sioux Point cut-off.

Plaintiffs' claim to said disputed tract is based upon conveyances from Woodlawn Trust & Savings Bank and a decree quieting title to the lands in dispute in plaintiff, entered by the district court for Dakota county on Septem-

ber 8, 1920, in an action in which plaintiffs' predecessor in title, Woodlawn Trust & Savings Bank, was plaintiff, and the defendant Ed T. Kearney was one of the defendants.

Defendants claim the lands in dispute as accretion to riparian land owned by them, and further base their claim on adverse possession for more than 20 years last past, and deny that the decree of the district court for Dakota county entered September 8, 1920, is valid and binding for the reason that defendant Ed T. Kearney had filed an answer in said action and the decree was entered without a trial or evidence being taken and without notice to him, and that the attorney purporting to act for him and consenting to such decree was not authorized to act for him and had no authority to appear in said action on behalf of defendant Ed T. Kearney, and that defendant had no notice or knowledge that decree had been entered in said action until just previous to the filing of the present action; and for further claim allege that they have been in adverse possession of said premises for more than 10 years since the entry of the decree of September 8, 1920, and that their title has now become absolute and ask that their title be quieted in them.

The case was tried to the court and a decree was entered quieting title to the north 25 acres of the south half of the southeast quarter of section 28 in the defendants and quieting the title to 10 acres off the south side of the north half of the southeast quarter in the plaintiffs. From this decree plaintiffs prosecute this appeal and defendants have filed a cross-appeal.

The evidence discloses that defendants trace their title to lots one and two in the southeast quarter of section 28, township 29, range 8, east of the sixth principal meridian, to patents issued by the United States government to their predecessors in title, and that, at the time of the government survey, said lots one and two were bounded on the south by the south section line of said section 28, and on the north by the south bank of the Missouri river, and that said lots at that time contained 54.70 acres. It also appears

that, due to erosion by the Missouri river, said lots one and two were eroded until they contained less than 10 acres; that later, as the result of an evulsion, the Missouri river left its bed and cut a new channel, approximately two miles north of the premises in controversy, and forming what was known as Cut-off lake, which occupied the most southerly portion of the former river bed in said section 28; that later by reason of certain drainage ditches constructed in that neighborhood and certain floods occurring in that territory, Cut-off lake and adjacent low lands to the north were gradually filled with silt, so that when, in the year 1931, an extension of the drainage ditch from Cut-off lake to the present Missouri river channel was constructed, the land in controversy became suitable for agricultural purposes and consequently valuable.

It appears from the evidence that, as early as 1914, efforts were made to make some use of the disputed tract, and defendants' then tenant testified that he had constructed a fence along the approximate line which defendants now contend forms the north boundary of their property, but, in constructing such fence, it was necessary to use a boat in crossing a part of the tract and that the wires were fastened to trees in some places because of water standing on the land. Again, in 1916, another tenant of defendants testified that he had erected a fence along the line claimed by defendants as the north line of their premises.

The first question this court is called upon to determine is the validity of the decree entered September 8, 1920, because, if that decree is valid, it will dispose of any claims of defendants' adverse possession prior to that date.

Defendants' attack on said decree is based on the claim that the attorney purporting to represent them in that action was not authorized to act for them and that they had no knowledge of the entry of such decree.

The attorney in question was called as a witness by plaintiffs and testified positively that he had consulted with defendant Ed T. Kearney prior to defendant's filing his answer, and that later it became necessary to either try

the case or settle it and that he again consulted with defendant, and that defendant was fully advised of the decree both before and after its entry and that in the obtaining of said decree he acted as attorney for defendant Kearney and one other defendant.

"Where an attorney appears in a cause, the presumption is that he has authority and that presumption continues until the want of such authority is established by proof." *Vorce v. Page,* 28 Neb. 294, 44 N. W. 452. And, the burden of proof of such want of authority is upon the party asserting the same. *Connell v. Galligher,* 36 Neb. 749, 55 N. W. 229.

We have carefully examined the evidence in this case and conclude that the defendants have failed to sustain the burden of proof resting upon them, to show that the attorney purporting to act for them was not authorized to do so. It necessarily follows that the decree of September 8, 1920, quieting title in the Woodlawn Trust & Savings Bank to the premises in controversy, was binding upon the defendants in this action.

The defendants, however, contend that, since said decree was entered, they have been in open, notorious, continuous, exclusive and adverse possession of said premises and that their title thereto is now absolute notwithstanding said decree.

The evidence as to adverse possession by defendants since the entry of the decree in 1920 is not satisfactory. Prior to 1929 there was no such occupancy as would be notice to the plaintiffs or their predecessors in title of an intention to claim adversely.

Plaintiffs called, as their witnesses, a number of defendants' tenants who had occupied said premises between 1923 and 1929, and they were all agreed that the only fence along the north line of the land claimed by defendants was a strip of fence, between 20 and 30 rods in length, beginning near the northeast corner of the tract in controversy and running in a westerly direction. From the west end of this strip, the fence at one time during said period extended in a

southerly direction to inclose some cultivated land which the tenant on defendants' land was farming. It also appears from the testimony of these tenants that between 1923 and 1927 there were only between three and seven acres of cultivated land on the disputed tract which was farmed by them. If the fence constructed by defendants' tenants in 1914 and 1916 across the entire north line was still in existence, it had fallen into such a state of disrepair that the subsequent tenants were not aware of its existence. The evidence is quite conclusive that, subsequent to the decree of 1920, no effort was made to maintain a fence for more than 30 rods along the disputed north line and such fence as was maintained was for the purpose of keeping stock off the cultivated lands of defendants' tenants, which arrangement was apparently by agreement between tenants on lands owned by plaintiffs' predecessors in title lying to the north of the disputed tract and the tenants on defendants' lands lying to the south of the disputed tract.

In the case of *Root v. Woolworth,* 150 U. S. 401, appealed to the United States supreme court from the circuit court of the United States for the district of Nebraska, it was held that, where the court has decreed that plaintiff has title to the land as against the defendant and it appears from the proof that the defendant did not reenter after such decree, the statute of limitations does not begin to run and he could not assert adverse possession without bringing express notice to the plaintiff, or his vendees, that he was claiming adversely; that without such notice the length of time intervening between the decree and the institution of the present suit would give him no better right than he previously possessed and his holding possession would be treated as in subordination to the title of the landowner. To the same effect is the case of *Abrams v. Taintor,* 76 Neb. 109, 107 N. W. 225, in which the case of *Root v. Woolworth, supra,* is referred to and followed.

In the case at bar there is no evidence of a reentry and no evidence that the defendants at any time gave notice to the plaintiffs or their predecessor in title of their intention

to occupy said premises adversely after the decree of September 8, 1920. On the contrary, the weight of the evidence would indicate a contrary intention prior to 1929. It necessarily follows that the trial court was in error in quieting title to the north 25 acres of the south half of the southeast quarter of section 28, township 29, range 8, east of the sixth principal meridian, in the defendants.

The judgment of the district court is affirmed in so far as it quieted the title to the ten acres in the plaintiffs, and reversed in all other respects, and remanded, with directions to enter decree in conformity with this opinion.

AFFIRMED IN PART AND REVERSED IN PART.

GEORGE A. FISHER, APPELLANT, V. NATIONAL MORTGAGE LOAN COMPANY ET AL., APPELLEES.

271 N. W. 433

FILED FEBRUARY 11, 1937. No. 29728.

1. **Corporations**: OFFICERS. An officer or director of a corporation occupies a fiduciary relation towards the corporation and its stockholders.
2. ———: ———. An officer or director of a corporation will not be permitted without authority to divert corporate property to the payment or securing of a debt of the corporation to himself.
3. ———: LIENS. A lien on the property of a corporation can only be fixed by an agreement between the corporation and the lien-holder or by some fixed rule of law.
4. ———: ———. An officer or director of a corporation cannot acquire a lien on the property of a corporation as a consequence of his own breach of duty.
5. **Judgment**. When a defendant, after the institution of a suit against him, concedes at the trial a portion of the relief demanded against him, such concession does not prevent the entering of a judgment in favor of the plaintiff.
6. **Corporations**: RECEIVERS. A receiver may be appointed for a solvent corporation when there is gross mismanagement or other situation calling for equitable relief.
7. ———: ———. Evidence examined and *held* not sufficient to require the appointment of a receiver for the defendant corporation.

8. Evidence examined and *held* that the plaintiff brought the action in good faith to protect the interest of the corporation.
9. Corporations: ACTION. When an individual stockholder of a corporation makes a demand of the directors of the corporation to take immediate action for the recovery of property converted by an officer and director of the corporation, and the directors refuse or neglect to do so, it is not necessary for such stockholder, before he brings a representative suit, in the interest of all stockholders and the corporation, against such officer, corporation and its directors, to request the stockholders that they, as a body, bring suit, when such request would be useless or unavailing.

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

Stewart, Stewart & Whitworth, Bernard S. Gradwohl and *Charles B. Paine,* for appellant.

Peterson & Devoe, Meredith K. Nelson and *E. S. Nickerson, contra.*

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

MUNDAY, District Judge.

Appellant, George A. Fisher, brought this action in equity as a stockholder in the National Mortgage Loan Company, a corporation, upon behalf of himself and all other stockholders similarly situated, against said corporation and John C. Hartigan, Albert F. Ackerman, Frank Simodynes, Otto H. Brockman, William Mueller and P. A. Bindernagle, its directors. In his petition he alleged in substance that the plaintiff for many years had been the owner of 400 shares of stock in said corporation; that the defendants John C. Hartigan and Albert F. Ackerman have been, for more than 10 years last past, president and secretary, respectively, and managing officers of said corporation; that said defendants Hartigan and Ackerman for many years last past have grossly mismanaged the business of the corporation and have wrongfully and fraudulently disposed of

its property and assets; that defendant Hartigan has at all times been an attorney and devoted only a very small portion of his time to the business of the corporation, but caused the corporation to pay him an exhorbitant salary of several hundred dollars a month for over 10 years; that the company has not been in active business for many years, and its management only required a small portion of defendant Ackerman's time as secretary, and that he was paid an exhorbitant salary for over 10 years last past; that the stockholders of the company voted to liquidate the business of the company in April, 1930, and that said officers and directors have not complied with the stockholders' vote; that on or about January 2, 1934, defendant Hartigan as such president and attorney of the corporation, and with approval of defendant Ackerman, wrongfully and unlawfully and without right or authority, took from the assets of the corporation and converted to his own use $10,000 in United States government bonds and $20,000 in Lincoln Joint Stock Land Bank bonds of the par value of $20,000, and wrongfully claimed he was entitled to said bonds for services rendered said corporation; that on April 16, 1934, plaintiff caused a written demand to be made on the defendant Hartigan to return said bonds to the defendant company and at the same time caused a written demand on each and all of the directors of the company to require defendant Hartigan to return said bonds to the corporation, but the defendants and each of them have failed to comply with the demand; that said directors and officers have held no directors' meeting for more than four years and said directors have wrongfully and negligently permitted the aforesaid mismanagement of the defendant company by its officers; that the assets of the company are largely real estate of value of about 75 to 100 thousand dollars; that plaintiff has no adequate remedy at law. Plaintiff prayed that the defendant Hartigan be required to return said bonds or the proceeds thereof to said corporation; that defendants Hartigan and Ackerman be required to account to the company for mismanagement and

for excessive salaries; that a trust company be appointed to liquidate the assets of the company and that the defendant company be required to pay the plaintiff a reasonable attorney's fee and costs of the action and for general equitable relief.

The joint answer of the president, secretary, the corporation, and all directors save one, admitted that the company was a corporation; that the parties named as directors were such; that liquidation was voted in 1930, but owing to adverse conditions it could not be carried out without sacrifice, and that the same will be completed when in the judgment of the board of directors the same can be done without unnecessary loss; that the plaintiff does not bring this action in good faith, but on behalf of a judgment creditor of said corporation named Baxter to assist said creditor in the collection of an unsuperseded judgment in the sum of $72,000, and denied the other allegations of the petition.

The defendant Mueller answered and alleged substantially the same facts as the other defendants, except the allegations as to the details of the work of liquidation of the company, which allegations he denied.

On March 12, 1935, the defendant Hartigan filed a separate and amended answer in which, in addition to the allegations of his original answer, he alleged that for many years last past he had been attorney for said corporation and its predecessor and had represented it in matters connected with its business, and that for the last 13 years continuously until the present time has acted as legal adviser of the defendant corporation and has conducted the defense of many cases in Nebraska and Colorado and that one case was then pending in the supreme court of Nebraska; that he employed attorneys for said case in the supreme court, the judgment in which was not superseded, and for the purpose of securing payment to his attorneys in said case in the supreme court and himself of attorneys' fees earned and to be earned in the trial and in the ultimate disposition of said cause, and for the purpose of

procuring payment to himself of attorney's fees which he had theretofore earned for legal services rendered to said company as above set out and for money expended by him in the preparation and trial of said case and his expenses while so employed as attorney, there was turned over to him by defendant corporation for said purposes the bonds belonging to said corporation in the value of $24,800; that the reasonable value of the services rendered by the defendant and his said attorneys exceeds $30,000; that from the proceeds of said bonds he had paid out $500 to his said attorneys, on attorneys' fees, $1,200 in preparing said case in the supreme court, $250 in preparing the appeal of said case, and $3,000 to the company for operating expenses of its business, $3,500 in cash as security for appeal bond, and $4,000 to himself for salary.

For reply plaintiff filed a general denial, also alleging payment for all of the past services of the defendant Hartigan; and the statute of limitations was pleaded as to said claims and that the defendant Hartigan was estopped to claim that he took said bonds as security. The defendant Mueller filed a reply in the nature of a general denial, but alleging that defendant Hartigan was not to collect for any legal services other than his salary as president, and also pleaded the statute of limitations.

There is not much dispute in the evidence as to the principal facts. The record is quite voluminous.

On the facts material to this appeal, the plaintiff, Fisher, testified that he was a farmer living near Malcolm, Nebraska, and owned 400 shares of stock in the corporation acquired in 1917; that he paid $10,000 for this stock; that it was determined by the stockholders in 1930 that the assets of the corporation were to be liquidated as rapidly as possible; that he had called at the office of the corporation many times since liquidation was voted and it was closed and locked even during the middle of the day; that after he had signed the agreement to bring this suit the secretary told him that Baxter had a judgment against the corporation, and that was the first he knew about it and

the first he knew that his present attorneys represented Baxter; that he went to see his present attorneys about bringing this suit at the suggestion of another, and that he signed an agreement that he would not be liable for attorneys' fees and providing his attorneys would receive the fees allowed by the court. This agreement was in evidence, but did not provide whether or not the plaintiff was to pay costs. Plaintiff further testified that he had talked to several stockholders about bringing the suit and that he had tried to get stockholders' and directors' meetings several times without avail during the last four years. On rebuttal plaintiff was not permitted to testify as to his motives in bringing the suit. Plaintiff further testified that he attempted at various times to get a financial statement of the company from the secretary but could not secure any and had not received any such statements for four years; that the secretary had stated directors' and stockholders' meetings were not necessary.

The defendant Ackerman, secretary of the corporation, testified in part that at the time the defendant Hartigan, president of the corporation, took the $10,000 in Liberty bonds, the president told him he was taking the bonds as security for payment of fees owed him in the past for expenses and services to the company and to secure him and the attorneys he was employing in the Baxter case; that he had charged off the books of the company the Joint Stock Land Bank bonds of the par value of $20,000 as a loss, but did so under a misunderstanding as to the president's directions; that he understood the president held the bonds as security for claims; that he as secretary devoted all his time to the affairs of the company and that he had been secretary since 1925; that since 1925 the corporation had been in no active business other than the collection of rents from its various properties and income from stocks and bonds that it held; that the assets of the corporation are now comprised entirely of real estate, being principally farms; that the president of the corporation got the Liberty bonds and the Joint Stock Land Bank bonds

by taking them out of the company's safety deposit box at the trust company in Lincoln, and that he and the president each had a key to said box; that he did not know until later that the bonds were gone; that no assignment was given to the president nor was there any bill of sale or transfer that he knew about; that the president gave him $2,100 in December, 1934, and $900 in February, 1935, as salary, and that the total of these two amounts was still carried on the books of the company as a liability from the company to the president; that all the farms of the corporation are leased and the company has local agents to look after them and pays them separately; that the company has not sent out annual statements to the stockholders since 1930.

President Hartigan testified in part that he became connected with the corporation in 1922 and has been director since that time; that he became president in 1923 and drew $300 a month until 1924 as salary and expenses, and from 1924 to 1925 he drew $250 a month, and since that time he drew $200 a month; that the work had taken all of his time, and during the last two years he probably had devoted about a quarter of his time during that time to the corporation; that he withheld the land from the market and delayed ultimate liquidation of the company until it could be sold without sacrifice, and that as real estate values had gone down there was no possibility of turning the same without a loss; that he handled cases during 1923 to 1926 for the company. Evidence was then admitted by the court over objection relating to the labor of the president on many cases for the purpose of showing the motive of the president. The president further stated that he took the bonds from the safety deposit box and that he sold the United States bonds at par and the Joint Stock Land Bank bonds at 73, making a total of $24,800; that he advanced $3,000 to the secretary as salary and expenses; that he had deposited $3,500 with a surety company in connection with a bond in the Baxter case, which would be returned; that he paid himself $4,000 salary; that he had paid out other

amounts for attorneys' fees and expenses in connection with the Baxter litigation; that he bought land in Kansas with $15,000 of the proceeds from the bonds and took title in his own name; that he did not take up with the directors about taking the bonds before taking them; that there had been no stockholders' meeting for five years; that he had made no disclosures to the stockholders for five years nor had a directors' meeting for five years; nor had any statement been sent to the stockholders for about five years; that he had no agreement with the company as to any lien; that nothing was taken up with the board of directors and no agreement of any kind was made with them, and that he did not take up with any one connected with the company the use of the bonds respecting his claim.

The president further testified that the declaration of trust as to the Kansas land was executed March 12, 1935, after trial had commenced; that about $5,250 of his claim was for a lien based on services rendered in previously handled cases; that the grounds of his claim were for services rendered by himself and his attorneys in the Baxter litigation; that there had been no agreement for fees in this litigation, but that in his opinion the fee should be $5,000 for himself and $5,000 for his attorneys in the event he won the Baxter case, and otherwise $3,000 each; that he had never rendered the company a statement for his services nor were such items shown on the books of the company; that his principal business with the company was advice and opinion; that he had also paid his own traveling expenses out of the proceeds of the sale of said bonds; that he took said bonds to protect the assets of the company so that they would not be reached by the Baxter judgment and so that he could pay his attorneys and reimburse himself; that he had no thought of getting it for himself and that he expected to submit it to the stockholders before final determination.

The decree of the district court, omitting the formal parts, is: "All claims of Hartigan and others for attorneys' fees and expenses for and in behalf of the National Mort-

gage Company being question not involved in this action should be first submitted by the directors or stockholders. The reversal of the judgment by the supreme court in the Baxter case removes all doubt of the solvency of the company, and this court, in this action, is without authority to appoint either a receiver or trustee for said company. As to the land in Kansas, title to which defendant Hartigan took in his own name, is in fact, in Hartigan's declaration, held in trust for the benefit of the mortgage company, and to which Hartigan has filed a declaration of such trust in the county in which the same is located, makes it unnecessary for this court to enter any order therefor. Wherefore, the court finds generally in favor of the defendants and against the plaintiff, and the petition is dismissed at plaintiff's costs."

The appellant contends that there should be judgment in favor of the corporation in the sum of $24,800 for said bonds converted; that an officer may not without specific authority divert his corporation's property to the payment or securing of a debt to himself; that a finding against appellee cannot be reviewed in the absence of a cross-appeal; that a judgment must be entered in favor of the plaintiff where the figures of the defendant show liability; that after the institution of a suit, when the defendant concedes a portion of the relief demanded and changes his position, such fact does not prevent the court but requires the entry of a judgment in favor of the plaintiff; that judgment should be entered against the defendant's president and secretary for the excessive salaries taken by them while refusing to carry out the mandate of the stockholders to liquidate the corporation; that the court should appoint an agent under directions of the court to carry out the liquidation voted by the stockholders.

This case is principally the application of corporation law to the facts in evidence therein. An officer or director of a corporation occupies a fiduciary relation towards the corporation and its stockholders. *Howell v. Poff,* 122 Neb. 793, 241 N. W. 548; *Bodie v. Robertson,* 113 Neb. 408, 203

N. W. 590; *Miller v. Brown*, 1 Neb. (Unof.) 754, 95 N. W. 797; *Lowe v. Copeland*, 125 Cal. App. 315, 13 Pac. (2d) 522.

An officer or director of a corporation is not permitted without authority to divert corporation property to the payment of or securing a debt to himself. *Howell v. Poff, supra; Camden Land Co. v. Lewis*, 101 Me. 78, 63 Atl. 523; *Security Bank v. Kingsland*, 5 N. Dak. 263, 65 N. W. 697; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, 26 N. W. 184; 7 R. C. L. 479, sec. 461.

In the *Haywood* case the rule is thus stated: "Directors, officers, and agents, and other like trustees, cannot mortgage or convey to themselves any more than one can contract with himself. The idea that the same persons constitute different identities of themselves by being called directors or officers of a corporation, so that, as directors or officers, they can convey or mortgage to or consent with themselves as private persons, is in violation of common sense. *In re Taylor Orphan Asylum*, 36 Wis. 534, 552, and cases above cited. See 1 Perry on Trusts, sec. 207, and Morawetz on Priv. Corp., sec. 245; *Walworth County Bank v. Farmers L. & T. Co.*, 16 Wis. *629; *Cumberland C. & I. Co. v. Sherman*, 30 Barb. (N. Y.) 553."

In the instant case, it is not a question of the justness or validity of the claims of the president. It is the law, as stated by the authorities, that an officer or director of a corporation cannot take the property of the corporation into his own hands to pay or secure a debt due himself from the corporation without authorization from the proper corporate authority.

A lien on the property of the defendant corporation could only be fixed by agreement between the corporation and the president as claimant of the lien, or by some fixed rule of law. *Perry v. Neel*, 126 Neb. 106, 252 N. W. 812; *General Motors Acceptance Corporation v. Sutherland*, 122 Neb. 720, 241 N. W. 281; 17 R. C. L. 597, sec. 3.

It is also well established by all modern authorities that one cannot acquire a lien on property of another or of a

corporation as a consequence of his own breach of duty. 37 C. J. 313, and cases cited.

There is no cross-appeal by appellees. It is a well-recognized rule of law in this state that a finding against an appellee will not be considered in the absence of a cross-appeal. *Western Brick & Supply Co. v. Mid-West Construction Co.*, 101 Neb. 254, 162 N. W. 635; *In re Estate of House*, 129 Neb. 838, 263 N. W. 389. In the instant case the trial court stated in the decree that all claims for attorneys' fees and other expenses should be submitted to the directors or stockholders.

After the institution of this suit and apparently on the first day of the trial the defendant Hartigan executed a declaration of trust which provided that defendant Hartigan held the real estate in trust for the defendant corporation, but said real estate was subject to a lien for payment of attorneys' fees to himself and others. This deed of trust is mentioned in the decree of the district court, and its execution and delivery is a concession of a portion of the relief demanded by plaintiff. Such a declaration of trust did not prevent judgment for plaintiff. No action was ever taken by the corporation creating such a lien and its president had no authority to summarily take assets of the corporation and invest them in real estate to secure a lien of himself or others. Also the corporation had a right to direct in what assets its funds should be invested; not an officer and director of the corporation without its authority.

The supreme court of New Jersey in the case of *Fougeray v. Cord*, 50 N. J. Eq. 185, 24 Atl. 499, states this proposition well. The defendants, corporate officers, took certain assets of the corporation in payment of a claimed indebtedness of the corporation to themselves. The court said: "It seems to me that it would be a reproach to the administration of justice to doubt the power and duty of the court in such a case. It is similar to that of a trustee who holds certificates of stock in his name as trustee lodged in a strong box belonging to the trust estate, and then deliberately has

them transferred to his individual name, and the certificates lodged in his individual private strong box, and, when called to account for his breach of trust, retransfers the certificate to his name as trustee and lodges the new certificates in the strong box belonging to the estate, and then coolly says to the court that 'the breach of trust is made good; nothing is lost, and I am entitled to retain the key of the strong box and to have the certificate of stock continue to stand in my name as trustee.' It is well settled that the officers of a corporation occupy towards its stockholders the relation of trustee and *cestui que trust*, and on that broad ground are liable to be called upon to account for their conduct in this court. Morawetz, Corp., sec. 381; Cook, Stock, sec. 648. But if this ground is not, strictly speaking, true, I agree with Mr. Cook that reliance may well be placed upon the broad principle laid down by Lord Hardwicke, one hundred and fifty years ago, in *Sir Robert Sutton's Case*, a case similar to the one now before the court, reported in 2 Atk. 400. At p. 406 he says: 'The tribunals in this Kingdom are wisely formed both of courts of law and equity, and so are the tribunals of most other nations, and for this reason there can be no injury but there must be a remedy in all or some of them, and therefore I will never determine that frauds of this kind are out of the reach of courts of law or equity, for an intolerable grievance would follow from such a determination.' "

When directors serve as officers of a corporation they are liable for return of their salaries in excess of reasonable compensation. But in the instant case the stockholders voted to liquidate the corporation and no change was made or suggested in the salaries of the president or secretary, and it is presumed that such salaries were not unreasonable. At least there is not sufficient showing that such salaries were unreasonable.

A receiver may be appointed for a solvent corporation where there is gross mismanagament or other situation calling for equitable relief. *Howell v. Poff, supra.* The defendant Hartigan and his attorneys undoubtedly did good serv-

ice in defending the Baxter suit. Still the corporation is solvent and all claims should be presented to the corporation for consideration and allowance. We think the facts in the record before us hardly justify the appointment of a liquidating agent or receiver. The defendant Hartigan, as president of the corporation, was undoubtedly under a great burden at the time of the Baxter judgment and suit against the company. Since that case has been disposed of favorably to the defendant corporation, the corporation and directors should have an opportunity to fairly and legally liquidate the company, or at least attempt to do so, until otherwise ordered by proper corporate or other authority. The returning to the corporation, as ordered by this court, of the proceeds from the assets so taken by the defendant Hartigan, leaves all ordinary business and *intra vires* matters of the corporation up to future action by the corporation.

Appellees admit in their brief in the main practically all of these legal propositions, but they seriously contend that they are not applicable in the instant case; that a court of equity should not grant relief to the plaintiff in a stockholders' suit, unless the plaintiff is in good faith the person urging the suit and brings the action in good faith to protect the interest of all the stockholders and the corporation. The appellees contend that the plaintiff was acting in the interest of Baxter in the collection of the judgment; that when the plaintiff signed an agreement that he was not to pay any attorneys' fees, coupled with the fact that the costs had not been paid, it indicated that he was not the real party in interest. Appellees further contend that, were it not for the insistence of courts on such good faith, the privilege of bringing stockholders' suits would be subject to grave abuse, and that which was intended as an instrument of justice would become an instrument of ruthless competition by which parties would crush their weaker competitors; that this rule has been carried so far that a stockholder will not be permitted to bring such suit unless he bears the risk of litigation. Many authorities are cited to these propositions.

We think plaintiff does not come within this rule. He owned 400 shares of stock in the corporation for which he had paid $10,000 and was vitally interested in the conduct of the corporation. When he employed his attorneys in this suit he did not know of the Baxter judgment, nor that his present attorneys had represented Baxter in that suit. He had made many trips to the office of the corporation to get information and quite often found no one there and had sought to get statements of the business of the corporation, and the secretary of the corporation told him that meetings of the stockholders and directors were not necessary. In fact, he had had no success in getting any information as to the business of the corporation. The most that can be said was that he made an agreement whereby his present attorneys were to receive any allowance made by the court for attorneys' fees in this action and that he should not be personally liable for the same. No agreement was made that he should not pay costs. Plaintiff attempted to testify in rebuttal as to his purpose in bringing this suit, but this testimony was excluded on the objection of defendants.

The appellees also maintain that the judgment of the district court should be sustained because a stockholder is not entitled to bring a representative suit on behalf of the corporation and all the stockholders until he has made a reasonable effort to get action by the stockholders as a body, unless he shows such effort would be futile. They claim that when the plaintiff proved he had made demand upon the board of directors for action to secure the return of the aforesaid bonds, and that the directors refused or neglected to do so, such demand and refusal was not enough, and that plaintiff should have made a showing that he had made an effort to obtain a meeting and action by the stockholders as a body for the return of such bonds; also, that the plaintiff did not allege or show any reason why such effort on his part to get a stockholders' meeting would be futile and that there is no allegation that the defendants controlled a majority of the stock of the corporation. Ap-

pellees also cite many authorities to this proposition. The cases seem to hold that there must be a demand that the stockholders as a body sue the directors before an individual stockholder may sue for himself or others so situated for the benefit of the corporation. There is one exception to this general rule, i. e., unless such request, for any reason, would be useless or unavailing. This exception seems to be recognized in most every case cited. The theory of the rule, and the exception, seems to be that the individual stockholder must exhaust all means of redress within the corporation itself before bringing such an action. Some examples wherein such a demand for action by the body of the stockholders is not necessary are where it is made clear that such demand would meet refusal, or that the litigation following would naturally be under control of persons opposed to success, or where the governing body is the wrong-doer, or where the appeal to the stockholders would be unavailing for want of time or for lack of authority to act or other cause, or where the corporation has gone out of existence. In the instant case there had been no directors' meeting for about five years and the president and secretary of the corporation had been its managers during said time. There had been no stockholders' meeting for several years and the plaintiff could not get information as to the condition of the company. He could not secure a financial report of the company and was informed by the secretary that directors' meetings were not necessary. The directors seem to be in accord with the president and the secretary. All of them but one joined in an answer with its president and corporation in this suit. There is no statutory restriction on the powers of the directors to conduct the ordinary business of a corporation similar to the one in the instant case. There is nothing in the record in this case to indicate that the board of directors does not have power to conduct the ordinary business of the corporation. Therefore, we assume the board of directors had such power. 2 Thompson, Corporations (2d ed.) secs. 1065, 1066. Unless there is a restriction by

statute, constitution or by-laws, the management of the ordinary business is vested in the board of directors and cannot be exercised by the stockholders. The authority of stockholders is exhausted in this respect when directors are elected. Nor have the stockholders a right to restrict the control or action of the directors in such matters. 2 Thompson, Corporations (2d ed.) secs. 1178, 1184. There are some matters in which the stockholders have authority to act, but it is not the ordinary business matters. The board of directors is the governing body. It was to this body the plaintiff was required to go. Plaintiff made his demand on the directors for action, but it was of no avail. It was disregarded. Plaintiff believed that the president as an officer and director of the company had wrongfully misappropriated and converted the funds of the corporation. As shown, he was the owner of a substantial amount of stock and had been such for years. Plaintiff could not have been expected to do more than he did to get corporate action. The body of the stockholders had no authority to ratify over the objection of a single stockholder most of the acts charged against the president. 4 Thompson, Corporations (2d ed.) sec. 4484; 3 Cook, Corporations (8th ed.) sec. 669. Most of the acts charged were *ultra vires,* as far as the corporation is concerned, as well as beyond the power of the president. These acts were not mere ordinary business transactions which could be ratified by the board of directors or the stockholders, even had the stockholders been empowered to direct the ordinary business transactions of the corporation. It, therefore, would have been useless and unavailing for the plaintiff to have made a demand on the stockholders, if he could have induced them to hold a meeting, under the facts and circumstances set out above. We think that plaintiff made a sufficient demand. The case of *Continental Securities Co. v. Belmont,* 206 N. Y. 7, 99 N. E. 138, 51 L. R. A. n. s. 112, is a case often cited as a leading authority on this question. The following therefrom is pertinent: "In any case where action is taken by stockholders confirming and ratifying a fraud

and misapplication of the funds of the corporation by the directors or others the action is binding only by way of estoppel upon such stockholders as vote in favor of such approval. Morawetz on Corporations (2d ed.) sec. 625."

See *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374, 59 N. W. 838; *Folts v. Globe Life Ins. Co.*, 117 Neb. 723, 223 N. W. 797; 7 R. C. L. 319, sec. 296; *Reed v. Hollingsworth*, 157 Ia. 94, 135 N. W. 37; *Wilcox v. Bickel*, 11 Neb. 154, 8 N. W. 436; *Brewer v. Boston Theatre*, 104 Mass. 378.

Appellees also maintain that a stockholder is not entitled to bring a stockholders' suit unless the refusal of the directors and stockholders to take action was unlawful and not a proper exercise of the discretion vested in them. They contend that there may be valid reasons for the directors not to bring the suit, even where there is a valid cause of action where the litigation may involve more expense than it would be worth and there may be doubt as to whether it may be successful; that it may be a better business policy to refrain from suits in order to preserve certain relations with other parties, or to recover judgments on the cause of action may only invite ruin to the corporation; that the directors had refrained from bringing suit against the president for sound business reasons because the directors and officers knew that the president had taken the bonds in good faith, and that if the corporation sued the president Baxter would immediately levy on the proceeds. Also they maintained that such suit was not permitted by an individual stockholder unless the acts amounted to actual or constructive fraud; that the acts charged were only voidable and not void. To sustain these propositions the appellees again cite many authorities. However, in the instant case, plaintiff alleged and proved misapplication and wrongful conversion of the corporate funds. It would be more than a business policy to ratify such acts. In such a case a court of equity has jurisdiction. *Howell v. Poff, supra.*

We are satisfied after a careful study of the entire record

in this case that the plaintiff was justified in bringing this suit and has proved sufficient facts to entitle him to some relief for the corporation. This case presents more than a question of internal dissentions among stockholders or mere differences and disputes as to their dissatisfaction with corporate management, and more than the ordinary business of the corporation. It presents such a state of facts as warrants intervention by a court of equity. It is put thus in 2 Thompson, Corporations (2d ed.) sec. 1197: "While ordinarily the courts will not interfere in the internal management of the corporate affairs, which must be exercised within the discretion of corporate officers, yet by reason of the fiduciary relation which directors occupy to the corporation all transactions between the corporation and a director or officer will be subjected to the rigid scrutiny of the courts, and if they are unfair, or against the interests of the corporation, then the rule does not apply."

Therefore, the defendant Hartigan should pay to the defendant corporation the amount of $24,800, the amount being the value of said bonds so converted with interest thereon. Whether or not said corporation shall purchase said real estate bought with part of the proceeds from the sale of said bonds so converted or accept the declaration of trust so proffered is a matter for the proper corporate authority to decide, as also is the amount that it shall pay for said real estate, if it so accepts said real estate; also the allowance of attorney's fees and expenses to the defendant Hartigan, officers' salaries and other attorneys' fees, is a matter for the corporation to decide. No valid reason is given why an officer thereof should take its assets, other than provided by law, to pay claims against the corporation that have not been audited and allowed in a lawful way by the corporation.

The judgment of the district court is affirmed in that part wherein a receiver is not appointed and wherein it does not allow any attorneys' fees, expenses and other claims paid or obligations created by the defendant Harti-

gan for and in behalf of said corporation, and wherein it does not change the salaries of the officers of the corporation. In all other respects said judgment is reversed and it is ordered that the defendant Hartigan pay to said corporation the sum of $24,800 with interest thereon at 6 per cent. per annum from January 1, 1934; that the defendant corporation pay the sum of $400, taxed as costs, to plaintiff for plaintiff's attorneys for services to them in the district court and in this court in this case, and that the appellees pay the other costs taxed in the action both in the district court and in this court.

AFFIRMED IN PART AND REVERSED IN PART.

EILEEN TENBORG, APPELLANT, V. CHESTER DILLIE, APPELLEE.
271 N. W. 689

FILED FEBRUARY 19, 1937. No. 29825.

Trial: INSTRUCTIONS. "It is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence, whether requested so to do or not." *Blue Valley State Bank v. Milburn*, 120 Neb. 421, 232 N. W. 777.

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

Gaines, McLaughlin & Gaines and *L. Q. Hills*, for appellant.

Brown, Fitch & West, contra.

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

GOSS, C. J.

Plaintiff appealed from a judgment on a verdict favoring defendant in an action for personal injuries received in a collision of automobiles at a paved intersection.

Plaintiff was driving north on Twenty-seventh street and defendant was driving west on Sprague street, in Omaha. The front of defendant's car struck the rear of

plaintiff's car. The latter turned in a northeasterly direction, ran over the curb and back into Twenty-seventh street, where it stopped. Defendant's car stopped in the intersection at about the place of collision. Plaintiff received bruises and other personal injuries. The collision occurred in the early afternoon of Saturday, September 1, 1934, as plaintiff was driving to her place of employment after going to lunch. She returned to her work but quit rather early that day. The next day was Sunday and the following day was Labor Day. On Tuesday morning she returned to work. Her pains persisted and she consulted a doctor, who advised her to go home and go to bed. She went to the home of her parents near Emmet, Nebraska, and returned after ten days and went to work. Her employment has continued permanently, but there was sufficient evidence of doctors who have continued to treat her, and of herself, that she has been so impaired as to make it a question for the jury as to defendant's liability and as to her damages.

The petition alleged that defendant was negligent in the following respects:

"(a) In operating his automobile at a high and excessive rate of speed and in violation of the statutes of the state of Nebraska and the ordinances of the city of Omaha; to wit 40 miles per hour;

"(b) In failing to yield the right of way at said intersection to the plaintiff who had driven into the intersection far in advance of the defendant;

"(c) In failing to have his automobile under proper control;

"(d) In failing to maintain a lookout for the automobile being driven by the plaintiff, which said automobile had entered the intersection and had almost crossed the same;

"(e) In operating his automobile at a rate of speed unsafe and dangerous and such as to endanger life and limb of others under the circumstances; to wit 40 miles per hour;

"(f) In failing to stop his automobile or decrease the

speed of same so as to avoid the collision with the automobile plaintiff was driving;

"(g) In failing to swerve his automobile so as to avoid colliding with the automobile plaintiff was driving."

We state these allegations in full because several of them are interlocking, one with another or with others.

No complaint is made that the court refused any requested instructions.

The first assignment of error complains that the court failed to instruct the jury as to the rule as to speed set forth in section 39-1135 of the 1933 Supplement to the Statutes. Briefly stated, that section makes it *prima facie* unlawful for a driver to proceed faster than 15 miles an hour "when approaching within fifty feet and in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last fifty feet of his approach to such intersection, he does not have a clear and uninterrupted view of such intersection and of the traffic upon all highways entering such intersection for a distance of two hundred feet from such intersection." The section gives local authorities power to increase this speed at stop intersections.

Though plaintiff pleaded quite a number of acts of negligence committed by defendant, she did not plead that his view was obstructed. There was evidence from which the jury might infer that, for a short distance, the view of both parties was obstructed within the limits prescribed by the statute. But we think that, in the circumstances, the rule set forth in the particular statute is a rule of evidence, not required by the court to be given to the jury in an instruction in the absence of a request by the party desiring such an instruction and particularly when the issue is not pleaded. While it is a well-recognized rule that it is the duty of the court to instruct the jury upon all points properly pleaded when the evidence supports them, we know of no rule requiring the court on its own motion to instruct the jury on a point not made an issue by the pleadings.

Errors are further assigned that the court failed to instruct the jury as to particular phases of the acts of negligence pleaded and proved so that the jury might be guided in deciding them.

The only instruction given by the court setting out the acts of negligence pleaded by plaintiff was in the first instruction, in which, after telling who the parties were, and the street intersection toward which each was driving, the instruction stated: "Plaintiff alleges that defendant was driving his automobile in a negligent manner and at a high and excessive rate of speed, and plaintiff alleges that she entered the intersection of Twenty-seventh with Sprague street before defendant reached said intersection, and alleges that defendant negligently drove the right front corner of his car against the right rear corner of plaintiff's car."

Possibly the failure to state to the jury the above-pleaded act of negligence "(b)" in failing to yield the right of way at the intersection was cured by the court's instruction No. 8, which gave the jury the rules in such a situation and from which they might understand that such was one of the acts of negligence alleged. But they might also conclude, from the failure to submit other acts, that the acts described were the only acts of negligence to be considered by them in the whole case.

The very general instruction above quoted did not call the attention of the jury to the acts of negligence charged and to a certain extent supported by evidence that the negligence of defendant consisted in not having his car under control, in failing to stop or to decrease his speed and in failing to swerve so as to avoid a collision.

While the evidence did not show that defendant was driving 40 miles an hour as alleged in "(a)" and "(e)," heretofore quoted, yet there was evidence to support the submission to the jury of the charge that he was traveling at an excessive rate of speed in the particular circumstances. Joseph Riley, a witness for defendant, testified that, in his opinion, both parties were going between 25

and 30 miles an hour; defendant applied his brakes before he reached the intersection and left skid-marks there which witness saw later. Plaintiff's witness, Alex Thompson, testified that defendant's car skidded and left skid-marks on the pavement which he inspected and described as extending for 90 feet on the pavement. This evidence required some instruction by which its application to the charge of speed might have been made by the jury.

In other words, it may be said generally that the court should have submitted to the jury each act of negligence charged that finds support in the evidence. "It is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence, whether requested so to do or not." *Blue Valley State Bank v. Milburn,* 120 Neb. 421, 232 N. W. 777. See *Hall v. Rice,* 117 Neb. 813, 223 N. W. 4; *Brooks v. Thayer County,* 126 Neb. 610, 254 N. W. 413; *Wagner v. Watson Bros. Transfer Co.,* 128 Neb. 535, 259 N. W. 373. A failure so to instruct constitutes reversible error.

Other errors are assigned. As they are not likely to occur on another trial, we omit a discussion of them.

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

REVERSED.

NORA REINHARDT ET AL., APPELLEES, V. HENRY W. MENSSEN ET AL., APPELLANTS.

271 N. W. 442

FILED FEBRUARY 19, 1937. No. 29838.

1. **Trial**: INSTRUCTIONS. The instructions are to be considered as a whole and if they thus state the law it is sufficient. *Vithen v. Jensen,* 128 Neb. 188, 258 N. W. 267.
2. **Affirmance**. The verdict and judgment were based upon sufficient evidence.

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

E. A. Wunder and *Hartigan & Skultety*, for appellants.

Arthur J. Denney, contra.

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

GOSS, C. J.

Defendants appeal from a judgment on the verdict for $2,000 with interest from October 1, 1933, in favor of Nora Reinhardt and for $200 with interest from August 7, 1932, in favor of Beata Reinhardt.

The two plaintiffs are granddaughters of Johann H. Menssen, who died January 4, 1924, leaving a will in which he bequeathed $10,000 to five grandchildren, share and share alike, to be paid to them when twenty-one years of age. Henry W. Menssen was the executor and the other defendants were sureties on his bond. By an order of distribution entered in the county court on October 18, 1926, it was found that all debts and inheritance taxes were paid, that the $10,000 bequest to the said grandchildren was reserved in the hands of the executor, and that it was decreed to be a trust fund in the hands of the executor, to be paid to them under the terms of the will as soon as they became of the age of twenty-one years, respectively. The evidence shows that Nora Reinhardt became twenty-one on October 1, 1933, and had received no part of her $2,000, and that Beata Reinhardt became of that age on August 7, 1932, and had, when the action was commenced, received all but $200 of the bequest due her.

The evidence shows that on May 21, 1926, the executor had sold real estate left by the will and on July 3, 1926, he filed his report showing he had sold one quarter section to one party for $16,100, had sold eight village lots for $110 to Annette Menssen, and had sold another quarter section to Annette Menssen for $19,500. The report of this particular land, like that of the others, recites: "She being the highest and best bidder therefor, and she having paid the amount of her bid I transferred to her by sufficient deed said

real estate." Annette Menssen, the purchaser of the quarter section above named, was the wife of the executor and the report indicates that the land was sold to her for $19,500 in cash. On July 3, 1926, the county court approved and by order duly confirmed the sale and ordered deeds made to the respective purchasers.

The evidence further shows that in fact for the quarter section Annette Menssen paid only $5,500 in cash, gave a first mortgage to Henry W. Menssen for $11,000 and gave a second mortgage to O. Vanier for $3,000, to provide the payment of a total of $19,500 to the executor-trustee for the amount reported by the executor as paid in cash. Annette Menssen, joined by her husband, deeded this quarter section to their daughter, Mrs. Anna Kujath. When the oldest of the Reinhardt children came of age and demanded his $2,000 the Kujaths and Menssen refinanced the $11,000 mortgage by giving a first mortgage for $9,000 and a second mortgage for $6,000. Of the cash proceeds of $9,000, $3,000 was used to pay off the Vanier second mortgage for $3,000, $2,000 was paid to the oldest Reinhardt child, $1,800 was deposited to apply on the amount due the next Reinhardt child to come of age, $1,100 was paid to the guardian of the Reinhardt children, as a part of their residuary estate under the will, to which they were entitled over and above their $2,000 to each specifically bequeathed. The rest of the $9,000 proceeds were used to pay items of expense. Menssen released the $11,000 mortgage. No authority was sought by the executor-trustee from the county court for any of these doings. Menssen also took a $200 unsecured note from his daughter, Anna Kujath, in the adjustment. This was to represent the difference between the $1,800 and the $2,000 to become due the next Reinhardt child coming of age. These transactions evidently occurred in June, 1930.

Later the first mortgage of $9,000 was foreclosed and the Kujaths and Menssen, as executor, were parties. The land did not sell for the whole of the liens and Menssen, as executor, recovered a judgment on his $6,000 second

mortgage for $6,464.50, with 10 per cent. interest from May 2, 1933. He even petitioned the county court to allow him to release this judgment when the Kujaths sought to obtain a new loan from the Federal Land Bank of Omaha, which made the requirement that his deficiency judgment should be released by authorization of the county court. In fact, he had already executed a release of the judgment. The Reinhardts opposed the order and the record shows no further action taken on the application. The $6,000 second mortgage, which was supposed to be security to pay the $2,000 each to the last three Reinhardt children, is lost.

Plaintiffs secured leave from the county court to bring their suit.

Defendants assign error because the court gave instruction No. 6, as follows: "The jury are instructed that if you believe from all the evidence that the executor, Henry W. Menssen, has lost the money bequeathed to the plaintiffs under the will of said Johann H. Menssen, deceased, and that such loss occurred on account of his own bad judgment or remissness of duty and without benefit to the estate, you should find for the plaintiffs in the amount shown by the preponderance of the evidence to be due."

It is argued that nowhere does the instruction define the care to be used, which, says the brief of defendants, is "the care, prudence and judgment which the man of fair average capacity and ability exercises in the transaction of his own business." Defendants have overlooked the fact that in instructions No. 3, No. 4, and No. 5, the court had rung the changes on this language "that a trustee is bound to employ such diligence and prudence as men of discretion and intelligence employ in their own affairs." The instructions are to be considered as a whole and if they thus state the law it is sufficient. *Vithen v. Jensen,* 128 Neb. 188, 258 N. W. 267.

It is argued that there was nothing in the evidence to warrant the use of the word "remissness" in the instruction. We were under the impression that the trial and argument proceeded upon the theory that defendant had

been remiss in his duty to the beneficiaries of his trust. Perhaps the court got the impression, and put it in its context, by reason of reading the quotation from 24 C. J. 112, found on page 753 of the opinion *In re Estate of Swanson,* 129 Neb. 751, 263 N. W. 141. In view of the pleadings and evidence we do not think the use of the expression was at all prejudicial.

The only other assignments of error are that the verdict is not sustained by the evidence and is contrary thereto and that the verdict is contrary to law. We have recited the evidence sufficiently to show that it was distinctly a jury question. Their decision is binding. The judgment is

AFFIRMED.

FIRST TRUST COMPANY OF LINCOLN, APPELLEE, V. HAZEL V. RATHBONE ET AL., APPELLANTS: GEORGE SCHWAKE ET AL., APPELLEES.

271 N. W. 428

FILED FEBRUARY 19, 1937. No. 29876.

1. **Mortgages:** FORECLOSURE: SALE: CONFIRMATION. Mere inadequacy of price will not preclude confirmation of a foreclosure sale unless it is such as to shock the conscience of the court or amount to evidence of fraud.
2. ———: ———: ———: ———. An order confirming a mortgage sale will not be set aside on appeal for inadequacy of price, unless it is so gross as to show fraud, and unless the evidence shows that a resale would produce a better bid.
3. ———: ———: MORATORIUM. When it appears from the evidence that the amount of the mortgage lien on property under foreclosure exceeds its value, the moratory stay must be denied.

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

Chambers & Holland and *John H. Keriakedes,* for appellants.

T. F. A. Williams, contra.

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

DAY, J.

In this suit to foreclose a real estate mortgage, an order of sale was entered October 26, 1934, which fixed the mortgage lien at $17,351.40 and a tax lien in favor of another at $1,204.83. At a sale September 3, 1935, after a nine-months' stay, the plaintiff bid $13,950 for the property, subject to the tax lien. This is an appeal from the order confirming the sale and denying the defendants' application for a stay under the moratorium.

The appellants object to the confirmation of the sale for the reason that the bid was grossly inadequate. The rule is well established in this jurisdiction by numerous cases that mere inadequacy of price will not preclude confirmation of a foreclosure sale unless it is such as to shock the conscience of the court or amount to evidence of fraud. *Lemere v. White,* 122 Neb. 676, 241 N. W. 105; *Keller v. Boehmer,* 130 Neb. 763, 266 N. W. 577; *Omaha Loan & Building Ass'n v. Clarke,* 125 Neb. 497, 250 N. W. 748; *Nelsen v. Doll,* 124 Neb. 523, 247 N. W. 44. See, also, *Suring State Bank v. Giese,* 210 Wis. 489, 246 N. W. 556.

A careful examination of the record does not reveal that the bid of the plaintiff was inadequate in this case. The evidence as to the value of the property at the time the court passed upon the motion to confirm the sale was in conflict. It consisted of the testimony of experts and interested parties. The witnesses for the plaintiff placed the value of the property between $10,000 and $12,000, while those for the defendants placed the value as high as $25,000. An analysis of the testimony shows that the difference of opinion was the result of the reasons given for arriving at the value. The reasons given by the witnesses for arriving at the value were the age and repair of the building, the rental value, and the location. These same features were considered by the witnesses for the defendants, but in addition they considered the possibility that at

some future time the University of Nebraska might need the property and might pay much more than its present value for it. A valuation based upon such a consideration is highly speculative and conjectural. The property sold for approximately $14,000. The trial court found that the bid was not so inadequate as to preclude a confirmation. This court reaches the same conclusion.

Again, this court has held that an order confirming a mortgage sale will not be set aside on appeal for inadequacy of price unless it is so gross as to show fraud, and unless the evidence shows that a resale would produce a better bid. *Commerce Trust Co. v. Bradley,* 125 Neb. 593, 251 N. W. 174. The record does not indicate that another bid would produce more money. In such a case a new sale would be but useless ceremony.

The second error assigned by the appellants is predicated upon the refusal of the trial court to grant a moratory stay under the statute. In this connection it will be noted that the order of sale entered October 26, 1934, fixed the liens on the property at $18,556.23. Even considering the evidence of the witnesses for the defendant as to the speculative value of the property and giving some weight thereto, the defendant has no equity in the premises.

In line with our former analysis of the testimony relative to value, this court finds, as did the trial court, that the defendant had no equity in the real estate involved in the foreclosure suit. When it appears from the evidence that the amount of the mortgage lien on property under foreclosure exceeds its value, the moratory stay must be denied. *Clark v. Hass,* 129 Neb. 112, 260 N. W. 792; *Luikart v. Graf,* 130 Neb. 736, 266 N. W. 641; *Srajhans v. Mares,* 130 Neb. 924, 267 N. W. 82; *First Trust Co. v. Airdale Ranch & Cattle Co.,* 131 Neb. 475, 268 N. W. 362.

The judgment of the trial court will not be disturbed.

AFFIRMED.

STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, PLAINTIFF, V. LLOYD CROCKER, DEFENDANT.

271 N. W. 444

FILED FEBRUARY 19, 1937. No. 30079.

1. **Attorney and Client.** Canons of ethics and rules governing professional conduct among attorneys are recognized and applied by courts in proper cases.
2. ———. Attorneys assume certain obligations and duties as officers of the courts, and in the performance thereof they must conform to certain standards in relation to clients, to the courts, to the profession, and to the public.
3. ———: DISBARMENT. When one seeks and attains admission to the bar of the courts of this state, he voluntarily assumes the obligations imposed by the ethical regulations generally recognized by the profession, and the violation of such rules renders an attorney subject to disbarment or suspension.
4. ———. Advertising for professional employment by lawyers has long been recognized by the profession as inimical to the public welfare, and this is especially true when a lawyer advertises for employment in divorce cases.
5. ———. It is not in the public interest that a lawyer stir up litigation and strife among people in order to secure professional employment.
6. ———: DISBARMENT. The supreme court may as a part of its inherent jurisdiction investigate the conduct of attorneys and disbar or suspend them if they are found guilty of conduct violative of the high standards of ethical conduct generally recognized by the members of the profession.
7. **Divorce.** The public policy of this state, as declared by legislative enactment, is to discourage divorce cases.
8. **Attorney and Client: DISBARMENT.** It is contrary to the expressed public policy of this state for a lawyer whose sole interest is his professional employment in a divorce case to invite or encourage such litigation and to do so is ground for suspension or disbarment.
9. ———. An advertisement in a newspaper by an attorney at law soliciting divorce cases is conduct requiring discipline.

Original proceeding by the state, on the relation of the attorney general, to disbar the respondent. *Judgment of suspension.*

Richard C. Hunter, Attorney General, and *Paul P. Chaney,* for plaintiff.

H. N. Mattley and *Lloyd Crocker,* for defendant.

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

DAY, J.

The attorney general filed a complaint for disbarment against Lloyd Crocker, an attorney at law, the basis of which is that the defendant caused to be published in a daily newspaper an advertisement as follows: "DIVORCES $15 and costs. Default cases. Lloyd Crocker, lawyer, 230 Brandeis Theatre Bldg., At. 7732." The defendant filed a written answer in which he admitted the publication as alleged. In his answer, he also asked leave to appear personally before the court, which he was permitted to do January 21, 1937. At that time, he made no attempt to justify his conduct in any manner but expressed great regret about the matter and gave assurances that there would be no repetition of such conduct on his part. The matter is now before the court for a judgment on the pleadings. It has long been recognized by the profession as improper for a lawyer to advertise for business. The very nature of the professional employment is such that for one to do so violates the public policy of the state to the detriment of the public.

Canon 27 of Professional Ethics as published by the American Bar Association is pertinent here: "The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters

of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable."

This canon is declarative of the rules recognized generally by the profession. Canons of ethics and rules governing professional conduct among attorneys are recognized and applied by courts in proper cases. *Hepp v. Petrie,* 185 Wis. 350, 200 N. W. 857. Indeed, this court has very recently applied this rule in two unreported cases. But even before that, this court in the case of *State v. Goldman* (1934) 127 Neb. 340, 255 N. W. 32, applied this rule, when it held that the action of an attorney in carrying on directly or through others employed by him systematic solicitation of damage suits, a business commonly known as "ambulance chasing," warranted disbarment. However, before, in *State v. Priest* (1932) 123 Neb. 241, 242 N. W. 433, it was held that attorneys assume certain obligations and duties as officers of the courts, and in the performance thereof they must conform to certain standards in relation to clients, to the courts, to the profession, and to the public. See, also, *State v. Ireland,* 125 Neb. 570, 251 N. W. 119.

When one seeks and attains admission to the bar of the courts of this state, he voluntarily assumes the obligations imposed by the ethical regulations generally recognized by the profession, and the violation of such rules renders an attorney subject to disbarment or suspension.

In *In re Winthrop* (1925) 135 Wash. 135, 237 Pac. 3, although the legislature had adopted the Canons of Professional Ethics of the American Bar Association as the standard, the court stated that they have quite generally

been approved as a correct statement of the rules which should govern the conduct of an attorney. Legislative recognition of the high standards of professional conduct is gratifying, but not essential for the court to discipline its own officers. Regardless of the Canons of Professional Ethics of the American Bar Association, it has long been recognized by the profession as grossly undignified and improper for a lawyer to advertise for professional employment. *Matter of Neuman,* 169 App. Div. 638, 155 N. Y. Supp. 428. It has also been stated as long ago as 1893 that the "ethics of the legal profession forbid that an attorney should advertise his talents or his skill as a shopkeeper advertises his wares." *People v. MacCabe,* 18 Colo. 186, 32 Pac. 280. A well-known annotator has collected a number of cases supporting this view. See annotation, 55 A. L. R. 1313, to the case of *Matter of Cohen,* 261 Mass. 484, 159 N. E. 495, in which it was held: "The supreme judicial court may, as part of its inherent jurisdiction, investigate the conduct of attorneys at law and remove them from office absolutely, or suspend them for a stated period, if found guilty of conduct in any respect unbecoming the high standard of propriety which should be maintained by all members of the legal profession." See, also, *People v. Berezniak* (1920) 292 Ill. 305, 127 N. E. 36, and *In re Morrison* (1920) 43 S. Dak. 185, 178 N. W. 732. It will be noted from the dates of the various opinions that there is a marked trend of judicial opinion toward a maintenance of the high ethical standards of the profession.

But the basis of these decisions is the public policy of the state and the public interest. "Ambulance chasing" and advertising for professional employment by lawyers have long been recognized by the profession as inimical to the public welfare, and this is especially true when a lawyer advertises for employment in divorce cases. It is not in the public interest that a lawyer stir up litigation and strife among people in order to secure professional employment. Experience has demonstrated that there is a temptation, under such circumstances, to instigate litigation

where no sufficient cause exists. This is particularly reprehensible where the litigation involved is divorce. It cannot be condemned in too severe terms. The public policy of this state, as declared by legislative enactment, is to discourage divorce cases. The state is an interested party. The dissolution of the marriage relation involves a matter of public interest. A divorce cannot be granted upon the agreement of the parties, nor upon their uncorroborated testimony. Even the jurisdiction relative to divorces exercised by the courts is given by statute, and there is no power relative thereto outside of the statute. In view of the many legislative declarations of public policy, it may be said that it contravenes the public interest to encourage divorce litigation. This is particularly true of a lawyer whose sole interest is his professional employment in a divorce case. The advertisement involved in this case was a solicitation for professional employment in divorce cases.

While this is the first case which has been brought to the attention of this court, numerous other courts have considered the proposition. The Minnesota court in *State v. Giantvalley*, 123 Minn. 227, 143 N. W. 780, held that an advertisement stating that accused attorney specialized in divorce matters violated a statute, though defendant did not expressly offer to procure divorces or to accept professional employment in divorce suits. The attorney in that case was convicted of a violation of a criminal statute prohibiting advertising for divorce cases. However, the opinion discusses the regulation of the bar and the public policy of the state.

The South Dakota court held in *In re Donovan*, 43 S. Dak. 98, 178 N. W. 143, that an attorney who published a booklet containing clippings purporting to have been taken from many newspapers referring to him as an international expert on marriage and divorce was "guilty of advertising as a divorce lawyer through the public press." In that case, the attorney advertised himself as particularly qualified to secure divorce decrees and the state as a place to secure an easy divorce. That attorney was suspended

from practice for a period of six months, without reference to any statute directly condemning the practice.

The Colorado court in *People v. MacCabe, supra,* decided: "The ethics of the legal profession forbid that an attorney should advertise his talents or his skill as a shopkeeper advertises his wares. An attorney may properly accept a retainer for the prosecution or defense of an action for divorce when convinced that his client has a good cause. But for any one to invite or encourage such litigation is most reprehensible." In that case the attorney was suspended from practice for a period of six months. In the annotation in which this case is cited in 9 A. L. R. 1500, it is stated: "It is generally held that the encouragement by attorneys of divorce litigation, by means of advertisements or circulars so worded as to induce divorce proceedings, and the employment of themselves therein, constitutes ground for disbarment or suspension."

The Nevada court condemned such practice in *In re Schnitzer,* 33 Nev. 581, 112 Pac. 848. See, also, *Reno Bar Ass'n v. Scoular,* 34 Nev. 313, 123 Pac. 13.

The California court suspended an attorney from practice for a period of five years for advertising in violation of a statute prohibiting an attorney from advertising for employment in divorce cases. *In re Biaggi,* 36 Cal. App. 650, 172 Pac. 1130. See, also, *Mayer v. State Bar of California,* 26 Pac. (2d) 9, where the offense was the attorney's advertising Mexican and Nevada divorces. The attorney was suspended for one year. In Massachusetts, an attorney has been suspended from practice for a period of two months for soliciting divorce litigation by advertisements. *Matter of Cohen, supra.*

This casual review of the authorities reveals that the courts generally have condemned the practice of a lawyer advertising for professional employment and particularly for divorce cases. We have found no authority approving the practice. It does not seem that the practice of lawyers hawking their brains as wares upon the street corner could be approved. An advertisement in a newspaper by an at-

torney at law soliciting divorce cases is conduct requiring discipline.

It is now necessary to determine the discipline required by the circumstances of this particular case. It appears that the advertisement appeared in the classified columns of the Omaha Bee-News for four consecutive days, and that the attorney then discontinued it. In his appearance before this court, the attorney expressed regret and gave assurances that it would not be repeated. We regret that it is not possible for us to end the matter with a reprimand, but duty seems to demand more than that. Considering the attorney's departure from the standards of conduct generally recognized by the profession and required by the public policy and the public interest of the state, it is necessary to give our action a punitive quality to mark the high obligation of the members of the bar. The order will be that the attorney be suspended from his rights and privileges as a member of the bar of the courts of this state for 30 days from this day, and pay the costs of the proceeding.

JUDGMENT OF SUSPENSION.

PENN MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. KARL E. LINDQUIST ET AL., APPELLANTS.
271 N. W. 429

FILED FEBRUARY 19, 1937. No. 29957.

New Trial. When a petition for a new trial is filed within one year after final judgment, under section 20-1145, Comp. St. 1929, the newly discovered evidence alleged must be of so controlling a nature as to probably change the result of the former trial.

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

Brown, Fitch & West, for appellants.

Hall, Young & Williams, contra.

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

PAINE, J.

Defendants and appellants filed a petition for a new trial, under section 20-1145, Comp. St. 1929, on the ground of newly discovered evidence, which was discovered after the term in which the decree was rendered. The plaintiff demurred to the petition, from the sustaining of which demurrer the defendants appeal.

The facts are fully discussed in the opinion, released April 17, 1936, in this same case, found in 130 Neb. 813, 266 N. W. 600, which sets out that an action in equity was brought by the insurance company on June 22, 1934, to cancel a total disability rider, or agreement, attached to a life insurance policy for $10,000, dated October 14, 1930. This court held that the incontestability clause of one year did not apply to this total disability rider. It also affirmed the decree of the lower court canceling the total disability agreement on the ground of alleged false answers made in the application.

It appears from the petition for a new trial that, during the pendency of the appeal, and in August, 1935, the insurance company mailed a notice to the defendant Karl E. Lindquist that interest in the amount of $9 was due on September 21, 1935, upon $150 for one year at 6 per cent., and on September 23, 1935, he paid said sum and received a receipt therefor.

It is also alleged that the premium due in September, 1931, was paid by a note, dated October 21, 1931, for $386.50, made up of $331.80, annual premium on the $10,000 policy, and $54.70 upon the total disability rider; that the said $150 is the balance unpaid on said note given for premium.

Defendants set out in their motion for new trial that this payment of $9 has taken place since the trial of the case, and such transaction is material and controlling, and ask that the court grant a new trial, so that evidence of this payment of $9 interest can be introduced. The plaintiff having filed a demurrer, the matter was argued, and the trial court sustained the demurrer.

The plaintiff tendered to the defendants the full amount paid as premiums on the total disability provision, with interest up to that date, which tender was refused, and the money, $261.65, was then deposited with the clerk of the district court for the benefit of the defendants. The note given for the premium due in September, 1931, had a number of payments made on it, and the $150 was simply the balance unpaid on said note, and was a lien against the policy.

In the addenda to brief of defendants, and in the exhibit attached to the affidavit of defendant Karl E. Lindquist filed therewith, it is indicated that the notice of this $9 interest was sent out from plaintiff's office in error, and that this payment of interest has been tendered back to said defendant, but refused by him.

In a very recent case in the United States supreme court, entitled *American Life Ins. Co. v. Stewart,* 81 L. Ed. 306, released February 1, 1937, Justice Cardozo discusses several of the same questions which arise in the case at bar. Actions in equity were brought after the death of the insured to set aside two policies of life insurance for fraudulent misstatements in the application. The district court decreed the cancelation and surrender of the policies, and the circuit court of appeals reversed this decree. 80 Fed. (2d) 600; 85 Fed. (2d) 791. Justice Cardozo reverses the decree of the circuit court of appeals, and in his discussion shows that a suit in equity can best give relief in such cases.

The defendants cite the case of *McDonald v. Early,* 24 Neb. 818, 40 N. W. 410, in which it was held: "In a petition for a new trial under the Code, where it appears that the petitioner has discovered new and material evidence, of which he had no knowledge before the trial, the legitimate effect of which evidence, in connection with that given on the trial, would be to entitle him to a judgment, ordinarily it will be the duty of the court to grant a new trial."

But it must appear in such application for a new trial that the new evidence is of so controlling a nature as to

probably change the result of the former trial. *Williams v. Miles,* 73 Neb. 193, 102 N. W. 482; *City Savings Bank v. Carlon,* 87 Neb. 266, 127 N. W. 161; *Nelson v. State,* 121 Neb. 658, 238 N. W. 110.

This court has also said that the new facts upon which a new trial may be granted should not only be competent, relevant, material, and contradictory, but they should render clear and positive that which was before equivocal and uncertain, and should be 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, 244 N. W. 298.

We are unable to say that, if the court granted the petition for a new trial, the receipt of this evidence, showing the payment of $9 for one year's interest on the balance of this old note or lien, would keep the disability provision of the contract in force, or change the decree entered by the trial court or this court.

It may be admitted that this evidence could not have been presented at the trial, but we do not find, as the defendants argue, that as a matter of law this evidence would entitle the defendants to a judgment against the plaintiff. Finding no error in the ruling of the district court, the same is hereby

AFFIRMED.

TENA E. GLISSMANN, APPELLANT, V. HAPPY HOLLOW CLUB ET AL., APPELLEES.
271 N. W. 431

FILED FEBRUARY 19, 1937. No. 29870.

1. Judgment: DORMANCY. A judgment becomes dormant and ceases to be a lien on real estate of the judgment debtor in five years from the date thereof, unless an execution is sued out on such judgment within such period.
2. ———: ———. When a judgment becomes dormant, it loses its priority and will be superseded by the lien of subsequent judgments in full original life or which have been duly revived.

3. ———: REVIVOR. A judgment revived is a lien upon the real estate of the judgment debtor from the date of the order of revivor.

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

S. L. Winters, for appellant.

Frank H. Woodland, Votava, McGroarty & Sklenicka and *George Boland, contra.*

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

CARTER, J.

This is a suit in equity brought for the purpose of determining the priority of two judgment liens against the interest of Henry C. Glissmann in certain real estate sold to the Happy Hollow Club on contract. From a decree finding that the defendant George Boland had a lien prior to that of the plaintiff, plaintiff appeals.

Other phases of this case have been before this court on two previous occasions. *Bauermeister v. McDonald,* 124 Neb. 142, 247 N. W. 424; *Glissmann v. McDonald,* 128 Neb. 693, 260 N. W. 182.

The record shows that Hans C. Glissmann was the owner of certain lands near Omaha which he sold to the Happy Hollow Club by contract on June 22, 1922. Hans C. Glissmann died on June 15, 1928, at which time a considerable sum remained unpaid on the contract. By his will his son, Henry C. Glissmann, received an undivided one-eighth interest in the lands, subject to the contract with the Happy Hollow Club.

On March 8, 1927, the Bank of Benson procured a judgment against Henry C. Glissmann and Tena E. Glissmann, his wife, in the amount of $3,842.06. The Bank of Benson subsequently assigned this judgment to the defendant George Boland. The record conclusively establishes that this judgment has been kept alive by a series of executions issued and levies made thereon over a period of years.

The record further shows that on December 6, 1922, one H. F. Davis obtained a judgment against Henry C. Glissmann in the district court for Douglas county in the amount of $4,070.67, and the mandate of the supreme court affirming said judgment was filed on May 21, 1926. This judgment was assigned to Chris H. Kuehl on July 15, 1927, and the assignment filed in the case on March 24, 1933. On October 19, 1928, this judgment was assigned by Chris H. Kuehl to Tena E. Glissmann and the assignment filed in the case on November 29, 1932. No execution was ever issued upon this judgment and it is conceded that it became dormant and was not revived until September 27, 1935.

The interest of Henry C. Glissmann in the real estate involved in this action vested on June 15, 1928, the date of the death of his father. The judgments in question could become a lien thereon for the first time on that date. Assuming that both judgments were liens of equal priority on that date, as contended by plaintiff, the question is whether defendant Boland's lien became superior to that of Tena E. Glissmann when the judgment owned by her became dormant.

A noted text-writer states the rule as follows: "In those jurisdictions where a judgment, in order that its lien may continue, must be periodically revived, the lien of a judgment not revived within the statutory time will be superseded by the lien of younger judgments in full original life or which have been duly revived." 1 Black, Judgments (2d ed.) sec. 458.

Another text-writer states the rule in this language: "After the lien of a judgment has expired its priority is lost. A junior lien placed upon the land after the expiration of such time takes precedence, and the former judgment cannot then be revived by its owner so as to stand as the first lien." 15 R. C. L. 812, sec. 276.

This court has said: "It is obvious that in case a judgment creditor fails for more than five years after the date of his judgment to sue out an execution, the judgment becomes dormant and ceases to be a lien upon the real estate

of the defendant. We see no escaping the conclusion that where a judgment becomes dormant its lien is thereby lost as against a mortgage made by the debtor during the life of the judgment." *Flagg v. Flagg,* 39 Neb. 229, 58 N. W. 109.

In *Horbach v. Smiley,* 54 Neb. 217, 74 N. W. 623, this court also said: "It is true some of the judgments embraced in this class became dormant and, for a time, ceased to be liens upon the premises. *Flagg v. Flagg,* 39 Neb. 229. But these judgments were subsequently revived, which had the effect to reinstate the liens upon the real estate from the date of the order of revivor."

In *Halmes v. Dovey,* 64 Neb. 122, 89 N. W. 631, this court said: "The judgment lien is created by statute, and is destroyed by statute if an execution thereon is not taken out within five years from the date of the judgment, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of taking out of another execution thereon. If execution is not taken out in the time limited by the statute, the judgment becomes dormant, and the judgment lien is destroyed. This dormant judgment may be revived, but when so revived it will operate as a lien only on the real estate which the judgment debtor may own at the time of the revivor." While this case is not squarely in point, it indicates that a revived judgment becomes a new lien on the real estate of the judgment debtor on the date of its revivor and that it is inferior to other liens existing prior to that date.

We necessarily conclude that plaintiff lost her judgment lien that attached on June 15, 1928, when the judgment became dormant. When her judgment was revived on September 27, 1935, a new judgment lien attached as of that date. It is, therefore, subsequent to the lien of the judgment owned by the defendant Boland which attached on June 15, 1928.

Counsel for appellant contends that Tena E. Glissmann was a married woman and that she owned no separate estate at the time she signed the note on which the defend-

ant Boland's judgment is based, and that George Boland cannot levy on the after-acquired property of Tena E. Glissmann to satisfy his judgment. It must be borne in mind that Henry C. Glissmann acquired the real estate by inheritance on June 15, 1928, and that the Boland judgment became a lien at that time and has been continued as such up to the trial of this case. Any purchase made by Tena E. Glissmann was subject to Boland's judgment lien. The question of Tena E. Glissmann's liability on the judgment is therefore immaterial in this case.

Other contentions made by plaintiff are without merit. The judgment of the district court is in all respects correct and it is

AFFIRMED.

PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT, V. EUGENE FELTZ, APPELLEE.
271 N. W. 787

FILED FEBRUARY 19, 1937. No. 29806.

1. **Eminent Domain**: PETITION. In order to confer jurisdiction, the petition in a condemnation proceeding must describe the lands to be crossed, the size of the ditch, canal or works to be constructed, the quantity of the land to be taken and the names of the parties interested.
2. ———: APPEAL. An appeal by a landowner from the award of appraisers does not waive objections to the jurisdiction of the appraisal court.
3. ———. Proceedings in condemnation under a petition which fails to set forth the jurisdictional facts required by statute are null and void.

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

E. H. Evans and *Beeler, Crosby & Baskins*, for appellant.

Halligan, Beatty, Halligan & Maupin and *G. J. McGinley, contra.*

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

RYAN, District Judge.

The plaintiff commenced this action in the district court for Keith county, Nebraska, to enjoin the defendant from disturbing or interfering with plaintiff's possession of a strip of land containing 7.76 acres, more or less, which the plaintiff claims to have acquired from the defendant through condemnation proceedings. A temporary injunction was granted on the filing of the petition. The defendant answered and filed a cross-petition asking to have the plaintiff enjoined from trespassing upon the real estate involved, and to have his title quieted against any claims of the plaintiff by reason of the attempted condemnation proceedings.

Upon the trial of the case on its merits, the district court dismissed the plaintiff's petition, dissolved the temporary injunction theretofore granted, and granted the defendant a permanent injunction against the plaintiff until such time as plaintiff should acquire title or right of possession to the real estate involved, by a proper and legal condemnation proceeding, and provided in the decree that the injunction should not become operative or effective until 60 days thereafter, so that plaintiff might have the opportunity to reinstate condemnation proceedings to the real estate involved, and secure title thereto. The plaintiff has appealed from that decree.

The plaintiff is a corporation organized under and by virtue of the provisions of chapter 86, Laws 1933, and there is no question raised as to its right to exercise the power of eminent domain. On January 24, 1935, the plaintiff instituted a condemnation proceeding in the county court of Keith county, Nebraska, for the purpose of acquiring a right of way across the lands of the defendant and others, for the construction of a supply canal. The petition of the plaintiff described the lands of the defendant, sought to be condemned, by metes and bounds, and stated that the acreage was 7.76 acres, more or less. The only reference to the canal proposed to be constructed across

said land found in the petition is the designation of it in paragraph 1 as a "supply canal."

The defendant, by proper objections filed in the county court, challenged the sufficiency of the plaintiff's petition, principally on the ground that it failed to state the size of the ditch or canal to be constructed. These objections were overruled, the appraisal was made, damages assessed, and both the plaintiff and defendant appealed to the district court from the award of the appraisers. The defendant also prosecuted error proceedings to the district court, preserving his objections to the appointment of the appraisers. The canal was constructed by the plaintiff while the temporary injunction was in force. The defendant also challenged the sufficiency of the plaintiff's petition in the condemnation proceedings in his answer and cross-petition filed in this action. This pleading is of considerable length, but the principal objection urged is that the petition of the plaintiff in the condemnation proceedings was fatally defective and wholly insufficient to vest the county court of Keith county, Nebraska, with jurisdiction to proceed with or conduct the eminent domain proceedings against the lands of the defendant. The principal objection urged was that said petition did not set forth in any manner whatsoever the size and description of the supply canal intended to be constructed across the lands of the defendant.

This appeal presents two questions of law for decision: (1) The matter of the sufficiency of the plaintiff's petition in the condemnation proceeding. (2) Did the appeal taken by the defendant from the award of the appraisers waive such defects, if any, as might be found in said petition?

Section 46-603, Comp. St. 1929, prescribes the procedure which the plaintiff was required to follow. It provides as follows: "In case of the refusal of the owner or claimant of any lands through which such ditch, canal or other works are proposed to be made or constructed, to allow the passage thereof, the person, desiring the right of way, may present to the judge of the county in which such lands are situated, a petition describing the lands to be crossed,

the size of the ditch, canal or works, the quantity of land which is required to be taken, and setting forth the names of the parties interested in the lands to be crossed, and praying for the appointment of five appraisers, disinterested freeholders of said county, to ascertain the compensation to be made to such owners or parties interested. Upon the filing of said petition, the same proceedings for condemnation of such right of way shall be had as is provided by law for the condemnation of rights of way for railroad corporations; and the same provisions of law providing for the condemnation of rights of way for railroad corporations, the payment of damages and the rights of appeal shall be applicable to irrigation ditches, canals and other works provided for in this article."

It appears from this section of the statute that the essential allegations of a petition seeking to enforce the right of eminent domain are: (1) A description of the lands to be crossed; (2) the size of the ditch, canal or works proposed to be constructed; (3) the quantity of land which is required to be taken; (4) the names of the parties interested in the land to be crossed.

In the early case of *Omaha & R. V. R. Co. v. Rickards*, 38 Neb. 847, 57 N. W. 739, this court held with reference to the description of the lands to be taken: "In proceedings to condemn land of an individual for the use of a railroad, the petition must accurately describe the tract affected by the proceedings. Where the petition describes the land by government subdivision, the description is insufficient to authorize the condemnation of real estate within the limits of an incorporated city, which real estate has been laid out and platted into lots and blocks."

This decision was cited with approval in the case of *Dailey v. Missouri P. R. Co.*, 103 Neb. 219, 170 N. W. 888, wherein it was held: "A petition to condemn the land of another for the use of a railroad is the basis of the proceeding, and before an owner over his protest can be compelled under the sovereign power of eminent domain to part with the title to his land, it is essential to the validity of the pro-

ceedings that the petition filed with the county judge under section 5946, Rev. St. 1913, accurately describe the tract sought to be condemned." In that case the petition described the property of Mrs. Dailey as: "Lot 11, block 6, Paddock's Place, * * * is of uneven dimensions, but is approximately 115 feet deep by 66 feet wide." On the trial of the case it was stipulated that lot No. 11 was 66 feet wide from the north to the south line; and from east to west, at the north line, it was 139.5 feet deep, and at the south line, from east to west, it was 140 feet deep. The variance between the actual size of the lot and that set forth in the petition was held to render the condemnation proceedings null and void.

In the case of *Blue River Power Co. v. Hronik,* 112 Neb. 500, 199 N. W. 788, the question of the description of the lands to be crossed as well as the size of the works to be constructed were both involved. That was a proceeding under the law of eminent domain seeking the condemnation of rights for the overflow of lands caused by the erection and maintenance of a dam across the Blue river, which was being constructed for water-power purposes. The allegation contained in the petition with reference to the size of the works to be constructed was as follows: "That the Blue river runs through and across the above described tract of land; that your petitioner has been duly authorized to construct a dam across the Blue river upon said real estate to the height of sixteen (16) feet for water-power purposes; that your petitioner duly submitted a plan of its proposed dam to the state board of irrigation, highways and drainage of the state of Nebraska, for examination and approval, and that said state board duly approved the same March 2, 1918, and authorized its construction to a height of sixteen (16) feet." In that case the court held: "In order to confer jurisdiction, the petition by which such proceedings are instituted must with substantial accuracy describe the lands to be crossed, the size of the works to be constructed, and the quantity of land required to be taken." In discussing the description of the dam, the court said:

"There is to be a dam to the height of 16 feet across the Blue river somewhere upon the 20-acre tract of land owned by the petitioner. A great deal may, and doubtless does, depend upon the particular location of the dam and of each end thereof and its direction and length as to the overflow that will be produced thereby. The petition shows that certain lands for the distance of more than four miles upstream are to be overflowed and affected by this dam. It follows that very little difference in the height and location of the dam will make a large difference in the land to be overflowed. The skilled person who would determine the exact location of these lines must have a starting point, and we fail to discover one in the petition. The dam is said to be 16 feet high. From what point does the measurement proceed? Is it from the low water mark or the bed of the stream? And, if the bed of the stream, is it the lowest part thereof or is it what is sometimes called the flow line, and how determined and how may it now be found? * * * The petition gives no information which the statute requires as to the size or location of the works, which in this instance is the dam, and the body of water which will be impounded thereby. * * * Now, if a condemnation proceeding fully completed, because it describes vacant, unoccupied land by governmental subdivisions, when it has been laid out in lots and blocks, or because it made a variance of a little less than 20 per cent. in the depth of certain property, is so fatally defective that no rights were acquired thereby, it must necessarily follow that, when objection is made in the inception of a proceeding that the description is so indefinite as that contained in the petition here, and as incapable of being made definite by anything therein stated, it is likewise fatally defective and insufficient to confer jurisdiction."

The appellant, however, contends that a duplicate of exhibit 2, found on page 205 of the bill of exceptions, was on file in the office of the county judge, and was furnished by him to the appraisers at the time the award was made. The facts with reference to that matter are not clear from

the record, except that it does appear that the appraisers had a copy of the plat at the time of the appraisement. It is not claimed, however, that a copy of exhibit 2 was attached to the petition filed in the county court. A careful examination of exhibit 2 shows that it consists of the metes and bounds description of the lands of the appellee sought to be condemned, and the plat thereof with the engineer's legend. It does not, however, set forth the size of the canal to be constructed, though it does show the general course of the same. There is no cross-section of the canal showing the width or the depth, and we must conclude, therefore, that even had a copy of exhibit 2 been attached to and made a part of appellant's petition, it would still be insufficient to meet the statutory requirements and to vest the county court with jurisdiction to appoint appraisers in condemnation.

The contention of the appellant that the appeal to the district court by the appellee from the award of the appraisers waived any technical defects in the petition is without merit, since the petition was insufficient to vest that court with jurisdiction. The rule is well stated in *Toledo, A. A. & N. M. R. Co. v. Munson,* 57 Mich. 42, 23 N. W. 455: "And while under the present statute the notice of appeal must point out the errors and objections to the proceedings had in the premises, all others being deemed to have been waived, and while the statute required the supreme court to pass upon those only, yet jurisdictional defects may be noticed at any stage of the proceedings, for the reason that if the court proceeds without jurisdiction, the whole proceedings are null and void."

It follows from these considerations that the judgment of the district court was correct and it is affirmed.

The finding of the trial court that the rights of the defendant had not been prejudiced is also affirmed, and the plaintiff is allowed 60 days from the issuance of the mandate herein in which to institute proper condemnation proceedings and acquire title to the right of way of said supply canal.

AFFIRMED.

EUGENE FELTZ, APPELLEE, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.
271 N. W. 790

FILED FEBRUARY 19, 1937. No. 29807.

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

E. H. Evans and *Beeler, Crosby & Baskins*, for appellant.

Halligan, Beatty, Halligan & Maupin and *G. J. McGinley, contra.*

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

RYAN, District Judge.

This is an appeal from and error proceeding to the county court of Keith county, Nebraska, by the appellee as plaintiff in error v. Platte Valley Public Power and Irrigation District, defendant in error. This is the companion case to No. 29806, Platte Valley Public Power and Irrigation District, appellant, v. Eugene Feltz, appellee, and involves the same propositions of law. For the reasons stated in the opinion in the case referred to, the finding of the district court is

AFFIRMED.

NICHOLAS LAUDENKLOS, JR., APPELLEE, V. DEPARTMENT OF ROADS AND IRRIGATION OF THE STATE OF NEBRASKA ET AL., APPELLANTS.
271 N. W. 790

FILED FEBRUARY 26, 1937. No. 30050.

1. Master and Servant: WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY. It is a general rule that exposure to cold, resulting in injury, is not compensable if it is the same as that to which the general public is exposed.
2. ———: ———: ———. But the rule as applied to the

facts in this case is as follows: Evidence *held* to require affirmance of the district court's finding that employee's exposure to cold was special, peculiar danger, greater than that of the general public in the same locality, so that freezing of his hand constituted an "accident arising out of and in the course of his employment."

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

William H. Wright, Attorney General, Daniel Stubbs and *Paul P. Chaney,* for appellants.

Robins & Yost, contra.

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

GOSS, C. J.

On a trial before the district court the appellee was awarded compensation for disability for a period and in an amount, including his doctor bills, stipulated to be correct if the decree should be affirmed here. The employer has appealed on the theory that the employee did not sustain an injury arising out of his employment so as to entitle him to the benefits of the workmen's compensation law.

On February 16, 1936, the employee froze one of his hands while helping with about a dozen others to shovel snow from highway No. 91, east of the village of Dodge. He was warmly dressed, having two pairs of double flannel gloves on his hands. The gang had begun shoveling at 8 o'clock in the morning about a quarter of a mile east of town. They removed the deepest snow so as to make a roadway about eight feet wide. The snow removed varied in depth from one to eight or nine feet. They had progressed eastward to a point about two miles from town and were shoveling at the top of a grade, with a northeast wind, when his fingers were found to be frozen and he was taken home by the foreman. Before starting to work that morning the employee testified he had read the thermometer on the post office at Dodge and it indicated fifteen degrees

below zero. Fred Hahn, government weather observer, testified that at Fremont that day it was fifteen below zero at 7 o'clock in the morning, six below at noon and eight below at 6 o'clock at night. It is inferable from the evidence that the claimant was in good health and was not susceptible to the influence of cold by reason of any bodily impairment. None of his coworkers was frozen on that particular day.

We have had no previous freezing cases determined under the compensation law. We have had several heat prostration or sunstroke cases. The general rule applied in such cases is that "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, 246 N. W. 454; *McNeil v. Omaha Flour Mills Co.*, 129 Neb. 329, 261 N. W. 694. The same rule was applied to "snow blindness." *Hayes v. McMullen*, 128 Neb. 432, 259 N. W. 165. In these cases the accident or injury was held to arise out of and in the course of employment because the employee was found to be subject to a greater hazard than the public generally in the same locality. But in *Gale v. Krug Park Amusement Co.*, 114 Neb. 432, 208 N. W. 739, an employee, injured by reason of a tornado or cyclone, was held not to be under the protection of the compensation law because the tornado or cyclone affected every one alike in similar circumstances.

So, for precedents in cases produced by cold, we must look to other jurisdictions having provisions similar to our own.

In *Ferrara's Case*, 269 Mass. 243, 169 N. E. 137, a driver, collecting ashes and taking them to a dump on a cold windy day (the temperature not given) lost fingers due to injuries caused by frost-bites. It is true that the men started a fire at the dump and were told by the boss not to do it. It was held that the employee was in fact exposed to greater danger than the ordinary outdoor worker and was entitled to compensation.

In *McManaman's Case,* 224 Mass. 554, 113 N. E. 287, the opinion affirms a judgment finding that a longshoreman, whose fingers were frozen while he was working at his regular occupation of unloading a steamer at a pier when the thermometer stood at four degrees below zero, was entitled to compensation and that the injury was one arising out of his employment; that he was exposed "to materially greater danger and likelihood of getting frozen than the ordinary person or outdoor worker on the date in question."

In *Larke v. Hancock Mutual Life Ins. Co.,* 90 Conn. 303, 97 Atl. 320, the employee "froze his nose and the tissues adjacent thereto and then suffered a frost-bite. There was evidence that the day was very cold" (temperature not stated). As a result the employee contracted erysipelas and died. The evidence, which we omit reciting, satisfied the court that the freezing and frost-bite arose out of and in the course of the employment and "exposed him to the severity of the weather and to the danger of frost-bite very much more than the ordinary person in that locality was exposed." The judgment of the trial court was affirmed, awarding compensation for the death of the employee.

In *Gibbons v. United Electric Railways Co.,* 48 R. I. 353, 138 Atl. 175, Gibbons claimed and received an award of compensation for injuries received resulting in amputation of phalanges of two toes, one on his right foot and one on his left. The employee was required to work constantly for 24 hours. It might be said that this circumstance differentiated him from the general public.

Freezing may constitute an accidental injury within the meaning of the New York workmen's compensation law. *Quick v. Illston Ice Co.,* 195 App. Div. 676, 186 N. Y. Supp. 690; *Days v. Trimmer & Sons, Inc.,* 176 App. Div. 124, 162 N. Y. Supp. 603.

In *Riley v. Boise City,* 54 Idaho, 335, 31 Pac. (2d) 968, claimant was required as a patrolman to walk his beat from 8 a. m. to 4 p. m. It was four below at 8 a. m., eleven above

at 3 p. m. and decreased to eight above at 4 p. m. His longest period of exposure was the last hour during which he walked continuously for twenty blocks, turning on alley lights, after which he rode home on a bus for fifteen minutes and walked the last five minutes, arriving home about 4:30. Upon removing his shoes and stockings immediately, he discovered that his left foot was frozen. Two traffic policemen and one other patrolman on similar duty suffered no frost-bite. The court affirmed the judgment awarding compensation, arguing that claimant's hazard was increased over others because of the circumstances and that his injury therefore arose out of his employment.

The foregoing authorities suffice to indicate that the courts in the other jurisdictions have held rather uniformly that in freezing cases the evidence will be considered with some liberality before applying to it the rule that, if others than the one claiming compensation do not receive any disability, whether merely in the same locality and therefore subject to the same temperatures, or whether even engaged upon the same work, it must follow that one who is actually disabled is without benefit from the compensation law.

The evidence was brief. It showed, however, that Laudenklos was traveling toward the east while shoveling snow; that when it was discovered that he had frozen his hand he was at the top of an incline and the cold was intensified by a wind from the northeast; that while the foreman testified that he had a heater in his car where any of the workmen might go for warmth, the witness admitted that he did not tell Laudenklos or any others of the fact. So far as the evidence shows, Laudenklos did not know of the heater. The circumstance that one who is shoveling keeps his hand gripped around the handle of the shovel and that those who were doing the work on the day in question were working in the face of the wind at the time the freezing of Laudenklos had manifested itself (even though his associates were not frozen) proves that the members of this shoveling gang were surrounded by quite different circumstances from others in the same locality who might be

free to change their direction so as to avoid the northeast wind or the circulation of whose fingers would not be obstructed by their grip on a shovel. Freezing comes on insidiously. On such a day as the one on which this occurred it might affect only one. Though the evidence shows it did affect another on a previous day. In the opinion in *Fogg v. Van Saun Coal Co., Inc.*, 12 N. J. Misc. 680, 174 Atl. 419, which held a frost-bitten hand subject to the compensation act, the writer of the opinion denies the application of the rule that, if one is frozen and others are not, the one is refused compensation. He well says: "If one hundred men are working in a factory and one is struck by a falling beam should he be denied compensation because his hazard was not any greater than the other ninety-nine?"

We are of the opinion that the injury to claimant was compensable. It is a general rule that exposure to cold, resulting in injury, is not compensable if it is the same as that to which the general public is exposed. But the rule as applied to the facts in this case is as follows: Evidence *held* to require affirmance of the district court's finding that employee's exposure to cold was special, peculiar danger, greater than that of the general public in the same locality, so that freezing of his hand constituted an "accident arising out of and in the course of his employment."

The judgment of the district court is

AFFIRMED.

FIRST TRUST COMPANY OF LINCOLN, TRUSTEE, APPELLANT, V. FRED WALLER, SR., ET AL., APPELLEES.
271 N. W. 681

FILED FEBRUARY 26, 1937. No. 29800.

1. **Account.** A court may properly decline to entertain a bill in equity for an accounting for unpaid interest, where the items, dates and rates are all definitely stated in the petition without complications and require only simple calculations familiar to any competent jury.
2. **Trial.** Where a bill in equity for an accounting is demurrable

as such, an order transferring the cause to the law docket for consideration as an action at law is not erroneous.

3. Torts. Where a trustee for bondholders extinguished the trust by receiving for them payments of the bonds and the interest in full, when due, in strict compliance with definite terms of the bonds, without default or fraud on the part of any one, the trustee afterward cannot maintain an action to recover additional interest, on the ground that the makers of the bonds delayed him in distributing the payments to the bondholders, without showing they authorized the litigation.

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

Stewart, Stewart & Whitworth and *Charles B. Paine*, for appellant.

Sterling F. Mutz and *Edward C. Fisher, contra.*

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

ROSE, J.

This is an action by the First Trust Company of Lincoln, plaintiff, trustee for bondholders, to charge defendants, Fred Waller, Sr. and Fred Waller, Jr., partners as Waller Signs, makers of the bonds, with interest after payment in the hands of the trustee equaled the principal debt and interest, on the alleged ground that defendants wrongfully prevented the trustee from making prompt distribution of such payments to bondholders entitled thereto.

The petition and an amended petition in the form of two causes of action were assailed by demurrers which were sustained. The action was dismissed. Plaintiff appealed.

The Lincoln Safe Deposit Company, October 1, 1931, lent defendants $95,000, evidenced by 174 negotiable bonds aggregating that sum, bearing interest at the rate of 6 per cent. per annum until due and 10 per cent. thereafter. To secure the bonds defendants assigned to the Lincoln Safe Deposit Company, payee, contracts obligating the Skelly Oil Company to make thereon monthly payments far exceeding the bonded indebtedness. The bonds were all sold to

more than 50 purchasers. Each bond contained the following provisions:

"It is further agreed that all payments to be made on this bond, whether principal or interest, shall be made to said Lincoln Safe Deposit Company, for the benefit of the holder thereof. * * * If any default occurs in this bond or in any of said bonds or in the contracts herein assigned or the agreement respecting same, then the Lincoln Safe Deposit Company may as trustee for the holder of all of said bonds without notice to, or hindrance from any one, declare this bond and all said bonds, matured, due and payable."

July 9, 1932, the Lincoln Safe Deposit Company, trustee for the bondholders, was adjudged a bankrupt and plaintiff was appointed successor-trustee July 21, 1932.

Plaintiff alleged that "On December 1, 1932, the First Trust Company of Lincoln, Nebraska, received from the Skelly Oil Company the sum of $10,704.07 as a payment due under said contracts;" that, referring to unpaid bonds, "The principal of all of the aforesaid bonds has been paid and the principal of all interest coupons thereon has been paid;" that "said Trust Company received from the Skelly Oil Company the amount of the principal of all of the aforesaid bonds and the amount of the principal of all of the aforesaid coupons at their respective maturities but defendants have failed and refused to pay the interest on the principal of said bonds and the interest on the principal of said interest coupons from the date said amounts were received from the Skelly Oil Company until July 1, 1934, which was the date on which payment could be made by plaintiff to the bondholders, as aforesaid."

It is further alleged in the petition that, after plaintiff received the remainder of the principal and interest on the unpaid bonds, when due, defendants wrongfully prevented prompt distribution to bondholders and thus became liable to them for interest during the delay. The alleged actionable wrongs are that defendants made unfounded claims to the trust funds in the hands of plaintiff, successor-trustee;

that they gave notice that distribution to the bondholders would be at the peril of plaintiff; that they sued plaintiff herein to account for exacted usury in the loan. In the former action for usury it was held in effect that payment by the Skelly Oil Company to plaintiff, successor-trustee, was equivalent to payment of the bonds and that usury, if any, could not be recovered back. A dismissal of that case was affirmed on appeal. *Waller v. First Trust Co.*, 126 Neb. 403, 255 N. W. 29. Plaintiff's understanding of the present case is indicated by the following statements in the brief:

"Plaintiff prayed that it recover judgment against the defendants on its first cause of action in the sum of $5,827.38 with interest thereon at the rate of 10 per cent. per annum from July 1, 1934, and that in the event it be determined by the court that plaintiff was not entitled to recover judgment against the defendants on its first cause of action, then plaintiff prayed that it recover judgment against defendants and each of them on its second cause of action in the sum of $3,005.81 with interest thereon at the rate of 6 per cent. per annum from July 1, 1934. * * *

"The only difference in the two causes is in the rate of interest asked for as damages. This difference is based upon the fact that the contract calls for interest until payment at the rate of 10 per cent., while on the other hand, if the recovery is in tort, it is established that the measure of damages should be interest (6%) on the sum of money, the use of which has been wrongfully interfered with."

It is clear on the face of the petition as a whole, including the bonds, the interest coupons, and the collateral security, that two causes of action were not stated. The substance of the plea is the same in both instances—a tort causing wrongful delay of the trustee in distributing the trust fund to the bondholders, the beneficiaries of the trust. What is pleaded as a cause of action in equity for an accounting for interest is wholly inadequate for that purpose. The petition shows on its face there were no complicated accounts involved or other facts calling for relief in equity. The items, dates and rates were all definitely stated with-

out complications and would require only simple calculations familiar to any competent jury. *Merritt v. Johnston,* 109 Neb. 859, 192 N. W. 734. Considered from an equitable standpoint, that part of the petition relating to the first cause of action was demurrable and the district court properly transferred the entire cause to the law docket.

Does the petition as a whole state facts sufficient to constitute a cause of action in tort in favor of plaintiff as successor-trustee for the bondholders? The trustee named in the bonds was the Lincoln Safe Deposit Company. Its powers and duties as such came from each of the bonds which bound the makers, the trustee and the bondholders. Each bond provided:

"All payments to be made on this bond, whether principal or interest, shall be made to said Lincoln Safe Deposit Company for the benefit of the holder thereof."

"Both said principal and interest are payable at the office of the Lincoln Safe Deposit Company in Lincoln."

"If any default occurs in this bond or in any of said bonds or in the contracts herein assigned or the agreement respecting same, then the Lincoln Safe Deposit Company may as trustee for the holder of all of said bonds without notice to, or hindrance from any one, declare this bond and all said bonds, matured, due and payable."

It thus appears that the trustee named had power to receive payment for the bondholders and to declare the entire debt payable in the event of a default. These are the enumerated powers and duties to which plaintiff succeeded. The trusteeship under the terms of the bonds related to receiving payment and to accelerating maturity in event of a default. Power to act as trustee for the bondholders in an independent action to recover damages for a tort after payment of principal and interest when due was not enumerated or implied. There was no occasion to declare the entire debt due. There was no default. The petition shows that payments were made as they fell due. Plaintiff as trustee received the entire unpaid debt and interest.

In receiving payment for debt and interest in absence

of default or fraud, plaintiff acted with authority for the bondholders, and payment to their trustee under the circumstances was equivalent to payment of the bonds. *Waller v. First Trust Co.*, 126 Neb. 403, 255 N. W. 29. Payment in full extinguished the trust created by the bonds and left the trustee without authority to maintain the independent action for damages resulting from the alleged tort. There is no sufficient showing of such authority. In these views of the petition the demurrers of defendants were properly sustained.

AFFIRMED.

CRETE MILLS, APPELLEE, V. NEBRASKA STATE BOARD OF AGRICULTURE, APPELLANT.
271 N. W. 684

FILED FEBRUARY 26, 1937. No. 29766.

Agriculture. The Nebraska state board of agriculture is a corporation possessing no immunity from the enforcement of its honest debts and its just obligations by the ordinary processes of the courts.

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

William H. Wright, Attorney General, and *George W. Ayres,* for appellant.

George I. Craven, contra.

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

EBERLY, J.

This is an action at law by the Crete Mills, a corporation, against the Nebraska state board of agriculture as defendant. The plaintiff sues to recover from defendant for grain, feed, and mill products, which, the evidence discloses without question, were purchased by defendant, were shipped and delivered by plaintiff to defendant, and the latter in

turn sold and disposed of the property thus received to exhibitors and holders of concessions at the Nebraska state fair, then being carried on by defendant; further, that the proceeds and profits of the sale thus made by defendant were appropriated by it to its own use, and that, in part settlement of the obligation thus incurred, defendant executed the note in suit by and through its duly authorized agent.

The defense in the district court was, in substance, that the Nebraska state board of agriculture, a corporation, is a public corporation, organized by act of the legislature of Nebraska as an instrumentality of the state, and as a part thereof is incapable of being sued without consent of the legislature, and that no such consent has been given.

In the trial had in the district court for Lancaster county, ultimately a jury was waived, and the issues were determined by the district judge in favor of plaintiff, and judgment was entered as prayed. The defendant appeals.

The crux of the situation presented by the appeal is the inherent nature of the defendant. Is it a public corporation constituting a governmental agency, within the protection of the principle that a sovereignty may not be sued without its consent?

The history of the legislation on the subject is suggestive. It appears that on October 14, 1858, there was duly approved by the then governor of the territory of Nebraska an act duly passed and enacted by the council and house of representatives of the territory of Nebraska, entitled, "An act to establish a territorial board of agriculture." Vol. 1, Complete Session Laws of Nebraska, 1855-1865, pp. 530, 531. It embraced twelve sections. The first three and the last five sections of this act were devoted to the subject of county agricultural societies, their organization and regulation.

Section 4 of the act provided that certain named persons were "hereby created a body corporate with perpetual succession * * * under the name and style of the Nebraska territorial board of agriculture."

Section 5 provided: "It shall be the duty of said board or a majority of them to meet at Omaha city as soon after the passage of this act as a majority of them may agree upon, and organize by electing a president, secretary, and treasurer, and such other officers as they may deem necessary; also to determine by lot the time that each member shall serve, so that the term of service of one-half of the members shall expire annually on the day of the annual meeting. And the president shall have power to call meetings of the board whenever he may deem it expedient."

Section 6 contained the following: "There shall be held at some central point in the territory, to be agreed upon by the board at their session, an annual meeting of the board, together with the president of each county society or other delegate therefrom duly authorized, who shall for the time being be *ex officio* member of the territorial board of agriculture, for the purpose of deliberation and consulting as to the wants, prospects, and condition of the agricultural interests throughout the territory; and at such annual meeting the several reports from the subordinate societies shall be delivered to the president of the territorial board, and the said president and delegates shall at this meeting elect suitable persons to fill all vacancies in the territorial board of agriculture."

Section 7 provided for the making of an annual report, "so as to give a general view of the condition of agriculture throughout the territory, accompanied by such recommendations as they may deem important and useful."

The subject of the holding of a state fair does not appear to be covered by the terms of this act.

In 1866 there was enacted by the territorial legislature, "An act for revising, amending, consolidating, and reenacting the Civil and Criminal Codes, and the laws of a general nature, of the territory of Nebraska." Under "Part I, chapter 1, Agriculture," were substantially reenacted the provisions relative to county agricultural societies as originally adopted in 1858, and likewise substantially the provisions relative to the territorial board of agriculture. To the lat-

ter, however, the following provision was added: "For the purpose of aiding agricultural pursuits in this territory, the sum of three hundred dollars be and hereby is appropriated out of the territorial treasury, and annually hereafter, subject to the order of the president and secretary of the territorial board of agriculture. Said amount to be used in the payment of premiums awarded by said board in the various branches of agriculture, and for no other purpose; Provided, That should the board fail in any year to offer and award premiums for the encouragement of agricultural pursuits, then the benefits of this chapter shall not be available that year." Vol. 2, Complete Session Laws of Nebraska, 1866-1877, p. 4.

The last-named enactment was in turn superseded by, "An act for the government, support, and maintenance of the state board of agriculture and state horticultural society," and "Approved, February 25, A. D. 1879." This act, substantially a reenactment of previous legislation, accomplished the change of name from territorial board to state board, and the sum appropriated by the state for the payment of premiums was increased from $300 to $2,000. Laws 1879, p. 396.

In 1883 section 1 of the act of 1879 was amended, as appears by chapter 1, Laws 1883, by adding thereto these words: "The said board shall also have power at the annual meeting to locate the state fair for a period not exceeding five years at any one time or at any one place."

This section was again amended by chapter 1, Laws 1899, which substituted for the provision last quoted the following: "The state fair shall be held annually at or near the city of Lincoln, in Lancaster county, under the direction and supervision of the state board of agriculture, and the state board of public lands and buildings is hereby authorized, empowered and directed to select a site for the same within a radius of three miles of the present state capitol building and to purchase a suitable tract of land for such a site; Provided, however, that said board of public lands and buildings after selecting said site, shall pay

not to exceed the sum of one dollar for a clear and sufficient title therefor."

In 1901 the legislature enacted chapter 1 of the session laws of that year, under the title: "An act authorizing the purchase of land for state fair purposes and to appropriate the sum of thirty-five thousand ($35,000) dollars, or so much thereof as may be necessary, for the purchase and improvement thereof, and to amend section 1, article 1, chapter 2, Compiled Statutes of Nebraska for the year 1899, and to repeal said section as now existing." Laws 1901, ch. 1. It appears, however, that this act contained no repealing clause. In Cobbey's Annotated Statutes of 1909, under section 3000 thereof, appears the following note: "The title of the amendatory act repeals this section, but the act itself does not repeal it, so it is published as still in force. The amendatory act, being temporary in its nature, is not published."

The Revised Statutes of 1913, however, changed the language of the act of 1899, so that it now reads: "The state fair shall be held annually at or near the city of Lincoln, in Lancaster county, under the direction and supervision of the state board of agriculture, upon the site and tract of land, selected and now owned by the state for that purpose and known as the state fair grounds." Rev. St. 1913, ch. 1, sec. 1. This was continued in the Compiled Statutes of 1922 and the Compiled Statutes of 1929.

In this connection, section 2, art. VIII of the Constitution, provides: "The property of the state and its governmental subdivisions shall be exempt from taxation. The legislature by general law may exempt property owned by and used exclusively for agricultural and horticultural societies * * * when such property is not owned or used for financial gain or profit to either the owner or user."

It is obvious, under this provision, that the defendant does not secure exemption from taxation because of its character as a governmental agency, but solely because its property is owned and used exclusively by an agricultural society and not "for financial gain or profit to either the owner or user."

In 1919 there was enacted chapter 190 of the session laws of that year, which constituted the Civil Administrative Code of this state. However, the Nebraska state board of agriculture was neither expressly nor by necessary implication embraced within its provisions, and was not subject to laws or regulations as a part thereof. This Code, in terms, created a department of agriculture as an executive organization. While its name has been changed, its functions and powers have since been substantially continued. See Comp. St. 1929, sec. 81-501; Comp. St. Supp. 1935, sec. 81-107. But it cannot be said that the state department of agriculture embraces or includes the defendant in the instant case as either the subject of its regulation or of its control.

The record further demonstrates beyond peradventure that, as a fact, the original incorporators of this board and their successors in interest, elected by them at the annual election, constituted a self-perpetuating body. The officers of this organization were continuously selected by the board, and its general policies were determined by the annual meeting at which the original incorporators and their successors in interest, by them selected, were supreme. The electors of the state generally had no voice in the proceedings of this board, and the political officers of the state exercised no powers of selection or appointment of its officers, or direction or control over its general business affairs. In the conduct of the Nebraska state fair, this board received an annual donation from the state for the payment of premiums. The state also made certain donations of funds and property, and the board, as a corporation, in turn made an annual report covering receipts and disbursements. At the present time certain reports are required annually by the state authorities of most private corporations.

It may be said, in passing, that the record discloses that since 1901, and excluding the $35,000 appropriation of that year, the sum of $456,184.97 has been taken out of the state fair receipts and put into permanent improvements, and that during the same period $471,829.40 of money

derived from the same source has been paid out for labor and repairs.

In this state, "the powers of the government * * * are divided into three distinct departments, the legislative, executive and judicial" (Const. art. II, sec. 1); and the supreme executive power is vested in the governor.

The inherent nature of the corporation under consideration would preclude the classification of powers exercised by it as "legislative" or "judicial."

It would seem that the legislative intent evidenced by the statutory enactments hereinbefore referred to would also remove this corporation from consideration as an "executive" agency. Since 1858 it has consistently operated independently, and as removed from executive control and direction. It cannot be considered as an independent executive department of government. Section 1, art. IV of the Constitution, provides: "The heads of all executive departments established by law, other than those to be elected as provided herein, shall be appointed by the governor, with the consent of" the legislature. So, too, the record discloses that the corporation in suit collects its receipts from admissions to fairs, and from charges against concessions, and from other like sources of income, and pays out and disburses the same by and through its own officers as a private corporation. Section 25, art. IV of our Constitution, provides for the payment of state funds "forthwith into the state treasury." Section 9, art. VIII, provides for the examination and allowance of claims against the state by the state auditor, and their approval by the secretary of state, before any warrant therefor shall be drawn. And section 25, art. III, 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."

In the instant case, there is no history of any compliance with these fundamentals by this corporation. It is obvious, therefore, that neither the inherent nature of the Nebraska state board of agriculture, the manner in which its per-

petuity is accomplished, the character of the business carried on, the method of its performance, nor the purpose sought to be attained, in any manner determines its character to be that of a public governmental agency, to which the principle of exemption from suit without assent of the state is applicable. In support of this conclusion, we cite the following authorities: 1 R. C. L. 783, sec. 2, wherein it is stated: "Although in rare instances agricultural societies are not incorporated associations, the majority of them are, and it is only with respect to the nature of the latter that there is any difference of opinion, as the former are but unincorporated societies governed by the general principles of law applicable to partnerships. Where incorporated, however, the question arises as to whether they are to be classed as private corporations, or as municipal corporations. * * * They are the result of the voluntary association of the persons composing them, and are not created by the state, of its own sovereignty, without the consent of the persons who constitute them. They are not territorial or political divisions of the state, nor are they entrusted with any of the ordinary attributes of sovereignty for the purpose of local government. The fact that the state may make annual contributions to assist them in offering prizes and premiums, and may require in return the rendition of an annual accounting thereof, together with reports or statistics relating to agricultural matters and the like, is absolutely immaterial; for they may accept such donations with the conditions that accompany them, or not, just as they see fit. They are not mere passive recipients of their corporate powers and duties, with no power to decline them or refuse their execution. They are as free from the interference or control of the government as private individuals, and cannot, therefore, enjoy any privileges which may not be enjoyed by the individual. These principles are equally true of both local and state agricultural societies, and the fact that no shares of stock are issued is of no consequence in determining their nature. Consequently, the authorities are almost unanimous in holding that they are simply pri-

vate corporations, with none of the privileges or immunities of municipal corporations."

In 1 Thompson, Corporations (3d ed.) pp. 35, 36, the following appears: "That a corporation is organized to promote objects of a public nature does not necessarily deprive it of its private character. 'The fact of the public having an interest in the work or the property or the object of a corporation, does not make it a public corporation. All corporations, whether public or private, are in contemplation of law, founded upon the principle that they will promote the interest or convenience of the public.' * * * The corporate character is not lost by reason of the fact that the state may control the appointment of some of the directors. A corporation chartered for public purposes and vested with the right of eminent domain was held to be a private corporation. A corporation is said to be private unless the whole interest belongs to the government, or it is created for the administration of political or municipal power."

"In the *Dartmouth College* case, Mr. Justice Washington discussed at length the proper method of division of corporations. He said: 'Public corporations are generally esteemed such as exist for political purposes only, such as towns, cities, parishes and counties; and in many respects they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government for public purposes when the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder or the nature and objects of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is in the strictest sense a public corporation. So a hospital created and endowed by the government for general charity. But a bank whose stock is owned by private persons is a private corporation, although it is erected

by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge and turnpike companies. In all these cases the uses may, in a certain sense, be called public, but the corporations are private; as much so, indeed, as if the franchises were vested in a single person.'" 1 Smith, Modern Law of Municipal Corporations, pp. 3 and 4, citing, *Dartmouth College v. Woodward,* 4 Wheat. (U. S.) *518, *668; *Osborn v. U. S. Bank,* 9 Wheat. (U. S.) 738; *Bank of United States v. Planters Bank,* 9 Wheat. (U. S.) 904; *Rundle v. Delaware & Raritan Canal,* 1 Wall. Jr. 275, 290.

In *Downing v. Indiana State Board of Agriculture,* 129 Ind. 443, 28 N. E. 123, 12 L. R. A. 664, we have a situation in principle quite similar to that presented in the instant case. The Indiana board of agriculture was created by an act of the legislature of that state, approved February 14, 1851. The question upon which the case was determined was whether the Indiana board of agriculture was a private corporation. Its constituting act was substantially identical in terms with the legislation we have referred to in the instant case. After reviewing the precedents, the Indiana court continues:

"Under the rules stated it is clear that the Indiana state board of agriculture is a private corporation, and it matters not to what extent the state has voluntarily aided it by contributions and appropriations.

"The corporation now owns a large amount of property. The main funds it has handled and used have been received from private citizens, railroad companies, the city of Indianapolis, and funds received from state fairs held by the board. The members of the board have not been chosen by the state; they are not state officers. It has not been a state institution. It is true there are no shares of stock issued and held by the trustees or private individuals. Neither are shares of stock issued by colleges and universities or charitable institutions, which are private corporations, and it is not necessary to make it a private corporation that shares of stock be issued. The act creating it made it a body cor-

porate, with perpetual succession in the manner prescribed. It is in a sense an educational institution. It seeks to bring together people engaged in agricultural pursuits, as well as those engaged in manufacturing farm machinery and other articles adapted to use in the cultivation of the soil and harvesting of crops, and other articles used by the public, as well as those engaged in raising stock, and to exhibit to those in attendance the crops resulting from the various methods of farming, and the various machinery manufactured for the use of those engaged in agricultural pursuits, as well as the various breeds of stock, and give to the people of the state, and particularly those engaged in agricultural pursuits, an opportunity of discussing various methods of farming and farm implements used, and the different breeds of stock raised, and to educate the people in this way in the pursuits of agriculture, and to educate and improve the condition of the agriculturist, that they may have a knowledge of the best methods of farming, best machinery to use, and the best breeds of stock.

"An agricultural society is defined in the Century dictionary as 'A society for promoting agricultural interests, such as the improvement of land, of implements, of the breeds of cattle,' etc.

"A new English dictionary defines an agriculturist as 'A student of the science of agriculture.' * * *

"The trustees so elected have no financial interest in the property of the corporation, that is to say, they are not the owners of the property of the corporation in such a sense as that they can sell it and appropriate the proceeds to their own use any more than could the trustees of the state university sell and convert the proceeds of the property to their own use; they are simply trustees to manage and control it."

Accordingly, the Indiana court determined that the board of agriculture of that state was, in strictness, a private corporation, and awarded it those rights which it was entitled to as such.

See, also, *Tongue v. State Board of Agriculture,* 55 Or.

61, 105 Pac. 250; *Lake County Agricultural Society v. Verplank*, 71 Ind. App. 186, 124 N. E. 494; *Lane v. Minnesota State Agricultural Society*, 62 Minn. 175, 64 N. W. 382; *Wilson v. Thayer County Agricultural Society*, 115 Neb. 579, 213 N. W. 966; *Pain v. Kiel*, 288 Fed. 527; *Dunn v. Brown County Agricultural Society*, 46 Ohio St. 93, 18 N. E. 496, 1 L. R. A. 754.

We have carefully examined the cases which are cited and relied upon by the appellant. They are to be distinguished from the instant case, because of the different terms of the statutes involved in each.

Thus, for example, in *Morrison v. Fisher*, 160 Wis. 621, 152 N. W. 475, the members of the Wisconsin state board of agriculture were appointed by the governor, and vacancies therein were filled by him. The state treasurer of Wisconsin was *ex officio* a member of the board, and whatever moneys were received were paid to and disbursed by such state treasurer.

In *Berman v. Minnesota State Agricultural Society*, 93 Minn. 125, 100 N. W. 732, the supreme court of Minnesota say, in part: "Subsequent to the decision of *Lane v. Minnesota State Agricultural Society*, 62 Minn. 175, chapter 126, p. 170, Laws of 1903, was enacted, wherein it was provided that the existing rights of the former society were confirmed. It was declared to be a public corporation, and one of the departments of the state; * * * the title to all moneys and property of the state agricultural society was thereafter vested in the state of Minnesota."

In *Busby v. Indiana Board of Agriculture*, 85 Ind. App. 572, 154 N. E. 883, we note that the court bases its determination on the fact "that the Indiana board of agriculture was created as an agency of the state for the purpose of managing and conducting a *department of the state* pursuant to art. 8, sec. 1 of the Constitution, sec. 189 Burns 1926." (Italics ours.)

Melvin v. State, 121 Cal. 16, 53 Pac. 416, was decided upon a statute that expressly provided, in the first section thereof, that "the state agricultural society is hereby de-

clared to be a state institution," and in the second section, the governor is required "to appoint twelve resident citizens of the state, who shall, when organized, constitute 'a state board of agriculture.'"

The present case involving solely a question of statutory construction, it is obvious that the cases cited by appellant are not persuasive, in view of the essentially different statutory provisions upon which they are based.

It follows that the Nebraska state board of agriculture is essentially a private corporation, possessing no exemption from suit or liability, and that the judgment of the district court for Lancaster county is, in all respects, correct, and is

AFFIRMED.

L. J. DILL, APPELLANT, V. FARMERS CO-OPERATIVE COMPANY OF OCONTO, APPELLEE.
271 N. W. 692

FILED FEBRUARY 26, 1937. No. 29649.

1. **Pleading.** Where a petition alleges a binding contract, a breach thereof amounting to a legal wrong and a resulting pecuniary damage, it states a cause of action and a general demurrer thereto should be overruled.
2. ———: DAMAGES. Where the facts stated in a petition show that plaintiff is entitled to damages of some sort, it is not a fatal error that the pleader has mistaken the rule by which such damages should be measured.

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

Edwin F. Myers, for appellant.

Evans & Lee, contra.

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

CARTER, J.

This action was commenced by the appellant to recover damages for breach of warranty on a contract for the purchase of four car-loads of alfalfa hay. The trial court sustained a demurrer to appellant's petition and, appellant refusing to further plead, dismissed the action. From the overruling of his motion for a new trial, appellant brings the case to this court on appeal.

The appellant alleges generally in his petition that on October 4, 1930, he entered into a written contract with appellee as follows: "Confirming purchase four (4) cars second and third cutting #1 green leafy alfalfa @ $15 per ton your track for quick shipment. Terms draft B-L attached. Weight and grade guaranteed. (Signed) Farmers Coop. Co. Accepted by E. T. Walter, Mgr. (Signed) L. J. Dill." Appellant alleges a breach of the warranty as to quality of the three cars of hay shipped and a breach of the contract for failure to deliver the fourth car. Appellant prayed for damages in the amount of $707.84 on the four causes of action pleaded. The only question is whether the trial court erred in sustaining the general demurrer to the petition.

The petition sets out the contract verbatim upon which the causes of action are predicated. It is alleged that the contract was breached and that appellant suffered damages in a specified amount as a result thereof. Appellee contends that the petition does not state a cause of action for the reason that the wrong measure of damages is pleaded. In stating that the wrong measure of damages is pleaded appellee is undoubtedly correct. The correct rule, under the provisions of the uniform sales act, as to the first three causes of action is: "In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty." Comp. St. 1929, sec. 69-469. Appellant failed in his petition to allege the value

of the hay as warranted and its value as delivered, although he alleges the specific amount that he claims to have been damaged thereby.

With reference to the necessity of pleading the correct measure of damages in order to state a cause of action, an authoritative text-writer says: "As a basis of recovery, damages must be alleged in a definite or, at least, a determinable, amount. A general allegation of damages is sufficient in the absence of a special demurrer. Indeed, it has been held that complaint which omits formally to aver the amount of damages sustained, is not demurrable on that account, if it contains a prayer for relief in a specified amount. An action for breach of contract lies, though no actual damages be sustained. And so it has been held that even though a complaint states a cause of action for only nominal damages for breach of contract, it is good on general demurrer. * * * Where the facts stated in a complaint show that the plaintiff is entitled to damages of some sort, it is not a fatal error that the pleader has mistaken the rule by which such damages should be determined. A complaint which does not set up the true measure of damages may be subject to a special demurrer; but if it discloses a violation of the plaintiff's legal rights in some respect by the defendant, it is good as against a general demurrer, and evidence is properly admissible thereunder as to the true measure of damages." 1 Bancroft, Code Pleading, sec. 164.

In *Crum v. Thomason*, 181 S. W. (Tex. Civ. App.) 803, the court said: "A petition, alleging plaintiff's ownership of certain premises, the erection by defendant of a cotton gin near-by, the facts constituting its operation a nuisance, and that plaintiff was damaged thereby in the sum of $495, stated a good cause of action without alleging the market value of the premises immediately before and immediately after the erection and operation of the gin, as the measure of damages is a matter to be regulated by the charge, and need not be pleaded."

In *Rickards v. Aultman & Taylor Machinery Co.*, 64

Mont. 394, 210 Pac. 82, the court said: "Where the complaint in an action on a contract does not set up the true measure of damages it may be subject to a special demurrer on that ground, but if it discloses a violation of plaintiff's rights it is good as against a general demurrer and evidence is properly admissible thereunder to show the true measure of damages."

In *Kraft v. Rice,* 45 App. Div. (N. Y.) 569, 61 N. Y. Supp. 368, the court said: "We agree with the court below in the formulation of the rule relating to the sufficiency of a pleading on contract, that if it clearly sets forth a contract and its breach, even though the theory of damages predicated thereon may be erroneous, it is a statement of a good cause of action. * * * If, in addition to the contract, a breach was alleged, then the plaintiff would be entitled to at least nominal damages, and the complaint would not be demurrable."

In *Colrick v. Swinburne,* 105 N. Y. 503, 12 N. E. 427, the court said: "It is not material that the plaintiff did not demand the precise damages to which he was entitled, or that he mistook the true rule of damages in his complaint. The complaint averred a legal wrong and a resulting pecuniary injury, and it was competent for the court, under the complaint, to adjust the recovery upon the true basis."

In *Kingsley v. Butterfield,* 35 Neb. 228 52 N. W. 1101, this court said: "The general rule as to pleading damages is as follows: 'Such damages as may be presumed necessarily to result from the breach of contract need not be stated with any great particularity in the declaration. * * * But in other cases it is necessary to state the damage arising from the breach of contract specially and circumstantially, in order to apprise the defendant of the facts intended to be proved.' 1 Chitty, Pl. 371. Damages which necessarily result from the injury complained of may be recovered without a special statement of the same."

In *Riverside Coal Co. v. Holmes,* 36 Neb. 858, 55 N. W. 255, this court also said: "At the common law general damages, such as the law presumes to arise, as being the

natural and necessary result of the wrong complained of, were not required to be pleaded. Damages for breach of contract to buy or sell goods were within this rule."

From the foregoing authorities we conclude that the first three causes of action were sufficient as against a general demurrer.

The fourth cause of action is predicated on the failure of appellee to deliver the fourth car-load of hay as contemplated by the contract. That portion of the uniform sales act, section 69-467, Comp. St. 1929, which deals with the measure of damages for failure to deliver goods sold is as follows: "2. The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract. 3. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

It is apparent that appellant has not pleaded the correct measure of damages in his petition, but, as heretofore stated in this opinion, it is good as against a general demurrer and upon a trial of the case evidence is properly admissible as to the true measure of damages.

We therefore hold that the trial court erred in sustaining a general demurrer to each and all of the causes of action pleaded in appellant's petition. The judgment of the district court is therefore reversed and the cause is remanded.

REVERSED.

HAROLD OSCAR WOODS, APPELLANT, V. CENTRAL STATES LIFE INSURANCE COMPANY, APPELLEE.

271 N. W. 850

FILED FEBRUARY 26, 1937. No. 29785.

1. Insurance: CONTRACT: CONSTRUCTION. "A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured." *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N. W. 397.
2. ———: ———: ———. A policy of insurance providing for total disability benefits when the insured "has become wholly and permanently disabled by bodily injury or disease, so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit or from following any gainful occupation," means inability to do all the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner.
3. ———: ———: ———. Under a policy containing such total disability provisions, the election of the insured to the office of county treasurer and his subsequent holding of that office do not constitute the performance of work or the following of an occupation for profit within the purview of the insurance contract.

APPEAL from the district court for Brown county: ROBERT R. DICKSON, JUDGE. *Reversed.*

G. A. Farman, Jr., for appellant.

Julius D. Cronin and *Peterson & Devoe, contra.*

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

CARTER, J.

This is an action on a policy of insurance to recover total permanent disability benefits alleged to have accrued thereunder. The insurance company contended that plaintiff was able to perform work and to follow occupations for compensation, gain and profit, and that liability had therefore ceased under the express provisions of the policy. A jury was waived and a trial had to the court. The trial court

found for the defendant and dismissed plaintiff's petition. From the overruling of his motion for a new trial, plaintiff appeals.

The policy provided for the payment of benefits when proof was made that the insured "has become wholly and permanently disabled by bodily injury or disease, so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit or from following any gainful occupation." The cessation clause in the policy provided that, "if it shall appear to the company that the insured is able to perform any work or to follow any occupation whatsoever for compensation, gain or profit, the company's obligations as above set forth shall cease."

In a suit on a policy containing similar clauses to the ones above quoted, the Missouri court of appeals said: "In other words, the insuring clause gives the right to benefits when insured is disabled so as to prevent the doing of certain things. The last clause but negatives his right to benefits when he is not so prevented, but when he is able so to engage and does so engage. They are correlative clauses. Both are to be given the same construction. It would be anomalous that the language employed when found in the insuring clause in one part of the policy should be given one construction and when found in another part of the policy should be given another. In the insuring clause, such language is construed to mean that insured is totally disabled when he cannot perform the material and substantial acts of his occupation and is thereupon entitled to benefits; in the last (so-called conduct) clause, it is to be construed as meaning that plaintiff is not totally disabled when he is able to and does perform the substantial and material acts of his occupation and is not in such event entitled to benefits. There is then no conflict between the two clauses. The latter has no effect to limit or vary the former. It is but declaratory of the former. It was doubtless inserted in the policies to enable the defendant to review the condition of plaintiff and his disabilities from time to time and to dis-

charge itself of liability under the policies when it is found that plaintiff's disabled condition has so far improved that he is again able substantially to carry on his occupation or substantially to engage in others." *Stoner v. New York Life Ins. Co.*, 90 S. W. (2d) (Mo. App.) 784. It is clear, therefore, that the addition of the cessation clause in no way changes the liability created in the first-quoted section of the policy.

The plaintiff in the case at bar was a registered pharmacist at the time he became disabled by an attack of infantile paralysis. It is not disputed that he is completely paralyzed below the waist and that his left arm is somewhat impaired. Neither is it disputed that his physical condition has not improved since he was afflicted with this disease and that his means of locomotion is limited to the use of a wheel chair. Total disability benefits were paid by the insurance company until April, 1932, after which further payments were discontinued. The only reason advanced by the insurance company for not continuing to pay the total disability benefits provided by the policy is that the insured was elected county treasurer of Brown county in 1930 and reelected in 1934, and that this is conclusive proof that insured is able to perform work or follow an occupation for compensation, gain or profit as provided in the policy.

The rule applicable is well stated in *Missouri State Life Ins. Co. v. Case*, 189 Ark. 223, 71 S. W. (2d) 199, as follows: "In construing provisions in policies relating to total and permanent disability sufficient to prevent the insured from engaging in any gainful occupation, the rule has been often stated to the effect that we do not give to these provisions a strict and literal interpretation, on the theory that a fair intention of the parties to the contract of insurance is that the insured shall receive indemnity when he is disabled to the extent that he is unable to carry on any business which, without the disability, he would be able to do or capable of engaging in. Therefore, to come within the meaning of the contract of indemnity, it is not required

that the insured shall be absolutely helpless, but he is totally disabled when the infirmity from which he suffers renders him unable to perform all the substantial and material acts of his business, or the execution of those acts in the usual and customary way." See, also, *Aetna Life Ins. Co. v. Person*, 188 Ark. 864, 67 S. W. (2d) 1007; *National Life & Accident Ins. Co. v. O'Brien's Exrx.*, 155 Ky. 498, 159 S. W. 1134; *Atlantic Life Ins. Co. v. Worley*, 161 Va. 951, 172 S. E. 168; *Metropolitan Life Ins. Co. v. Blue*, 222 Ala. 665, 133 So. 707; *Cooper v. Metropolitan Life Ins. Co.*, 317 Pa. St. 405, 177 Atl. 43; *Foglesong v. Modern Brotherhood of America*, 121 Mo. App. 548, 97 S. W. 240; *Nickolopulos v. Equitable Life Assurance Society*, 113 N. J. Law, 450, 174 Atl. 759; *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N. W. 397; *Oswald v. Equitable Life Assurance Society*, 128 Neb. 173, 258 N. W. 41.

We conclude that a policy of insurance providing for the payment of benefits when the insured has become wholly and permanently disabled by bodily injury or disease, so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit or from following any gainful occupation, does not mean, as its literal construction would require, a state of complete helplessness; but the total disability contemplated means inability to do all the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner. Under this construction of the policy, plaintiff is totally and permanently disabled and entitled to recover the benefits provided for in the policy.

The defendant contends that plaintiff, in holding the office of county treasurer, is actually engaged in an occupation for compensation, gain or profit within the meaning of the provisions of the policy and that there is, therefore, no existing liability for the payment of indemnity.

In *Mutual Life Ins. Co. v. Marsh*, 186 Ark. 861, 56 S. W. (2d) 433, it is disclosed that Marsh was a traveling salesman for a drug company. He was injured in an accident

and was left partially paralyzed. He was totally and permanently disabled in the ordinary sense, but payment was resisted for the reason that he was no longer disabled within the meaning of the policy and was able to work and engage in a gainful occupation for the reason that he had been elected circuit clerk. The court, in ruling against the insurance company, said:

"We do not agree, however, with the theory held by the appellant, for, if we adopt it, no case of total disability can arise except where not only the body is disabled, but the mind wrecked as well. No matter how seriously the body may be affected, there are those who, because of some peculiar ability or because of some happy chance, are still able, despite their handicap, to escape from beggary and to earn a living. Cases are not infrequent where men have been stricken totally blind and yet have earned substantial incomes; some, with their bodies totally disabled, have been able to conduct a successful business from the bed in which they are continuously confined; others, because of fortuitous circumstances, have been placed in a position where they were removed above want. These cases all arise, however, because of the possession of some extraordinary capacity or of some fortunate circumstance. Certainly, no cases of this character were in the minds of the insured or the insurer when the contract was entered into, but only the ordinary and usual events that would affect the ordinary person.

"In construing contracts such as the one now before us, it has always been insisted by the insurer that a strict and literal interpretation is required, and a few courts have adopted this view. The great majority, however, decline to do so, on the theory that a fair intention of the parties is that the insured should receive indemnity when he is so injured as would prevent him from carrying on any business which, without the injury, he is able to do or capable of engaging in. * * *

"If the appellee had been circuit clerk at the time he was disabled, the fact that he could go to his office and sit

around and sign his name would certainly not have precluded him from obtaining the benefits for which he had contracted and paid. We can see no difference in his having obtained this office after the disability than in the state of case supposed, and we do not think that an office such as that of circuit clerk was in the mind of the parties at the time of the contract, or under the facts in this case, that it comes within the term 'gainful occupation.' It has no degree of permanence, and in this particular case appears to be, so far as the appellee is concerned, a sinecure bestowed upon him perhaps because of his infirmities by an indulgent people. In any view of the case, since the appellee is not able to perform all of the substantial duties of the office in the usual and customary way, he is totally disabled within the rule announced in the case of *Aetna Life Ins. Co. v. Spencer,* 182 Ark. 496, and as the facts are not in dispute, the court properly directed a verdict for the plaintiff."

In *Dukes v. Jefferson Standard Life Ins. Co.,* 172 S. Car. 502, 174 S. E. 463, the insured was a farmer and became totally disabled due to a stroke of apoplexy. The insured was subsequently elected to the office of sheriff and the company refused to make further payments of benefits for the reason that insured had recovered from such disability. In deciding against the insurance company, the court said:

"Even if it could successfully be contended that the holding of the sheriff's office constituted the plaintiff's occupation, as it seems, is contended by the appellant, with which contention we are unable to agree, it would not avail the appellant anything in this appeal. The proof clearly shows that the plaintiff, since suffering from a stroke of apoplexy, has not been able to attend to the duties of the sheriff's office, but has had to depend upon his deputies, and such assistance as his wife and daughters have been able to furnish him. He has not made anything from the office of sheriff worthwhile, nearly all he made had to be spent in running the office. It is true, he has a lot charged up against parties for fees he is entitled to for handling executions, but cannot collect it. At least, that is the effect of

his testimony. The proof clearly shows that the plaintiff is not in a condition to attend to the work of the sheriff's office. In this connection, as we understand appellant's position, appellant contends that the very fact that plaintiff offered for reelection, was elected and took the oath of the sheriff's office, and undertook to perform the duties connected therewith, after having the stroke of apoplexy, causing his alleged disability, under the provisions of the policy the court should hold as a matter of law that the plaintiff is no longer disabled, within the meaning of the policy. We are unable to agree with this position." Another pertinent statement from the case last quoted from follows: "We wish to state, further, that the court is not concerned with the action of the people of the county of Orangeburg in electing a man sheriff of that county who was not physically able to discharge the duties of that office. His reelection was evidently due to his popularity and the very high esteem in which he was held by the people of that county."

We necessarily conclude that the election of the plaintiff as county treasurer raises no presumption that he has recovered or that he is able to pursue the ordinary duties of his vocation or profession. His election as county treasurer, and his subsequent holding of that office, is not, under the authorities cited and our construction of the insurance contract, an occupation within the purview of the policy.

The trial court therefore erred in not entering a judgment for the plaintiff.

REVERSED.

IN RE ESTATE OF HENRY SCHRAM, JR. KATHERINE SCHRAM, ADMINISTRATRIX, APPELLEE, V. A. H. BERBIG, ANCILLARY ADMINISTRATOR, APPELLANT.

271 N. W. 694

FILED FEBRUARY 26, 1937. No. 29844.

1. **Executors and Administrators.** The law of the place where real estate is situated governs exclusively with respect to the rights of parties therein and the modes of its transfer or distribution.
2. ———. A judgment by a probate court in a foreign state against the estate of a deceased person for a widow's allowance cannot be collected out of the proceeds of a sale of decedent's real estate situated in Nebraska.
3. ———. Where land is sold by order of court for any purpose, the character of the property is changed only so far as may be necessary to accomplish the particular purpose.
4. **Courts.** A judgment cannot be sustained as a matter of comity between this state and a foreign state when it is contrary to our statutory law on the subject.

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

Minor & Minor, for appellant.

T. F. Hamer and *E. G. Reed, contra.*

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

CARTER, J.

This is an action brought by Katherine Schram, administratrix of the estate of Henry Schram, Jr., deceased, against A. H. Berbig, administrator of the ancillary estate of Henry Schram, Jr., in Nebraska, to obtain an order directing the administrator of the ancillary estate to transfer to the domiciliary administratrix sufficient funds to pay the remaining unpaid claims against the domiciliary estate in Colorado. The trial court allowed the application and the administrator of the ancillary estate appeals.

The record discloses that Henry Schram, Jr., a resident of Cheyenne county, Colorado, died on October 5, 1932. At the time of his death he was the owner of real and personal

property in Cheyenne county, Colorado, and of real property in Buffalo county, Nebraska. Proceedings to administer his estate were commenced in Cheyenne county, Colorado, and Katherine Schram, the surviving widow, was appointed administratrix. Ancillary administration proceedings were also commenced in Buffalo county, Nebraska, and A. H. Berbig was appointed ancillary administrator.

It appears that claims were filed against the estate in Buffalo county, Nebraska, for the payment of which it became necessary to sell the Nebraska land. Upon payment of all claims, there remained in the hands of the ancillary administrator the sum of $2,753.59.

It further appears that, after the assets of the domiciliary estate in Colorado had been exhausted, there remained unpaid a claim of $200 for attorney's fees and a $2,000 widow's allowance authorized by the laws of Colorado. The executrix had on hand the sum of $732.37 to apply upon the claims. She thereupon instituted the suit at bar to have the sum of $1,267.63 paid to her by the ancillary administrator in Nebraska to complete the payment of the $2,000 widow's allowance.

The part of the Colorado statute that is material is as follows: "If any decedent leaves a widow residing in this state, in all cases she shall be allowed to have and retain as her sole and separate property, the sum of two thousand dollars in cash, or at her election, the equivalent thereof in value of real and/or personal property, to be set aside and awarded in the manner now provided by law." Comp. Laws (Colo.) 1921, sec. 5347, as amended by chapter 184, Laws (Colo.) 1929. It is stipulated by the parties that the widow's allowance of $2,000 was in all respects properly made under the laws of Colorado.

The ancillary administrator contends that, under the Nebraska statutes, the surplus of the proceeds from the sale of the lands located in Nebraska cannot be subjected to the payment of the widow's allowance made in Colorado. The pertinent part of the Nebraska statute is as follows: "In all cases of sale by an * * * administrator * * * under

a license granted by any district court by virtue of the provisions of law, whether such * * * administrator * * * was appointed in this state or elsewhere, the surplus of the proceeds of the sale remaining on the final settlement of the accounts shall be considered as real estate and disposed of among the persons, and in the same proportion as the real estate would have been by the laws of this state if it had not been sold." Comp. St. 1929, sec. 30-1138. The question for determination is whether the sum of $1,267.63 should be paid by the ancillary administrator to the domiciliary administratrix to discharge the widow's allowance of $2,000, or whether the whole sum of $2,753.59 should be distributed to the heirs of Henry Schram, Jr., as if it were real estate.

An authoritative text-writer states the applicable rule as follows: "An allowance can be granted only by a court in the state of domicile of the husband at the time of his death. If a widow's allowance has been granted by the court of the domicile it cannot be enforced against land of the deceased in another state." 2 Beale, Conflict of Laws, 1029, sec. 302. 1.

In Restatement, Conflict of Laws, sec. 302, the rule is expressed as follows: "If a widow's allowance has been granted by a court in the state of domicile of her deceased husband, it constitutes a valid claim against movable assets in another state." In comment a. thereto appears the following: "An order for a widow's allowance cannot be enforced against land in another state."

The leading case on this subject is *Short v. Galway*, 83 Ky. 501, 4 Am. St. Rep. 168. In that case the writer of the opinion says:

"The right, therefore, given by the statute of Ohio to the wife at the time of her marriage with Mitchell to one-half of his real estate, if such was the law, in the event she survived him, would not be enforced by the courts of this state, nor would the right acquired by the wife to enforce her claim for an allowance, in the event she survived her husband, against his real estate, be enforced, because by

the law of this state the land passes to the heir free from any such encumbrance, and if permitted to enforce such a lien by reason of the law of another state, it would, in effect, be giving to the wife an interest in the land; for if she can subject it because of a claim existing alone by reason of the marital relation, independently of any express contract, the statute of another state might give to her such an allowance as would swallow up the entire realty passing to the heir, although located in another jurisdiction. The statute of Ohio might provide that, in case of intestacy and dying without children, the widow should have not only the year's support, but a sum equal in value to one-half of the realty left by the decedent to constitute a lien upon the entire estate until payment. To enforce such liens in this state would be to change the course of descent, and take from the heir his lawful inheritance.

"As in this case the widow is allowed four thousand dollars for her support for one year, which is five times the sum in value that is allowed the widow in this state, it is a lien by the law of Ohio on the real as well as the personal estate, and can be enforced; but when undertaking to deprive the heir in this state of the inheritance by such a proceeding, you permit by indirection the law of another state to control or determine the laws of descent in subjecting the realty, not by reason of any express contract, but because of the rights of a party created by the statute of another state, springing solely from the marital relation. If personal estate, the judgment might be enforced, because that passes by the law of the domicile, and the courts of this state, if called on, would consult the Ohio statutes and the decisions of the courts of that state in determining the rights of the parties."

See, also, *Hansel v. Chapman*, 2 App. D. C. 361; *Smith v. Smith*, 174 Ill. 52, 50 N. E. 1083.

Where land is sold by order of court for any purpose, the character of the property is changed only so far as may be necessary to accomplish the particular purpose. Where, as in the case at bar, an administrator sells real

estate of his testator to pay his debts, the conversion of the realty into personalty is completed only to the extent to which the purchase money is required for the particular objects for which the sale takes place; and the excess, though in the form of money, remains impressed with the character of real estate for the purpose of determining who is to receive it. The proceeds attempted to be reached in the present case were derived from the sale of lands in Nebraska and are subject to being distributed as real estate under Nebraska law. A judgment by the courts of Colorado determining a course of descent of lands in Nebraska different from the law of Nebraska would be a nullity, and, likewise, a judgment amounting to the establishment of a lien against these proceeds to satisfy a widow's allowance decreed by the Colorado court arrives at the same result. To say that the law of the domicile may make the heirs liable to the extent of the real estate inherited, located in another state, to satisfy this widow's allowance would in effect subject the manner of inheritance to a law of another forum than that in which the lands are located. We necessarily conclude that the trial court erred in directing the transfer of the money herein involved to the domiciliary administratrix in Colorado.

Appellee contends that the transfer should be sustained as a matter of comity. Comity has been defined as "a willingness to grant a privilege, not as a matter of right, but out of deference and good will." *Dow v. Lillie,* 26 N. Dak. 512, 144 N. W. 1082. "The term 'comity,' as defined in Bouvier's Law Dictionary, is 'courtesy; a disposition to accommodate. Courts of justice in one state will, out of comity, enforce the laws of another state, when by such enforcement they will not violate their own laws or inflict an injury on some one of their own citizens.'" *Franzen v. Zimmer,* 90 Hun (N. Y.) 103, 35 N. Y. Supp. 612. The authorities seem to hold that, as a matter of comity, funds can be transferred from the ancillary to the domiciliary estate to pay debts incurred by the testator prior to his death or for the payment of a widow's allowance where the

funds were derived from the sale of personal property in the ancillary estate. But such a transfer of funds cannot be sustained as a matter of comity between states where it conflicts with the express provisions of our statute relative to the descent of real property. The order of the Colorado court allowing the widow's allowance can have no extraterritorial effect upon the real estate of deceased located in Nebraska.

For the reasons herein set forth, the judgment of the trial court is reversed and the cause is remanded.

REVERSED.

CLARA DEE MCDANIEL, APPELLANT, V. MERCY FARLOW, APPELLEE.

271 N. W. 905

FILED MARCH 5, 1937. No. 29864.

1. **Evidence.** Statements by an adverse party relevant to a material fact in issue and inconsistent with the facts alleged by such party or testified to by him are not hearsay.
2. ———. Such statements are admissible in evidence whether they constitute part of the *res gestæ* or not.
3. ———. Such statements constitute admissions against interest and are receivable in evidence without laying a foundation.

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

R. P. Kepler, Wright & Wright and *Roland V. Rodman,* for appellant.

Morrow & Morrow, contra.

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

GOSS, C. J.

Plaintiff appeals from an adverse verdict and judgment thereon.

Plaintiff was a guest of defendant and was injured in an automobile accident when defendant was driving the

car around a curve in the highway between Rushville and Hay Springs and it went off the highway and into a ditch.

The assignments of error relate solely to the exclusion of evidence. The record shows so many questions and offers of proof excluded that we shall treat of them only sufficiently to illustrate the theory on which the evidence was excluded, but we trust in such a manner as to exemplify the true rule as to all.

It was claimed by appellant that immediately after the accident and for several days thereafter appellee discussed the accident with a great many people and disclosed her view with reference to the cause thereof. Appellant vainly sought to get these conversations admitted in evidence. For example, James W. McDaniel, plaintiff's husband, testified that he was at his home in Sidney when he learned that his wife had been injured. He drove that night to Rushville and found her and defendant in the same room in the hospital; that he then had a conversation with defendant as to the accident. When asked to relate the conversation, an objection to the conversation was sustained. Plaintiff's counsel then offered to show that defendant stated in the conversation with McDaniel: "It was all my fault. I was driving too fast." To which offer defendant's counsel objected,—"To which the defendant objects as incompetent, irrelevant and immaterial and no proper foundation laid and it is not a part of the *res gestæ*." This objection was sustained.

The third day after the accident McDaniel and defendant went to a restaurant for lunch, and he testified that he had a conversation with her with reference to the accident, but the court sustained an objection to the question as to what defendant said, if anything, about the speed at which her car was traveling at the time of the accident. Substantially the same matter as heretofore recited was offered to show that Mrs. Farlow again expressed to this witness her sorrow that Mrs. McDaniel had been injured and said "It was all my fault. I was driving so fast that I couldn't make the turn." This evidence, also, was excluded.

Likewise there was excluded the testimony of Myrtle Stinson, a nurse who took care of Mrs. McDaniel in the hospital and whose deposition was taken regarding what was said by Mrs. Farlow as to where the blame for the accident rested, and there was excluded, also, the offer to prove that Mrs. Farlow told the witness it was her fault.

Plaintiff also sought vainly to get in evidence the testimony of Mary Weber, another nurse at the hospital, who testified by deposition that defendant said she was to blame because she was driving too fast.

Defendant was not permitted to answer questions on her cross-examination as to her admissions to Mr. McDaniel, to Myrtle Stinson and to Mary Weber, to the effect that she was driving too fast and was to blame for the accident.

Near the close of the trial plaintiff, in rebuttal, again offered the excluded evidence of McDaniel, Myrtle Stinson and Mary Weber, but it was again excluded.

"The admissions and declarations of a party to an accident against his own interest, upon a material matter, are admissible against him as original evidence, and, where he is examined as a witness in his own behalf, it is unnecessary to lay a foundation for the admission of such evidence by cross-examination." *Young v. Kinney,* 79 Neb. 421, 112 N. W. 558.

Where employer and employee are both sued for negligent acts of the servant while driving the employer's automobile, "Declarations made by the employee in conversation after the accident, and not *res gestæ,* are admissible in evidence against such employee, though not binding upon the employer, and cannot properly be excluded, notwithstanding they may have some ulterior or collateral effect detrimental to the employer's interests." *Berggren v. Hannan, O'Dell & Van Brunt,* 116 Neb. 18, 215 N. W. 556.

"The declarations and admissions of a party to an action, against his own interest, upon a material matter, are admissible against him as original evidence." *Havlik v. Anderson,* 130 Neb. 94, 264 N. W. 146.

Appellee criticizes the petition because it does not state

a cause of action. The specific objection, as we understand it, is that it does not allege, as would probably be more in conventional compliance with our guest statute, that the negligent acts charged amounted to gross negligence. However, the petition pleaded the facts. If the evidence did not show that they amounted to gross negligence no recovery could be had. The trial court considered the petition sufficiently charged the necessary facts and submitted the case to the jury. It was tried on the theory that the petition in effect charged gross negligence. The petition, in alleging the facts, stated that the car was driven by defendant "recklessly," that it was operated at a "reckless rate of speed" around a curve and turn with which defendant was unfamiliar. We are of the opinion the petition stated a cause of action.

Other evidence than we have here reviewed was excluded by the trial court, but it would prolong this opinion unnecessarily to review all the assignments. On another trial the errors, of which we have reviewed typical ones, are not likely to occur. For errors in the exclusion of evidence, the judgment is reversed and the cause remanded for a new trial.

REVERSED.

RUDOLPH TAGGE ET AL., APPELLEES, V. WILLIAM GULZOW ET AL., APPELLANTS.
271 N. W. 803

FILED MARCH 5, 1937. No. 29824.

1. **Public Lands.** In that part of the federal Constitution providing that congress shall have power "to exercise exclusive legislation" over all places purchased by consent of a state legislature for the erection of "forts, magazines, arsenals, dock-yards and other needful buildings," the words "needful buildings" mean buildings on lands ceded by a state to the United States and over which the federal government acquires exclusive jurisdiction.
2. ———. Lands in School District Number 28, Hall county, Nebraska, purchased with funds furnished by the United States

and title taken in the name of Nebraska Rural Rehabilitation Corporation for a farmstead project, are not lands ceded by the state of Nebraska to the federal government under a grant of exclusive jurisdiction over such lands and over the occupants thereof.

3. **Schools and School Districts.** Parents of children of school age, occupying lands in the farmstead project in Hall county, are residents of the public school district in which those lands are situated and such children are entitled to common school privileges without payment of tuition.

APPEAL from the district court for Hall county: ERNEST G. KROGER, JUDGE. *Affirmed.*

Cleary, Suhr & Davis and *Clinton Cronin,* for appellants.

B. J. Cunningham and *W. P. Lauritsen, contra.*

Heard before ROSE, GOOD, EBERLY, PAINE and CARTER, JJ.

ROSE, J.

This is a suit in equity by ten plaintiffs, each having children of school age, for a permanent injunction enjoining three defendants who are the officers of Common School District Number 28, Hall county, Nebraska, from preventing such children from attending school in that district without the payment of tuition. The injunction was granted and defendants appealed.

Plaintiffs all reside on an 80-acre tract of land purchased with funds from the federal government for the purposes of a "Farmstead Project" or a "Cooperative Farmstead." The realty is in the county of Hall and is described as the east half of the northeast quarter of section 34, township 11 north, range 9 west of the 6th P. M. The tract is wholly within the territorial boundaries of the school district. For the general purposes of the farmstead project there were constructed on the premises a building for a canning factory and another building for a community hall. In the 80-acre tract each of 10 families was allowed to occupy and use as a farmstead 7.2 acres on which a house, a barn and other buildings had been erected with federal funds. The

head of each family had the use of federal money to buy furniture, a cow, pigs and chickens, under obligations for repayment. Temporary occupancy was under a short-term lease requiring rent, but with the conditional privilege of purchase on small payments for a period of years. The occupants were selected from relief rolls. The family on a farmstead had no home except on the leased premises and intended to reside there permanently.

In the petition plaintiffs alleged they were residents of Public School District Number 28 in Hall county; that their children of school age were entitled to free school privileges in that district under the laws of Nebraska; that free access by them to such school was denied by defendants. In view of the allegations and facts outlined, as shown by the record, defendants state the substance of their defense to be:

"That said land is owned by the United States of America, holding title in the name of Nebraska Rural Rehabilitation Corporation of the county of Lancaster, in the state of Nebraska, a Delaware corporation; that said land was purchased by the United States for the purpose of erecting thereon needful buildings in carrying out a governmental project authorized by act of Congress; that under the United States Constitution and under the laws of the state of Nebraska the United States of America has exclusive jurisdiction over said tract of land; that the plaintiffs are all residents on said tract of land and are not residents of School District Number 28 in Hall county, Nebraska, and their children are not entitled to attend the public school of said district."

In an elaborate argument on this defense reference is made to the following excerpt from the federal Constitution:

"The Congress shall have power * * * To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of government of the United States, and to exercise

like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings." Const. U. S., art. I, sec. 8.

Reference is also made by defendants to the Nebraska statute which grants to the United States consent to purchase such lands in Nebraska as from time to time may be selected for "the erection of forts, magazines, arsenals and other needful buildings." Comp. St. 1929, sec. 72-601. By another provision exclusive jurisdiction over such lands is "ceded to the United States." Comp. St. 1929, sec. 72-602.

It is urgently insisted by defendants that Nebraska ceded to the federal government exclusive jurisdiction over the farmstead lands, since, as they argue, the buildings thereon are "needful buildings" within the meaning of the federal Constitution and the ceding clause of the Nebraska statute.

In that part of the federal Constitution providing that congress shall have power "to exercise exclusive legislation" over all places purchased by consent of a state legislature for the erection of "forts, magazines, arsenals, dock-yards and other needful buildings," the words "needful buildings" mean buildings on lands ceded by a state to the United States and over which the federal government acquires exclusive jurisdiction. Within the meaning of that definition, do the words, "other needful buildings," include the buildings on the farmsteads involved in the present controversy? The parties stipulated that the farmstead lands were owned by the Nebraska Rural Rehabilitation Corporation, a Delaware corporation, and that the management of the 80-acre tract was at first under a supervisor employed by the corporation named. The evidence is that the title to the lands was in the corporation. Defendants themselves adduced evidence tending to prove that the activities of the Nebraska Rural Rehabilitation Corporation were transferred to the agricultural department at Washington and in Nebraska; that the farmstead project in Hall county is operated through the agricultural department of Nebraska in cooperation and coordination with the depart-

ment of agriculture at Washington. On the record, therefore, the agricultural department of Nebraska is a participant in the operation of this relief measure. The evidence fails to show that exclusive jurisdiction over the 80-acre tract and over the occupants thereof was ceded to the federal government. The evidence also fails to show that the corporation named had power to exercise for the United States exclusive jurisdiction over the farmstead project. If the congress, in appropriating the purchase money, had in mind a benignant measure of relief for the needy, a purpose to reduce relief rolls and to create means for the self-support of persons in that class should be presumed. For that purpose, farming, producing butter and eggs and raising chickens and pigs are not purposes for which the federal government selects and exclusively uses lands for "forts, magazines, dock-yards and other needful buildings." The farmstead lands, like other lands in the school district, are used for agricultural purposes. The occupants of the farmsteads, like other farmers in the school district, are using lands in individual pursuits, not as representatives of the federal government in the exercise of exclusive sovereignty. The agricultural departments of the state and the nation, acting jointly, are not exercising exclusive legislative and executive powers of the United States over the lands and occupants in the farmstead area. For the purposes of civil and criminal jurisdiction and of political rights, the state has not lost its jurisdiction over the farmsteads and the occupants thereof. The status of plaintiffs as residents is the same as that of others in the school district. Plaintiffs are residents thereof and their children of school age are entitled to common school privileges without payment of tuition. Const. art. VII, sec. 6; Comp. St. 1929, sec. 79-1901. In this view of the record, the injunction was properly granted by the district court and the discussion of other questions presented becomes unnecessary.

AFFIRMED.

PETER ROLLAND ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 4, DAKOTA COUNTY, ET AL., APPELLANTS.
271 N. W. 805

FILED MARCH 5, 1937. No. 29881.

Schools and School Districts. Parents of children of school age, occupying lands in the farmstead project of Dakota county, are residents of the public school district in which those lands are situated and such children are entitled to free public school privileges in that district.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Affirmed.*

William P. Warner and *Joseph E. Marsh*, for appellants.

George W. Leamer, contra.

Heard before ROSE, GOOD, EBERLY, PAINE and CARTER, JJ.

ROSE, J.

This is a suit in equity by 13 plaintiffs, having children of school age, for a permanent injunction enjoining defendants as trustees and teachers of Common School District Number 4, Dakota county, Nebraska, from preventing such children from attending public school in that district. The injunction was granted and defendants appealed.

Plaintiffs reside on lands purchased with funds from the federal government for the purposes of a "Farmstead Project," and title taken in the name of Nebraska Rural Rehabilitation Corporation, a Delaware corporation. The lands occupied by plaintiffs in the farmstead area are within the territorial boundaries of the school district named.

The substance of the defense is that the farmstead lands and the occupants thereof are under the exclusive jurisdiction of the federal government and are not residents of the school district and are not entitled to free school privileges therein.

The controlling issue in the case is the same as in *Tagge v. Gulzow, ante*, p. 276, 271 N. W. 803, decided herewith, and for reasons stated in the opinion in that case the judgment herein is

AFFIRMED.

LINCOLN NATIONAL LIFE INSURANCE COMPANY, APPELLEE, V. WESLEY J. RICHARDS ET AL., APPELLANTS: FEDERAL TRUST COMPANY ET AL., APPELLEES.
271 N. W. 794

FILED MARCH 5, 1937. No. 29888.

1. Mortgages: FORECLOSURE: SALE: CONFIRMATION. "Mere inadequacy of price will not preclude confirmation of foreclosure sale, unless shocking conscience of court, or amounting to evidence of fraud." *Erickson v. Hansen*, 129 Neb. 806, 263 N. W. 132.
2. ———: ———: MORATORIUM. Moratory stay must be denied where it appears that the amount of mortgage lien on the land exceeds its actual market value.
3. ———: ———: ———. Where the mortgagor has no valuable interest in the mortgaged premises to protect, good cause is shown for denial of an application for moratory stay.

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

E. E. Richards, for appellants.

Francis V. Robinson and *Ginsburg & Ginsburg, contra.*

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

GOOD, J.

This is an appeal from an order of confirmation and denial of a moratorium in an action for foreclosure of a real estate mortgage.

The only objection to confirmation is that the mortgaged premises did not bring an adequate price. The mortgaged premises were bid in by the plaintiff for $9,600, but plaintiff also waived right to a deficiency judgment. The total amount of the decree in favor of plaintiff was $10,510, which with accumulated interest at the time of the sale, together with accumulated taxes, amounted to more than $12,000. Plaintiff's bid, therefore, was in effect more than $12,000 for the premises. The evidence of plaintiff is to the effect that the property was not worth more than $9,600 at the time of the sale, and $11,000 at the time of confirma-

tion, more than a year later. The evidence for plaintiff was by witnesses produced and orally examined in court, while the evidence for defendants, except that of defendant Richards himself, was by affidavit only.

There is a wide variation in the opinion of witnesses on either side. Evidence of value is largely a matter of opinion, especially as to realty. *Montana Ry. Co. v. Warren,* 137 U. S. 348, 353, 34 L. Ed. 681, 683. The evidence on behalf of defendants does not purport in the affidavits to state the market value of the premises. They speak of the intrinsic value, whatever that may be. There is no evidence, if the property was offered for sale again, that it would bring a larger price. No one has been produced who would bid more if a subsequent sale were had. The trial court was doubtless familiar with the witnesses and with the general conditions in that part of the state, and was in a better position to determine the weight of the evidence, especially as to those witnesses who appeared before it. Under the circumstances, we will consider the fact that the trial court saw and observed the manner in which the witnesses testified, at least as to those who testified orally in court.

"Mere inadequacy of price will not preclude confirmation of foreclosure sale, unless shocking conscience of court, or amounting to evidence of fraud." *Erickson v. Hansen,* 129 Neb. 806, 263 N. W. 132. To the same effect are *First Nat. Bank v. Hunt,* 101 Neb. 743, 165 N. W. 139; *Lindberg v. Tolle,* 121 Neb. 25, 235 N. W. 670; *Lemere v. White,* 122 Neb. 676, 241 N. W. 105; *Keller v. Boehmer,* 130 Neb. 763, 266 N. W. 577; *Srajhans v. Mares,* 130 Neb. 924, 267 N. W. 82.

It may be noted that for more than five years defendants have not paid a penny on the principal of their mortgage, or the interest or taxes. The evidence further shows that for five years previous to confirmation of sale the premises had not produced enough to pay the cost of production. The finding of the trial court as to the adequacy of the price bid is supported by the evidence.

Defendants applied for a moratory stay under the act of

1933. A hearing was had thereon and a moratorium denied. The evidence of that hearing is not before us. Later, and before confirmation of sale, defendants made another application for a moratorium under the act of 1935 after it had become a law, and a hearing was had thereon. Again a moratorium was denied. Whether the first denial of a moratory stay, unappealed from, is final, *quære*. That question is not argued or briefed, and is therefore not decided.

The evidence in the record fairly shows that the encumbrance against the land is far in excess of its actual market value, and defendants have no equity in the land to be protected by a moratory stay. This court has frequently held that a moratory stay must be denied where it appears that the amount of the mortgage lien on the land exceeds its actual value. *Clark v. Hass*, 129 Neb. 112, 260 N. W. 792; *First Trust Co. v. Stenger*, 130 Neb. 750, 266 N. W. 642; *Luikart v. Graf*, 130 Neb. 736, 266 N. W. 641; *First Trust Co. v. Hickey*, 130 Neb. 351, 264 N. W. 888. Where the mortgagor has no valuable interest in the mortgaged premises to protect, good cause is shown for denial of an application for a moratory stay. *First Trust Co. v. Stenger, supra.*

The record discloses no error in denying a moratorium. Judgment

AFFIRMED.

CITY OF PLATTSMOUTH, APPELLANT, V. JOHN E. HAZZARD: STANDARD SAVINGS & LOAN ASSOCIATION, APPELLEE.
271 N. W. 801

FILED MARCH 5, 1937. No. 29902.

Taxation: FORECLOSURE OF LIEN: REDEMPTION. The redemption from a tax lien foreclosure by the city under section 77-2039, Comp. St. 1929, cannot be made by paying the amount of the bid, but may be made only by paying the full amount of the taxes due with interest. Const. art. 8, sec. 4.

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

A. L. Tidd and *J. Howard Davis,* for appellant.

Walter R. Johnson and *W. A. Robertson, contra.*

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

DAY, J.

The city of Plattsmouth foreclosed tax liens on real estate owned by the Standard Savings & Loan Association. At the sale, the city bid less than the amount of the decree. The defendant sought and was permitted by the trial court to redeem by paying the amount of the bid. The city appeals from this order.

The several assignments of error may be substantially stated as, the court erred in permitting the defendant to redeem for the amount of the bid, which was less than the decree for taxes. The appellee has filed no brief and has not assisted the court by oral argument.

In a similar case this court held that a redemption from a tax lien foreclosure by a county, under a statute relating to delinquent taxes, could be made only by paying the full amount of the taxes due with interest, and that there was no right of redemption by the payment only of the amount of the bid. Comp. St. 1929, sec. 77-2039; Const. art. 8, sec. 4; *Commercial Savings & Loan Ass'n v. Pyramid Realty Co.,* 121 Neb. 493, 237 N. W. 575. This decision is controlling here. In that case it was said: "It is not equitable or just for the owner to expect to come into court and be allowed to redeem under the provisions of a different kind of foreclosure action, and by paying the amount bid to avoid payment of his just burden of taxes for all these years." In the case at bar, the city stands in the place of the county and is a trustee for the other governmental subdivisions for the enforcement of the payment of the tax. *County of Lancaster v. Trimble,* 34 Neb. 752, 52 N. W. 711.

Paraphrasing the language of *Commercial Savings & Loan Ass'n v. Pyramid Realty Co., supra,* we have the rule applicable here. The redemption from a tax lien foreclosure by the city under section 77-2039, Comp. St. 1929,

cannot be made by paying the amount of the bid, but may be made only by paying the full amount of the taxes due with interest. Const. art. 8, sec. 4.

The trial court erred in the order permitting the defendant to redeem by paying only the amount of the bid of the city, which was trustee for the other governmental subdivisions interested in the collection of the taxes.

REVERSED.

LAWRENCE YEARSLEY V. STATE OF NEBRASKA.
271 N. W. 802

FILED MARCH 5, 1937. No. 29885.

Contempt. A careful examination of the bill of exceptions discloses that the evidence fails to sustain the order committing plaintiff in error to jail for contempt of court, and the judgment is reversed and action dismissed.

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

L. R. Doyle, for plaintiff in error.

Ed Moran, contra.

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

PAINE, J.

Plaintiff in error brings error proceedings to this court for that on Saturday, May 2, 1936, plaintiff in error was sentenced by the district judge for Otoe county to serve a four-day sentence in the county jail for being in contempt of said court.

The petition in error sets out three errors of the trial court, but we will consider but one of them, to wit, that the evidence was insufficient to sustain the allegations set out in the citation for contempt.

The county attorney of Otoe county filed an affidavit in contempt on April 2, 1936, against the plaintiff in error,

setting forth that, after a writ of assistance had been issued in the case of John G. Hellerich v. Charles Tyson et al., Lawrence Yearsley, plaintiff in error, took a quitclaim deed to the premises involved and incited Charles Tyson and David Tyson, the defendants, to resist the sheriff and prevent him from complying with the writ of assistance, and that after the defendants were removed he did place chains and padlocks on the gates to prevent any person from going upon the premises, and asked that the court issue a citation commanding Lawrence Yearsley to appear before the court and show cause why he should not be found in contempt. On the same day D. W. Livingston, district judge, issued an order to show cause, and directing that Lawrence Yearsley appear before the court at 10 o'clock a. m., April 6, 1936, and show cause why he should not be punished as of contempt of court. Affidavits were filed by the plaintiff in error and also by his attorney.

The trial was had before the said Judge Livingston on Saturday, May 2, 1936. The bill of exceptions discloses the evidence of some seven witnesses called by the plaintiff in error and cross-examination by the county attorney, and the sheriff and two other witnesses testified for the state. A fair reading of this evidence discloses that the testimony clearly supported the affidavits filed by the plaintiff in error and his attorney. The plaintiff in error denied positively that he did anything to prevent the sheriff from carrying out the orders of the court, which was amply sustained by the evidence.

This court has recently held that a prosecution for criminal contempt is governed by, and in accordance with, the strict rules applicable to criminal prosecution. *State v. Barlow,* 131 Neb. 294, 268 N. W. 95; *Lux v. State,* 126 Neb. 133, 252 N. W. 897; *Tasich v. State,* 111 Neb. 465, 196 N. W. 688; *Gandy v. State,* 13 Neb. 445, 14 N. W. 143.

It is found by this court that the evidence fails to sustain the charge of contempt, and the order of the court finding the plaintiff in error guilty of contempt is set aside and reversed, and the contempt proceedings are dismissed.

REVERSED AND DISMISSED.

JOHN POTACH, APPELLANT, V. ROBERT J. HRAUDA, APPELLEE.
271 N. W. 795

FILED MARCH 5, 1937. No. 29831.

Appeal. A verdict of a jury in a law action based upon conflicting evidence will not be disturbed on appeal unless clearly wrong.

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

John C. Barrett, for appellant.

Cook & Cook and *Wear, Boland & Nye, contra.*

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

CARTER, J.

The plaintiff commenced this action against the defendant to recover damages resulting from an automobile collision. The defendant filed a cross-petition alleging that the collision was the result of plaintiff's negligence and praying for a judgment for the damages he suffered. The jury found against plaintiff on his petition and against defendant on his cross-petition. Judgment of dismissal was entered by the court. From the overruling of his motion for a new trial, plaintiff appeals.

The record discloses that on September 7, 1932, plaintiff was driving west on highway No. 30 and at a point approximately two miles west of Ames, Nebraska, collided with defendant's truck. Plaintiff testified that he saw defendant's truck approaching on the wrong side of the highway, that he drove his car to the north and right-hand side of the pavement to avoid an accident, but that defendant came straight down the pavement on the wrong side of the road and crashed into his car.

The defendant testified that he observed plaintiff's car coming down the highway on the wrong side of the road. He testified that he pulled his truck to the right so that the front wheels were almost off the pavement, that he stopped his truck and that plaintiff crashed into the side of the

truck. The evidence also shows that the rear-housing of the truck was driven back by the impact to such an extent that the drive shaft was disconnected from the universal joint, making it impossible for the truck to move under its own power after the accident. Defendant produced two witnesses, Martin and Shoemaker, who were driving west from Ames just prior to the happening of the accident in question. They both testified that, shortly before they came upon the scene of the accident, a model-T Ford truck, which they later identified as the one in which plaintiff was riding at the time of the collision, passed them on the highway, and that at all times while it was within their view it was traveling on the left-hand side of the road. They testified that, within a few seconds after it passed from their view, they came upon the scene of the accident. The evidence discloses that the Ford truck was in the ditch on the north side of the highway headed south, and that defendant's truck was on the south side of the highway headed in a southeasterly direction with the right front wheel on the dirt shoulder of the highway. The only question for the jury to determine was which car was on the wrong side of the highway at the time of the accident. The jury determined that plaintiff had failed to sustain his allegation that defendant was driving on the wrong side of the road. The evidence is clearly sufficient to sustain this finding by the jury. A verdict of a jury in a law action based upon conflicting evidence will not be disturbed unless clearly wrong. It appearing that the evidence is sufficient to sustain the verdict, this court will not disturb the judgment entered thereon. *Boehler v. Kraay*, 130 Neb. 233, 264 N. W. 745.

Plaintiff contends that the court unduly restricted him in his attempt to produce evidence of the location of oil spots and glass in and about the scene of the accident. The witnesses produced did not arrive at the scene of the accident until almost three hours after it occurred. There is evidence in the record that there was much traffic over the highway and that the glass had been kicked and swept off

the pavement to prevent damage to tires. We find no prejudicial error in the ruling of the trial court, under the circumstances of this case, that the evidence tendered was too remote.

Plaintiff also complains of certain instructions given by the court. The alleged errors therein relate to and have a bearing upon the amount of the recovery only. In view of the fact that the jury determined that there was no liability on the part of defendant, the plaintiff was not prejudicially injured by them.

The judgment of the trial court is in all respects correct and it is

AFFIRMED.

AMERICAN TRUST COMPANY ET AL., APPELLEES, V. ZERUIAH A. BRUBAKER ET AL., APPELLANTS.
271 N. W. 793

FILED MARCH 5, 1937. No. 29896.

1. Mortgages: FORECLOSURE: MORATORIUM. Where it appears that there has been a failure to comply with the terms of the order granting a moratory stay, such failure to comply constitutes sufficient cause for vacating the order granting the stay.
2. ———: ———: ———. "Moratorium stays are at all times under the control of the court, and may be reexamined, and upon good cause being shown may be modified or vacated at any time." *Security Mutual Life Ins. Co. v. Herpolsheimer Bldg. Co.*, *ante*, p. 149, 271 N. W. 343.
3. ———: ———: SALE: CONFIRMATION. Where the sale price of lands under foreclosure exceeds the value of the lands, and the sale is in all other respects correct, the trial court should confirm the sale.

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

Kirkpatrick, Good & Dougherty, for appellants.

Charles F. Stroman, contra.

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

CARTER, J.

This is an appeal from a judgment of the district court for York county in which an order granting a moratory stay under section 20-21,159, Comp. St. Supp. 1933, was vacated and the sale of the mortgaged premises confirmed.

The record discloses that appellants were the owners of 224 acres of land in York county against which the American Trust Company held a mortgage. Foreclosure proceedings were commenced and on November 28, 1932, a decree of foreclosure was entered in the amount of $19,299.63, with interest at 10 per cent., and which on the date of hearing in the district court amounted to $25,572. It further appears that taxes were due on said lands at the date of the decree in the principal amount of $914.27 and that subsequent taxes had not been paid for the years 1931, 1932, 1933, 1934 and 1935. A computation of the amounts due reveals that the liens exceed the sum of $26,000. Several witnesses were called to testify as to the value of this land. After considering all of the evidence, we are convinced that its value does not exceed $20,000. We have held in many recent cases that, when it appears from the evidence that the amount of the mortgage liens exceeds the value of the land, a moratory stay should be denied. *Srajhans v. Mares,* 130 Neb. 924, 267 N. W. 82; *Security Mutual Life Ins. Co. v. Herpolsheimer Bldg. Co., ante,* p. 149, 271 N. W. 343.

The record shows that appellants failed to comply with the terms of the court's order in granting the moratorium. In *Security Mutual Life Ins. Co. v. Herpolsheimer Bldg. Co., supra,* we said: "Moratorium stays are at all times under the control of the court, and may be reexamined, and upon good cause being shown may be modified or vacated at any time." A failure to comply with the terms of the order granting the stay constitutes sufficient cause to warrant the district court in vacating the moratory stay.

Appellants contend that the court erred in confirming the sale in that the land sold for an insufficient amount. The sale price was $20,000. As we have hereinbefore said,

the value of the land as shown by the record does not exceed that amount. The trial court did not err in confirming the sale.

No error appearing in the record, the judgment is

AFFIRMED.

GEORGE MCGINLEY ET AL., APPELLEES, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.
271 N. W. 864

FILED MARCH 9, 1937. No. 29821.

1. **Waters.** "Land, to be riparian, must have the stream flowing over it or along its borders." *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N. W. 781.
2. **Eminent Domain: DAMAGES.** In an action for damages arising out of riparian land condemned for a dam and dikes along the Platte river in Keith county, the owner is entitled to recover for the value of the land condemned and for consequential damages to the remainder of his ranch only so far as the consequential damages affect his use of the governmental sections a part of which are included in the land actually taken.

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

E. H. Evans and *Beeler, Crosby & Baskins*, for appellant.

Halligan, Beatty, Halligan & Maupin and *G. J. McGinley, contra.*

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

GOSS, C. J.

Defendant appeals from a judgment on verdict for $23,813.70, with 6 per cent. interest thereon from November 19, 1935, which was the date of the overruling of the motion for new trial and of the entry of the judgment.

The action was for damages for taking 68.7 acres of land owned by plaintiffs by virtue of deeds coming down from the government and of certain accreted land and

islands to the center of the present river. The acreage of the accreted and island land is not clearly shown in the evidence. The action arose out of the condemnation of land for a dam and reservoir located on the North Platte river in Keith county. The damages were recovered by the McGinleys for the land actually taken and for consequential damages to the remainder of their lands by reason of the construction of the dam and its necessary dikes to hold a reservoir of water. The condemnation took about a mile and a half of the McGinleys' five or six miles of frontage on the north side of the river.

In answer to special interrogatories submitted to the jury, they fixed the value of the land actually condemned and taken at $3,942.80, and the damages to the other lands of the McGinley ranch at $18,400. The difference between the sum of these two amounts and the verdict probably resulted from the computation of interest by the jury from the date of condemnation and taking of the land to the date of the verdict.

The consequential damages were submitted to the jury and determined by them on the whole ranch, which extended irregularly for many miles to the north line of Keith county and to some extent into Arthur county on the north. Mr. McGinley testified that he has 46,500 acres of deeded land, 2,560 acres of school land, and 440 acres of other leased land in the ranch, all of the deeded land being in his own name except 160 acres which is in his wife's name; that the ranch has 4,000 acres of bottom land and that the balance is sandhill pasture land.

The district objected to this evidence of consequential damages to that portion of the ranch extending so far from the river. While the McGinley petition claimed damages of $35,000, there was evidence of their witnesses that the damages to the ranch amounted to what would be at least one dollar an acre or $46,000.

The McGinleys' petition sets forth that the ranch was a compact body with approximately six miles of frontage on the river and extending north; that the farm-house,

barns, corrals and other improvements are located approximately one mile from the village of Keystone, where there is a shipping point on the railroad; that the river provides running water for its cattle and that there are many hundreds of acres of land in the ranch along the north bank of the river providing a very high type of hay-meadow for the production of hay and other feed for live stock and providing winter range; that along the north bank of the river a very heavy growth of trees and underbrush exists, which is useful for the shelter, protection and care of the livestock in the winter months; that plaintiffs run from 4,000 to 5,000 head of live stock on the ranch; that the reservoir of water proposed to be held by the dam and dikes will hold water to a depth of nine feet in the winter; that they will constitute a great menace and an ever-existing potential danger to cattle held upon the ranch during the winter months, in that, if any cattle during storms or blizzards should drift over the bank and into the water as so impounded, they will be lost, whereas, the river is naturally a shallow stream not productive of such menace; that this danger, known to those familiar, will decrease the market value of the ranch; that along the stream, prior to the construction of the works, were a number of water-holes which never froze in the severest winter and constituted a place to water cattle in the winter and a very valuable asset to the ranch, but they are cut off and destroyed by the works of the district; that along the entire bank of the river much of the timber and underbrush, which provided shelter for the cattle in winter from storms and in the calving period, has been destroyed or rendered valueless through flooding; that the danger of the dam or dikes breaking is a menace to the ranch and to improvements by the ranch owners and materially reduces its market value. In general it may be said that there was evidence supporting all these allegations of the petition.

The main questions are as to whether damages to the whole ranch, consisting of 46,500 acres of land, are to be considered in fixing the consequential damages to the re-

mainder of the ranch by reason of the works constructed by the district, or whether there is a more limited area of the ranch to be considered on this phase, and, if so, what is that area?

In 10 R. C. L. 157, sec. 138, it is said: "In determining what constitutes a separate and independent parcel of land, when the property is actually used and occupied, unity of use is the principal test, and if a tract of land, no part of which is taken, is used in connection with the same farm, or the same manufacturing establishment or the same enterprise of any other character as the tract, part of which was taken, it is not considered a separate and independent parcel merely because it was bought at a different time, and separated by an imaginary line, or even if the two tracts are separated by a highway, railroad or canal."

2 Lewis, Eminent Domain (3d ed.) 1207, sec. 698, says: "Under the rule that, where part of a tract is taken, damages or benefits to the entire tract may be considered, it sometimes becomes a question of some difficulty to determine what is to be regarded as the entire tract. In general it is so much as belongs to the same proprietor as that taken, and is continuous with it and used together for a common purpose. Thus, the whole of a farm is one tract, although it may consist of several government subdivisions, or lie partly in different counties, or have its parts separated by a highway or railroad or canal, and though the fee of the canal is in the state."

The principle that one whose land was condemned was not limited in his damages to the particular lot or subdivision, a part of which was taken, but was entitled to damages to his other lands for the direct effect of the taking of the lands condemned, began early to find expression in our cases. *Northeastern N. R. Co. v. Frazier*, 25 Neb. 42, 40 N. W. 604; *Blakeley v. Chicago, K. & N. Ry.*, 25 Neb. 207, 40 N. W. 956; *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240, 51 N. W. 842; *Fremont, E. & M. V. R. Co. v. Bates*, 40 Neb. 381, 58 N. W. 959 (where substantial damages were affirmed for depreciation of a 320-acre farm, by reason of

a railroad run diagonally across one quarter section only).

In *Scace v. Wayne County*, 72 Neb. 162, 100 N. W. 149, the owner had 313 acres adjoining the city of Wayne, part of it in section 16 and part in section 17. The entire tract was fenced and used together. A road was established cutting off 80 acres from the remainder of the tract. It deprived the owner of the use of a well, wind-mill, and tank located upon the land taken for the road and necessitated new fences. The court refused an instruction requested by the owner asking damages for the depreciation in value of the whole farm, and instructed the jury to find as damages only the fair market value of the land taken and the reasonable expense of moving the fence therefrom to the side of the road. The judgment was reversed; this court holding that the measure of damages was the depreciation in value of the entire tract, less benefits accruing to the owner.

Wiles v. Department of Public Works, 120 Neb. 689, 234 N. W. 918, involved the appropriation of a strip of ground across the southeast corner of plaintiff's 385-acre farm, cutting off about 43 acres from the remainder of the farm. Plaintiff got a verdict and judgment for $9,000. This was reversed as excessive, but was affirmed on condition that plaintiff would remit $3,000. The opinion reviews quite a number of Nebraska cases and remarks that in none of them "is the size of the tract as large as in the case at bar, i. e., 385 acres."

Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, is invoked by appellant as fixing the rule that consequential damages, involved in the condemnation of riparian rights, are limited to lands adjoining the riparian lands condemned and not extending beyond the government fraction acquired by a single entry or purchase from the government. The thirteenth and fourteenth syllabus points in that case say:

"Land, to be riparian, must have the stream flowing over it or along its borders.

"The extent of riparian land cannot, in any event, exceed the area acquired by a single entry or purchase from

the government; and whether, in view of the policy of the government in the disposition of its public lands, such riparian land may exceed the smallest legal subdivision of a section—that is, 40 acres—or in lieu thereof, if an irregular tract, a designated numbered lot, which is bordered by a natural stream, or over which it flows, *quære.*"

The text of the opinion, as shown on pages 353 to 356, fully elaborates the thesis of the syllabus, cites the authorities supporting it, and queries, but does not decide, whether the riparian rights should be attributed to a governmental entry of 40 acres or of a larger quantity of land not exceeding 640 acres.

The McGinleys claimed damages in this case for (1) the condemnation of their riparian lands and rights, and (2) for damages to the remainder of their ranch by reason of the taking or cutting off of rights arising out of their riparian ownership. Under the implications of *Crawford Co. v. Hathaway, supra,* no riparian rights attached to any of their ranch unless it was an unsevered part of the governmental subdivision possessing the attributes of riparian lands along the river. Other parts of the ranch, near or far, never had any riparian rights. They never could attain them because it was contrary to the nature of things. Riparian rights are such because they arise from being on the banks of a river or stream.

It is quite apparent that the unity of use rule we have quoted from Ruling Case Law and from Lewis on Eminent Domain does not apply to damages for taking land and thus depriving the owner of his riparian rights therein to the same extent as to area as it does where condemnation of a part of a farm is had for a railroad or for public works where riparian rights are not involved. For the ordinary condemnation for use of a railroad or for public works, the land that is damaged would seem from the authorities to take in all parts of a farm or ranch whose unity of use is impaired by the owner's deprivation of that which is taken (though we do not wish to lay down the rule that it would affect the uttermost part of a large ranch such as is in-

volved here). But where the condemnation of riparian land takes place, the rule of unity of use is confined to the damages suffered by the owner on the governmental fraction of the land, a part of which is taken. The reason for thus limiting the area for which damages may be claimed is that the riparian rights which are taken arise out of the fact that the owner, or his predecessor, obtained title to his riparian land from the government. Lands farther removed from the stream or river, though obtained from the same source, had no riparian rights whatever, no matter by whom owned. This we think is the logical rule. It is clearly the rule set forth in *Crawford Co. v. Hathaway, supra.* Though that case does not decide whether the damaged area, where riparian rights are condemned, is 40 acres or 640 at the maximum, we think the policy is left to be determined in the circumstances of each particular case; and that the damages to the remainder of the ranch involved here, by reason of the unity of use of the ranch, are confined to those sections of land parts of which are actually deprived of their riparian rights by reason of the land taken by the district for its use. We extend the right to recover to a whole section more or less arbitrarily, but chiefly because in that territory it has been possible to acquire a section of land from the government.

It follows that the district court erred in its instructions and in the admission of evidence allowing the jury to fix consequential damages to the vaster area of the ranch involved. The judgment of the district court is reversed and the cause is remanded for a new trial in harmony with this opinion.

REVERSED.

LEONARD DOESCHER, APPELLEE, V. WILLIAM ROBINSON ET AL., APPELLANTS.
271 N. W. 784

FILED MARCH 9, 1937. No. 29822.

1. **Trial.** Where there is a conflict of testimony in an action for false imprisonment, credibility of witnesses and weight of evidence are questions for the jury.
2. **False Imprisonment.** "False imprisonment is the unlawful restraint of a person without his consent either with or without process of law." *Johnson v. Bouton*, 35 Neb. 898, 53 N. W. 995.
3. ———: DAMAGES. The law does not prescribe a definite rule for the ascertainment of the exact amount recoverable for false imprisonment.
4. ———: ———. The amount recoverable for false imprisonment is such a sum as will fairly and reasonably compensate plaintiff for the pecuniary damage which the jury, in their sound discretion, under proper instructions, may find, from the evidence, was caused by the wrongful acts of defendants.
5. ———: ———. In an action for false imprisonment, a verdict in favor of plaintiff for $1,000 *held* sustained by the evidence.
6. **Appeal.** An order excluding as evidence a deposition not filed a day before trial *held* not erroneous, where the filing is required by statute. Comp. St. 1929, sec. 20-1261.
7. ———. An order overruling a motion for a continuance at the end of a trial, if within the sound discretion of the trial court, is not erroneous.

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

Mapes, Johnson & Maynard, for appellants.

Sutton & Fromkin, contra.

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

ROSE, J.

This is an action to recover damages in the sum of $12,000 for false imprisonment. Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $1,000. From a judgment therefor defendants appealed.

Plaintiff was an unmarried man 24 years of age, resided

with his parents on a farm near Beemer and assisted in farming 200 acres of land.

Defendants, as the cause was submitted to the jury, were William Robinson, Frank Rubin, Edward Bishop, and Interstate Detective Agency, a corporation. The three men named as detectives were members of the detective agency and conductd it. Gottlieb Schlecht had a contract with the detective agency under which it agreed to investigate and assist in bringing to justice any person guilty of larceny from him. He died in May, 1933, and later there were rumors that personal property belonging to his estate had been stolen and defendants began to perform for the administrator their contract as detectives. One of them met plaintiff on a street in Beemer July 1, 1933, invited him into an automobile, drove around with him for an hour or two, accused him of stealing some of the missing property and afterward released him. While plaintiff was cultivating corn July 5, 1933, the three detectives, two with guns visible in holsters, without any warrant or other process, approached him in the cornfield, left his team standing where it stopped, took him into their car, drove to different farms, accused him of thefts in the presence of third persons, and one of the defendants, with directions from the others, took him to West Point, the county seat, in the evening, and turned him over to the sheriff who kept him in jail for 48 hours. On his way home he walked three miles. The automobile rides and the imprisonment in the county jail were proved by the evidence on both sides.

The substance of the defense was that plaintiff confessed to the thefts and that defendants acted without malice in the performance of duty, with reasonable and probable cause to believe plaintiff guilty.

False imprisonment was clearly proved, and every fact upon which defendants relied for a defense was refuted by sufficient competent evidence which the jury believed.

On appeal defendants contend that there were no damages and that the evidence does not sustain the verdict for $1,000. There is nothing in the record to show that plain-

tiff was not a normal, unmarried man 24 years of age. His reputation had not been sullied by any former arrest or imprisonment for a criminal offense. He had never before been troubled by detectives or police officers. No prosecuting officer, detective or private individual ever filed a complaint against him. There was no such complaint in the present instance. His right to his inheritance of life, liberty and the pursuit of happiness had not formerly been disturbed. It is fair to infer, therefore, that his conscience had not been hardened by crimes or contests in criminal courts and that he was subject to the natural reactions of an innocent person whose rights have been invaded by unlawful acts of detectives. The evidence justified the jury in finding that plaintiff was under arrest against his will while he was taken for rides among farmers in his community and accused of stealing property belonging to the estate of Gottlieb Schlecht—a deceased neighbor who had lived, roomed and boarded with plaintiff's parents for 21 years, up to the time he was taken to the hospital during his last illness. The evidence tends to prove also that plaintiff was under arrest and imprisoned in an automobile after he was taken from his work in the cornfield by the armed defendants; that he was under arrest on his way to West Point; that he was prevented from communicating with his parents and with an attorney while in jail. Defendants themselves proved that they tried hard to have plaintiff charged with grand larceny, a threat to make him answer for a penitentiary offense. They told their stories to the county attorney and to the sheriff and plaintiff was released from custody after 48 hours in jail.

Defendants assert that plaintiff did not suffer any pecuniary damage. The law, however, does not put the harrowing experiences, to which they subjected him, on the same footing as the freedom, repose and comfort he enjoyed in the cornfield and in the home of his parents and in the society of friends. There is evidence that his reputation in his community was impaired; that he was shunned; that he was not invited to parties and other social gather-

ings as formerly; that he remained at home; that he was depressed; that it was a year before he was restored to former conditions; that he lost much every normal, innocent young man holds dear. While there was no direct testimony of "mental anguish," in that identical term, inference of humiliation, disgrace and mental suffering arose from circumstances and natural reactions from the wrongful acts of defendants. There is testimony, however, that plaintiff "acted kind of scared" after he returned home. Fear inspired by unlawful acts may be an element of damage.

Credibility of witnesses and weight of evidence were questions for the jury. The instructions protected defendants in every right which the law gave them. The law is: "False imprisonment is the unlawful restraint of a person without his consent either with or without process of law." *Johnson v. Bouton,* 35 Neb. 898, 53 N. W. 995. The law does not prescribe a definite rule for the ascertainment of the exact amount recoverable for false imprisonment. The rule often stated is that the amount recoverable is such a sum as will fairly and reasonably compensate plaintiff for the pecuniary damage which the jury under proper instructions may find, from the evidence, was caused by the wrongful acts of defendants. What is fair and reasonable damage is in the sound discretion of the jury. Within the meaning of these rules of law in connection with all the evidence considered from every standpoint, there is no substantial ground for setting aside the verdict as unsupported by the evidence or as excessive.

The judgment is also attacked on the ground that the trial court erred in excluding a deposition deemed by defendants essential to their defense. The rejected deposition was offered in evidence in violation of the following provision of statute:

"Every deposition intended to be read in evidence on the trial must be filed at least one day before the day of trial." Comp. St. 1929, sec. 20-1261.

The trial court found there was no excuse for the delay

and the record fails to disclose error in the exclusion of the deposition.

Defendants also challenge as erroneous the overruling of a motion for a continuance. This motion was presented near the close of a long trial after plaintiff had made his case and after defendants had adduced all their evidence except the rejected deposition. Since the deposition was properly excluded, the refusal to grant a continuance was in the discretion of the trial court. Neither an abuse of discretion nor an error in the ruling is shown by the record. Prejudicial error has not been found in the proceedings and judgment below.

AFFIRMED.

BERTHA WEIDENFELD, APPELLANT, V. OSCAR A. OLSON, APPELLEE.

271 N. W. 806

FILED MARCH 9, 1937. No. 29809.

1. **Evidence.** Parol evidence is inadmissible to prove a collateral or contemporaneous oral agreement to vary or contradict the terms of a written lease, which, upon inspection, appears to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties.
2. ———. "The rule that parol evidence is admissible to prove that contemporaneously with, or preliminary to, the execution of a written contract the parties entered into a distinct oral agreement on some collateral matter or as a condition on which the performance of the written contract is to depend, does not apply where the written contract is complete in itself and unambiguous, and where it expresses a contractual consideration." *Spiegal & Son v. Alpirn*, 107 Neb. 233, 185 N. W. 415.
3. **Attorney and Client.** "An attorney employed to collect a debt has not by virtue of his general employment authority to release a debtor except upon payment of the full amount of the debt in money." *Smith v. Jones*, 47 Neb. 108, 66 N. W. 19.

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

Spillman & Ptak, for appellant.

Burkett & Robinson, contra.

Heard before ROSE, GOOD and CARTER, JJ., and KROGER, District Judge.

GOOD, J.

November 13, 1931, plaintiff and defendant entered into a written lease, by the terms of which plaintiff leased to defendant a farm from the 1st day of March, 1932, to the 1st day of March, 1937. The lease provided that defendant should pay as rental the sum of $3,200, payable as follows: $320 on the 1st day of October, 1932, and a like amount on the 1st day of October thereafter for each of the succeeding four years; $320 on the 1st day of January, 1933, and a like amount on the 1st day of January for the succeeding four years. These 10 payments were evidenced by 10 promissory notes, each bearing interest at the rate of 10 per cent. per annum from maturity.

Three causes of action are set out in the petition. The first cause is for a balance of $50, alleged to be due on the note maturing January 1, 1934. The second and third declare for the full amount of the notes maturing, respectively, October 1, 1934, and January 1, 1935.

In his answer defendant alleged that the rental provided for in the written lease was only tentatively fixed, and that there was a contemporaneous oral agreement, made at the time of the execution of the lease, that, in case of a poor year or a poor crop, the plaintiff would throw off a part of the cash rent and make a just and equitable deduction, and defendant alleged that he relied upon said oral agreement; that the year 1934 was very poor; that the crop was extremely poor and almost a total failure, and that by reason thereof there had been a partial failure of the consideration of said notes, and that defendant was not indebted to plaintiff for the full amount of said notes, but was willing to pay, and was liable only for, a just, fair and equitable rent for the year 1934. As a further defense to the first cause

of action, defendant alleged that 1933 was a poor crop year and that plaintiff had consented to accept $540 for that crop year, and that such amount had been paid, and he therefore claimed there was nothing due upon the note due January 1, 1934.

By stipulation of the parties the new matter in the answer was treated as denied. At the close of defendant's evidence, plaintiff moved for a directed verdict upon each of the causes of action. The motion was overruled. Thereupon, the plaintiff put in rebuttal testimony, and after the close of all the testimony the court sustained a motion by defendant to direct a verdict for him on the first cause of action, and again overruled plaintiff's renewal of her motion for a directed verdict on the second and third causes of action. The cause was submitted to the jury, which returned a general verdict for the plaintiff in the sum of $225. Plaintiff has appealed.

Many errors are urged, but we shall consider only those that are essential to a determination of the cause.

Plaintiff complains because the court permitted oral evidence of an alleged contemporaneous oral agreement as to a reduction in the rental, in the event of a poor crop year or failure of crops.

We think the rule relating to parol testimony to vary or contradict a written instrument is aptly set forth in *Spiegal & Son v. Alpirn*, 107 Neb. 233, 185 N. W. 415. It was there held:

"Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of the payment of a money consideration, and is of a contractual nature, parol or extrinsic evidence is not admissible to vary or contradict the consideration expressed.

"The rule that parol evidence is admissible to prove that contemporaneously with, or preliminary to, the execution of a written contract the parties entered into a distinct oral agreement on some collateral matter or as a condition on which the performance of the written contract is to depend,

does not apply where the written contract is complete in itself and unambiguous, and where it expresses a contractual consideration."

In the opinion it was said (p. 245): "The test which most of the courts have applied to determine whether parol evidence is admissible to prove a collateral agreement is whether or not the writing appears upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties, and whether or not the parol evidence is consistent with, and not contradictory of, the written instrument." Among other decisions by this court, holding to a like tenor, are the following: *Wessell v. Havens*, 91 Neb. 426, 136 N. W. 70; *Smith v. Bailey*, 105 Neb. 754, 181 N. W. 926; *Schuster v. North American Hotel Co.*, 106 Neb. 679, 186 N. W. 87; *Security Savings Bank v. Rhodes*, 107 Neb. 223, 185 N. W. 421; *Erwin v. Kuhlman*, 130 Neb. 249, 264 N. W. 676.

In the instant case, from an inspection of the written lease, it appears to be a complete instrument, embracing all of the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties. It is not a mere receipt or acknowledgment of the amount of rental to be paid, but the consideration is contractual in its nature. The oral evidence, offered and admitted, of the alleged contemporaneous oral agreement tends to directly contradict and vary the terms of that instrument. We think the evidence was improperly admitted. Moreover, the evidence is insufficient to establish the making of such an oral agreement. According to defendant's evidence, when plaintiff called upon him at the farm prior to the making of the written lease, there was a conversation in which he asked that plaintiff execute a lease, permitting him to pay share or crop rent, in the event of a poor year or crop failure; she answered she was unwilling to do that, but said she would rather throw off some of the cash rent than lease for grain or share rent. Thereafter, they went to the town of Hartington some

miles distant, where the lease and notes were drawn by a banker, who testified that he put into the contract what the parties desired and expressed to him. There was no agreement on the part of the plaintiff that she would take less than the rental stipulated for in the lease. The evidence, therefore, even if it had been admissible, was insufficient to establish the alleged oral agreement. The alleged oral agreement was not contemporaneous with, but was some time in advance of, the execution of the lease and the promissory notes.

Defendant cites and relies upon a number of decisions by this court where exception to the general parol evidence rule is recognized. Among them are *Norman v. Waite*, 30 Neb. 302, 46 N. W. 639; *First Nat. Bank v. Burney*, 91 Neb. 269, 136 N. W. 37, overruled in *Security Savings Bank v. Rhodes, supra; Seminole Bond & Mtg. Co. v. Investors Realty Co.*, 127 Neb. 193, 254 N. W. 732; and some earlier cases, which are fully distinguished in the case of *Spiegal & Son v. Alpirn, supra*. In the *Seminole Bond & Mtg. Co.* case, the general rule is recognized, but, under the facts stated in that case, it was held to be an exception to the rule. None of the above cases is applicable to the facts disclosed by the record in the instant case. The record in this case does not warrant the application of any exception to the parol evidence rule.

With reference to the defense as to the balance due upon the first cause of action, the record shows that plaintiff had placed that note in the hands of an attorney for collection, who, without authority, made thereon this indorsement: "By agreement $50.00 deducted. $270.00 paid on this note. $9.00 int paid on this note. Payments made April 28, 1934." Defendant contends that plaintiff had authorized such payment or deduction in a letter written by her, which was introduced in evidence. That letter was clearly an offer to compromise. It was dated February 16, 1933, and stated that she would accept $540 for that year's rent "if you pay now." The offer was not accepted, and the payment was not made, in any event, until more than two months later.

"An attorney employed to collect a note has no implied authority to discharge debtor from liability on receipt of a lesser amount than that due.

"An agent or attorney may not, without express authority, compromise or settle a claim or release a debtor from his obligation without receiving the full amount due." *People's State Bank v. Bloch*, 249 Mich. 99, 227 N. W. 778.

In *Smith v. Jones*, 47 Neb. 108, 66 N. W. 19, it was held: "An attorney employed to collect a debt has not by virtue of his general employment authority to release a debtor except upon payment of the full amount of the debt in money." To the same effect is *Hamrick v. Combs*, 14 Neb. 381, 15 N. W. 731. See, also, *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463, 62 N. W. 899.

From a consideration of the entire record, it appears that there was no valid defense to any of the three causes of action, and the trial court should have sustained plaintiff's motion, at the conclusion of defendant's evidence, to direct a verdict for plaintiff as to each of said causes of action.

It follows that the judgment of the district court is erroneous and is reversed and the cause remanded, with directions to enter judgment for plaintiff, as prayed, upon each of the three causes of action.

REVERSED.

MAMIE DYMAK, APPELLEE, V. HASKINS BROTHERS & COMPANY ET AL., APPELLANTS.
271 N. W. 860

FILED MARCH 9, 1937. No. 29975.

1. **Master and Servant: WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY.** Evidence examined, and *held* to establish that appellee suffered an injury resulting from an accident arising out of and in the course of her employment.
2. ———: ———: ———. Injury from strain or overexertion due to a physical condition predisposing the employee to injury is an injury within the terms of the Nebraska workmen's com-

pensation act, even though had the person been sound in every particular the strain would not have been sufficient to occasion any serious physical injury.

3. ———: ———. "Under the employers' liability act * * * the inquiry respecting the extent of an injury to an employee should be directed to his condition at the time of the examination or trial." *Updike Grain Co. v. Swanson*, 103 Neb. 872, 174 N. W. 862.

4. ———: ———. Parties are entitled to a final determination of the character of the disability, the full amount to be recovered, and the times when this amount shall be paid; in other words, to a complete disposition of the case.

5. Allowance of compensation to attending physician employed by plaintiff, under circumstances of this case, approved.

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

Brome & Thomas and *Harold A. Moore*, for appellants.

Anson H. Bigelow and *Philip Abboud, contra.*

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

EBERLY, J.

This is a proceeding instituted in this court by Haskins Brothers & Company and Great American Indemnity Company, to review an award of compensation made by the district court for Douglas county against the appellants and in favor of Mamie Dymak on July 13, 1936.

Section 48-174, Comp. St. Supp. 1935, provides that this judgment, so appealed from, may be "modified or set aside only upon the following grounds: (1) That the court acted without or in excess of its powers. (2) That the judgment, order or award was procured by fraud. (3) That the findings of fact are not conclusively supported by the evidence as disclosed by the record, and if so found, the cause shall be considered *de novo* upon the record. (4) That the findings of fact by the court do not support the order or award."

It appears that the original order appealed from was

entered in the Nebraska workmen's compensation court, in the following terms:

"1. That on or about April 19th, 1935, the plaintiff was in the employ of the defendant Haskins Brothers & Company, a corporation, as a wrapping machine operator in and about the soap factory operated by the said defendant in Omaha, Nebraska, at a weekly wage of $13.00; that on or about said date, while plaintiff was attempting to start the wrapping machine, pulling the clutch not being sufficient to start the machine, plaintiff held to the clutch with one hand and stooped so that she could turn the fly wheel with the other hand, and in so doing severely wrenched her back in and about the sacro-iliac region, tearing and spraining the bones, ligaments and muscles and soft tissues in and about said sacro-iliac region; that said accidental injury arose out of and in the course of plaintiff's said employment.

"2. That by reason of said accident and the resultant injuries, plaintiff was temporarily totally disabled from and after April 19th, 1935, to and including January 13th, 1936, a period of 34 weeks, for which period plaintiff is entitled to $8.67 each week; that plaintiff's temporary total disability was immediately followed by permanent partial disability traceable to said accident and said permanent partial disability is found to be 50% of normal, for which plaintiff is entitled to $4.33 each week for a period of 266 weeks from and after January 13th, 1936."

Such award also contained an allowance for medical services and for legal services.

In the district court for Douglas county, the award of the compensation court was sustained.

Under the statutory limitations already referred to, this appeal presents the question of the correctness of this judgment.

The order entered is certainly within the powers of the compensation court. Fraud is not alleged, neither is it contended "that the findings of fact by the court do not support the order or award."

There is no question under the evidence that appellee suffered an injury resulting from an accident arising out of and in the course of her employment. She is therefore entitled to compensation, unless her right thereto is negatived by appellants' contention that "Medical evidence is conclusive that plaintiff had a congenital defect of the sacro-iliac region."

The following is, in substance, an accurate description of the physical condition of plaintiff as it existed prior to the accident: The X-rays disclosed an abnormal relation between the position of the sacrum and the lumbar spine. The position of the sacrum is more horizontal than normal. Normally the sacrum occupies, or is in, a plane at an angle with the plane of the lumbar spine, the angle being about 45 degrees with the angle at the front, with the apex of the angle at the front. In this case the sacrum is almost horizontal, so that the angle is close to 80 or 90 degrees. This is not the result of the accident, but rather is a congenital thing. According to the testimony of the experts, this type of back constitutes one that is weaker than a normal spine; more susceptible to strain than a normal spine.

The appellants cite *Gilkeson v. Northern Gas Engineering Co.*, 127 Neb. 124, 254 N. W. 714. In that case Gilkeson's witnesses' testimony tended to establish that a mitral regurgitation which existed subsequent to the accident, to which he had been subjected, was caused by it, and was due to the stress and strain thrown upon him. But from a consideration of all the evidence, this court concluded that Gilkeson had a mitral regurgitation and disability therefrom prior to and at the time of the exertion the accident imposed upon him, and that it was not increased in extent by the same. The rule invoked by these facts is wholly inapplicable here, where the undisputed evidence is that the plaintiff worked for defendant, Haskins Brothers & Company, more than eleven years, and prior to this accident had never had an accident or drew compensation. There is no evidence that prior to the accident here in suit she ever suffered from a strain or injury in the sacro-iliac region.

The facts in the instant case invoke the application of the well recognized principle, viz.: "Injury from strain or overexertion due to a physical condition predisposing the employee to injury is an injury within the terms of the various workmen's compensation acts authorizing compensation for injuries, personal injuries, accidental injuries, or personal injuries by accident, even though had the person been sound in every particular the strain would not have been sufficient to cause his death or provoke any serious physical injury." 71 C. J. 607. See, also, *Bunker v. Motor Wheel Corporation*, 231 Mich. 334, 204 N. W. 110; *Hackley-Phelps-Bonnell Co. v. Cooley*, 173 Wis. 128, 179 N. W. 590.

The amount of the award of compensation is challenged as being excessive.

"Under the employers' liability act * * * the inquiry respecting the extent of an injury to an employee should be directed to his condition at the time of the examination or trial," and subject to the right to make application for a modification any time after six months from the date of the award. *Updike Grain Co. v. Swanson*, 103 Neb. 872, 174 N. W. 862.

In *Poast v. Omaha Merchants Express & Transfer Co.*, 107 Neb. 516, 186 N. W. 540, Day, J., in delivering the opinion of this court, employed the following language: "A fair construction of the law would imply that where an employee sustains an injury resulting in temporary total disability, but of such a character that the extent (duration) of the disability cannot then be determined, the employee is entitled to receive compensation under subdivision 1 of section 3662 (now section 48-121, Comp. St. 1929), until such time as a cure is effected, or until it can be determined definitely what percentage of permanent partial loss the employee will suffer."

Again, the courts of a sister state have had for consideration these facts: "An employee's back was wrenched in an accident. It failed to get well in the time an ordinary wrenched back would, and arthritis was found. There was no way of determining just when the disability from the

accident ceased and that from arthritis began. It was held that, so long as disability continues within the legal limit of 300 weeks, compensation should continue. The man had had no trouble up to the time of the accident, so the burden of proof was held to be on the employer to show that the disability caused by the accident stopped." 2 Schneider, Workmen's Compensation Law (2d ed.) 1362, citing *Fitzsimmons v. State Industrial Commission,* 120 Okla. 31, 250 Pac. 111.

The evidence relating to plaintiff's disability at the time of the trial has been read and considered. That it is conflicting may be conceded. To set it out at length would unduly lengthen this opinion and would serve no purpose. The parties are "entitled to a final determination of the character of the disability, the full amount to be recovered, and the times at which this amount shall be paid; in other words, to a complete disposition of the case." *Schlesselman v. Travelers Ins. Co.,* 111 Neb. 65, 195 N. W. 466. See, also, *Wingate v. Evans Model Laundry,* 123 Neb. 844, 244 N. W. 635.

This determination must be made on the evidential facts as they exist at the date of the trial, even though further treatment might reduce the degree of permanent disability, the employer finding his protection, in the event of a subsequent reduction of the degree of the disability, in an action to decrease the amount of payments decreed to be paid. So considered, the evidence in the record sustains the judgment of the trial court.

The recovery for services of a competent physician, employed by appellee to treat the injury resulting from the accident in suit, is challenged. To sustain this contention, reliance is placed on the doctrine announced in *Radil v. Morris & Co.,* 103 Neb. 84, 170 N. W. 363. In the present case, the proof is that the defendant Haskins Brothers & Company wholly failed to notify its employees (including appellee) of the physician employed by it, or the arrangement made for their care in the event of injury.

In discussing the question involved in this case, the au-

thor of Schneider's Workmen's Compensation Law, employs the following language: "The following statement by the court in this case will apply to most of the American compensation acts except as to the time limit therein mentioned: 'The obligation to furnish medical and hospital services for the first two weeks after the injury, is imposed on the insurer by the express words of the act. This duty must be performed or reasonable efforts made to that end before the statutory obligation is satisfied. "Furnish" means to provide or supply. Its significance may vary with the connection in which it is found. It is used here to describe a duty placed upon an insurer respecting a workman who receives "a personal injury arising out of or in the course of his employment." Such a person is manifestly presumed by the act to be under more or less physical disability and hence not in his normal condition of ability to look out for himself. The word "furnish" in this connection imports something more than a passive willingness to respond to a demand. It implies some degree of active effort to bring to the injured person the required humanitarian relief. Reasonably sufficient provision for rendering the required service must of course be made. Then either express notice must be given to the employee or there must be such publication or posting of the information as warrants the fair inference that knowledge has reached the employee.' " 2 Schneider, Workmen's Compensation Law (2d ed.) 1614.

Coupled with this failure on part of appellants, evidence in the record before us tends to support the conclusion that the physician employed by the appellant Haskins Brothers & Company, first appeared at the home of appellee, where she was confined to her bed, on the third day after the accident, and, though afforded ample opportunity, failed to render the necessary services, and, in fact, consented to the continuance of the services of the physician who had been employed by the injured party. Under these circumstances the allowance made by the district court was correct.

Upon due consideration of the cross-appeal, in the light of the facts in the record, and the authorities cited by appellee, we find that she is not entitled to an award of compensation for life under subdivision 1 of section 48-121, Comp. St. 1929. However, it appears that the appellee is entitled to an allowance of attorney fees for services of her attorneys on this appeal, which is fixed at $150.

It follows, therefore, that the findings and award of the district court appealed from are, in all respects, correct, and are

AFFIRMED.

GEORGE W. HASSETT, APPELLEE, V. JAMES D. DURBIN ET AL.: FRED A. BUCHFINCK, APPELLANT.
271 N. W. 867

FILED MARCH 9, 1937. No. 29893.

1. **Judgment.** If it appears that no jurisdiction was acquired over a defendant in the manner required by law, a judgment rendered against him is void.
2. ———. A void judgment is in reality no judgment at all. It does not bind the person against whom it is rendered. It may be impeached in any action, direct or collateral.

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

Meeker & Curtis, for appellant.

Sterling F. Mutz and *Clyde Anderson, contra.*

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

PAINE, J.

This is a proceeding upon a motion to cancel a sheriff's deed and set aside the decree of foreclosure, sale, and confirmation, for the reason that service by publication was made upon the owner of the equity of redemption when he was a resident at the time of Ord, Nebraska. From a de-

cree denying such motion, an appeal was taken to this court.

In December, 1932, a petition for the foreclosure of a mortgage of $4,000 was filed by the plaintiff, George W. Hassett. Among the defendants named therein were Fred A. Buchfinck and his wife, Freda K. Buchfinck, and paragraph eight of the petition alleges that they claim a right, title, interest, or estate in said property, but that it is junior and inferior to the plaintiff's mortgage. The præcipe directed that a summons be issued for four of the defendants to be served in Chase county, Nebraska, but no service was made on the Buchfincks except by a newspaper publication, beginning December 15, 1932, and showing that answer day was January 30, 1933. On February 20, 1934, the decree of foreclosure was entered, and a return to the order of sale was made on April 11, 1934, and sheriff's deed was issued to the plaintiff.

On February 16, 1935, a motion was filed by Fred A. Buchfinck, asking that the decree of foreclosure, the sheriff's sale, and the order of confirmation be set aside and the sheriff's deed be canceled as void, for the reason that the defendant was not served with summons, and that at the time the notice by publication was given he was a resident of Ord, Nebraska, all of which was set out more fully in the affidavit attached to said motion, and a copy of said notice was served upon the plaintiff, George W. Hassett, who filed a demurrer challenging the sufficiency of the motion, which demurrer was overruled. A second demurrer was filed on November 18, 1935, setting out defects in the application to set aside the decree, and the motion to strike this demurrer was overruled, and an amended answer was thereupon filed by the plaintiff, alleging that no notice of the application to set aside said decree was served upon the other defendants in the case; that the motion does not state facts justifying a court of equity in setting aside the decree, in that it is not set out that the said Buchfinck has any defense to the action, or is ready and able to redeem the property from the mortgage, nor

does it show that the real estate is of sufficient value to pay the mortgage and leave any equity for the said Buchfinck. It was further set out in the amended answer that the plaintiff served the said Buchfinck by publication believing in good faith that he was a nonresident of Nebraska, for letters had been addressed to him in Colorado which had not been returned, and setting up other defenses to said motion.

For the purposes of this decision, this court will consider that the only issue in the case is whether the decree, sale, and sheriff's deed, based upon service by publication upon the holder of the record title, are void if it appears that he was a resident of the state at the time.

In the trial of the case oral evidence was introduced by said Buchfinck showing that he moved his family from Holyoke, Colorado, to Ord, Nebraska, on August 12, 1932, renting an apartment there, into which he moved his furniture, and at once bought out a restaurant in Ord, and as soon as he had painted and cleaned it up he engaged in the restaurant business at Ord, Nebraska, and was engaged in the same business at the time of this trial; that when he moved to Ord it was with the intention of establishing his residence there. That he purchased the south half of section 28-6-41, Chase county, in the fall of 1932, and recorded his quitclaim deed on October 14, 1932, which deed appears to be in the form of a special warranty deed, warranting against all claims and demands of the grantors therein.

The assignments of error of the trial court, in overruling the motion to vacate and set aside the decree, sale, and deed, are on the ground that the judgment is contrary to the law and contrary to the evidence.

Every resident of Nebraska is entitled to notice before being divested of his property, and service by publication may only be had on defendants, and the court can acquire jurisdiction of a defendant only as provided by statute. *Herman v. Barth,* 85 Neb. 722, 124 N. W. 135; *German Nat. Bank v. Kautter,* 55 Neb. 103, 75 N. W. 566; *Wagner v. Lincoln County,* 80 Neb. 473, 114 N. W. 574; *Scott v. McNeal,* 154 U. S. 34.

Proceedings taken in courts of general jurisdiction are presumed to be regular and in conformity with law, but when it is made to appear that no jurisdiction was acquired over the defendant, then the judgment rendered is void, and its invalidity may be shown in any action in which it may be called in question. *Chicago, B. & Q. R. Co. v. Hitchcock County*, 60 Neb. 722, 84 N. W. 97; *Topliff v. Richardson*, 76 Neb. 114, 107 N. W. 114.

Even though the decree recites that due and legal service by publication has been made, if it appears that the court has no jurisdiction to enter such original decree the judgment is void and a nullity. *Foster v. Foster*, 111 Neb. 414, 196 N. W. 702.

A void judgment may be entirely disregarded upon having its jurisdictional infirmity exposed. Proceedings in equity are peculiarly appropriate for the exposure of this infirmity, and after full opportunity has been given to those who seek to sustain as well as to those who seek to avoid the judgment, if it satisfactorily appears that the defendant was not summoned, and had no notice of the suit, a sufficient excuse is shown for his neglect to defend, and equity will not allow the judgment, if unjust, to be used against him, no matter what jurisdictional recitals it contains. 3 Freeman, Judgments (5th ed.) sec. 1228. See, also, *Kaufmann v. Drexel*, 56 Neb. 229, 76 N. W. 559; *Rasmussen v. Rasmussen*, 131 Neb. 724, 269 N. W. 818.

As to the person against whom a void judgment is rendered, it binds him in no degree whatever, it has no effect as a lien upon his property, it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated, or set aside. But whenever it is brought up against the party, he may assail its pretensions and show its worthlessness. It is supported by no pre-

sumptions, and may be impeached in any action, direct or collateral. It is quite different from a "voidable" judgment, which, though not a mere nullity, is liable to be made void when the proper steps have been taken to have its invalidity declared. 1 Black, Judgments, 248.

In the case of *Hayes County v. Wileman,* 82 Neb. 669, 118 N. W. 478, an action was brought to foreclose a tax lien, and the defendant was served only by publication, although he was a resident of Clay county, Nebraska. The case proceeded to a sheriff's deed, the same as in the case at bar, whereupon the defendant filed a motion to open up the decree, and Commissioner Duffie reversed the trial court and held that a judgment rendered on service by publication against a resident of this state on whom personal service might have been had was absolutely void; that such void judgment was in legal effect nothing; that all acts performed under it are void, and that such judgment may be vacated at any time on a motion made for that purpose by an interested party, and that section 82 of the Code (now section 20-525, Comp. St. 1929) has no reference to a void judgment. It was also held that, the decree of foreclosure and all the proceedings thereunder being absolutely void, the plaintiff need not pay the costs of the proceedings to remove the cloud.

"A void judgment, order or decree, in whatever tribunal it may be entered, is, in legal effect, nothing. 'All acts performed under it, and all claims flowing out of it, are void.' Hence, a sale, based on such a judgment, has no foundation in law. It must certainly fall." Freeman, Void Judicial Sales, 6, sec. 2. See, also, *Payne v. Anderson,* 80 Neb. 216, 114 N. W. 148.

In our opinion, the authorities do not support the decree of the trial court, and the same is reversed, and it is directed that the decree of foreclosure and all proceedings thereunder be vacated and set aside as to appellant Fred A. Buchfinck.

REVERSED.

ROSE, J., dissenting.

Fred A. Buchfinck, appellant, presented to the district court a motion to set aside the decree of foreclosure, the sheriff's deed to plaintiff under the judicial sale of the mortgaged land and the confirmation of the sale and deed, though these judgments were perfectly valid as to all other litigants. In the respects indicated the motion was wholly without merit and could not be sustained as made. There was therefore no error in the order overruling the motion. It follows that the judgment from which the appeal was taken should be affirmed in its entirety instead of reversed in part.

The judgment from which the appeal was taken should be affirmed for the further reason there is no pleading in the record to support a judgment for any relief sought by appellant. Neither his motion nor any pleading in a different form shows any property right or interest or wrong calling for judicial relief. An utter stranger having no interest in litigated matters and not being a party to the cause of action, but prompted wholly by curiosity, would not be entitled to invoke the aid of a court of law or equity to set aside a judgment merely because it is void. A party seeking to set aside a judgment that is void for want of jurisdiction should state facts showing some right to be restored or some wrong to be redressed. An implied propensity for litigation is not sufficient. Appellant did not plead a legal or an equitable interest in excess of the adjudicated liens on the land, or a right of possession or a right to rentals or a right to dispossess plaintiff or a means of redemption or a purpose to pay delinquent taxes and principal and interest due plaintiff. Appellant did, however, testify he owned the land but this amounted to no more than his quitclaim deed from his brother without a showing that his brother had title to convey. On such a record it is not the duty of a court of law or equity to set aside even a void judgment. It seems to me the district court ruled properly and that the reversal is wrong.

GOOD, J., concurs in this dissent.

JOHN SANDERSON, APPELLEE, V. HENRY HUFFMAN ET AL., APPELLANTS.
271 N. W. 870

FILED MARCH 9, 1937. No. 29859.

1. **Assault and Battery.** Mere anger on the part of a defendant at the time of making an alleged assault upon the person of another, which he is seeking to justify as having been committed in self-defense, will not, of itself, make such an assault unlawful.
2. **Appeal.** "Instructions which state conflicting propositions of law and tend to confuse the jury are erroneous." *Bryant v. Modern Woodmen of America*, 86 Neb. 372, 125 N. W. 621.

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

Roland V. Rodman and *John H. Kuns*, for appellants.

S. E. Torgeson, contra.

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

ELDRED, District Judge.

This action was commenced by John Sanderson, plaintiff, appellee, to recover damages he claimed to have suffered from an alleged assault and battery upon him by Henry Huffman and Nellie Huffman, defendants, appellants. The defendants' answer includes a plea of self-defense. Plaintiff, 67 years of age, a farm hand, had been in the employ of the defendants, who were farmers, for some months prior to the time of the altercation involved herein, at a compensation of $10 a month with board, room and washing. In the Huffman family were appellants, Henry Huffman, aged 71, his wife, Nellie Huffman, evidently some years younger, and a son, Archie, aged 13 years. It seems that this boy had annoyed the plaintiff by frightening cows during the time they were being cared for and milked, and on the evening of the day involved herein, plaintiff quit his employment and asked for his wages. During a heated conversation which followed, plaintiff called defendant

Henry Huffman a "cheapskate;" and other insulting epithets were apparently passed by all parties hereto, finally leading up to the physical altercation in which the plaintiff, both defendants, and the son, Archie, were all involved.

There was a decided conflict in the evidence as to just what occurred in the assault and the responsibility therefor, but it seems that Henry Huffman attempted to use a chair on plaintiff, which plaintiff took from him or held; that the son, Archie, used a stick of wood or kindling, as it was variously termed, and that the defendant Nellie Huffman secured a hammer with which the plaintiff was struck a number of blows on the head, inflicting lacerations of such character that surgical attention was required. On the trial before a jury, verdict was returned in favor of the plaintiff for $500, on which judgment was rendered. Motion for new trial being overruled, defendants have appealed to this court.

The only error assigned or urged by the appellants is that the court erred in giving instructions No. 6 and No. 10 on the issue of self-defense. Instruction No. 6 is in three paragraphs. Paragraphs one and three advised the jury as to when force is justified and not unlawful in repelling an assault, of which no complaint is made, and appear to fairly reflect the law on that subject. Paragraph two of instruction No. 6 reads:

"In connection with the law relating to self-defense as above outlined to you the court instructs you that mere words, however insulting they may be, do not justify the use of force upon the person of another. Any words that you believe the evidence shows the plaintiff used towards the defendants or any of them, would not of themselves justify the application of any force upon the plaintiff by the defendants, but may be considered in determining whether or not any force applied upon the plaintiff was applied in self-defense under rules above set forth or was applied because the defendants were mad rather than in the belief that the use of such force was necessary for the protection of either of them."

Instruction No. 10, so far as it relates to the question here considered, is as follows:

"A pertinent question for you to ask yourselves is that of whether or not any force that you find was applied to the plaintiff was applied in self-defense under rules herein given you, or whether it was applied unlawfully, because the one using it was mad."

It may be conceded that the term "mad" was intended to mean angry. The use of that term by the trial court was doubtless due to the fact that, when the witnesses were being examined, both the counsel examining the witnesses and the witnesses themselves used such colloquial expression when anger was intended. The jury could not have been misled thereby. The criticism of these instructions urged by the appellants is that a person unlawfully assaulted is entitled to the right of self-defense, though he may lose his temper and be angry at the time; that defendants were, by these instructions, deprived of the right of self-defense, if the jury found that the injuries complained of were inflicted while the defendants were angry.

The paragraph of instruction No. 6 above set out, in effect, stated that the jury might consider any words they believed the evidence to show the plaintiff to have used towards defendants, in determining whether any force applied by defendants (a) "was applied in self-defense;" or (b) "was applied because the defendants were mad (angry)." This paragraph of the instruction might not be so misleading if it were not for instruction No. 10, as the clause from instruction No. 6, above referred to, "because the defendants were mad," is followed by the statement, "rather than in the belief that the use of such force was necessary for the protection of either of them." Standing alone, error in that instruction might possibly be disposed of under the rule: Though an instruction may not be so specific as it should be, if it is not misleading, it is not a cause for reversal, where the complaining party made no request for a more specific instruction. But the conclusion naturally to be drawn from this instruction would

be that if the defendants committed the assault, of which complaint is made, while they were angry, then such assault was not justified. This conclusion is emphasized by instruction No. 10, wherein the jury are advised: "A pertinent question for you to ask yourselves is that of whether or not any force that you find was applied to the plaintiff was applied in self-defense under rules herein given you, or whether it was applied unlawfully, because the one using it was mad." By the foregoing the jury were clearly advised, in substance, that any force applied on another person, while the one using it was angry, would be unlawful. This we do not conceive to be the law. The fact that a defendant may lose his temper and become angry at the time of making an assault upon the person of another, which he seeks to justify as having been in self-defense, will not of itself, make an assault unlawful. The rights of the defendants were too narrowly limited by these instructions. *Eisentraut v. Madden*, 97 Neb. 466, 150 N. W. 627.

While it is conceded that the law governing the right of self-defense is properly set forth in other portions of the instructions, it is urged that the instructions above quoted are in conflict therewith. This contention appears well taken. The instructions were confusing. "Instructions which state conflicting propositions of law and tend to confuse the jury are erroneous." *Bryant v. Modern Woodmen of America*, 86 Neb. 372, 125 N. W. 621.

On the part of appellee it is contended that no other verdict could have been properly arrived at by the jury, and that therefore there was no prejudice by reason of any erroneous instruction given. We do not deem it proper in this opinion to discuss the evidence, nor comment on the weight thereof. There is a conflict in the evidence as to who provoked the assault which resulted in the alleged injury for which plaintiff is seeking to recover, as to what occurred at the time of the altercation and the responsibility therefor. Disputed questions of fact being involved, the case was peculiarly one for consideration by a jury. For the reasons stated herein the judgment of the trial court is

REVERSED.

VIRGIL E. BROWNFIELD, APPELLANT, V. WILLIAM EDWARDS ET AL., APPELLEES.

271 N. W. 797

FILED MARCH 9, 1937. No. 29819.

1. **Executors and Administrators:** ACTION ON BOND. After demand on the executor and his bondsman and after having obtained consent of the county court, a distributee has a right to sue on the bond of the executor in case the executor fails or refuses to make distribution in compliance with the decree of distribution entered in the county court.
2. ———: DECREE OF DISTRIBUTION: ENFORCEMENT. A final decree of distribution by the county court, wherein an executor is ordered to pay distributees certain amounts, has the force and effect of a personal judgment in favor of distributees and against the executor, upon which such distributees have a right to execution to be levied upon the property of the executor.
3. ———: ACTION ON BOND. The right to sue on the bond of the executor is an alternative right of which the distributee may avail himself if he chooses not to proceed by having execution and levy.
4. ———: DECREE OF DISTRIBUTION. Ordinarily, when an administrator or executor pays out money in pursuance of an order made by the county court, such administrator or executor cannot be personally charged with reimbursement of the same, in the absence of evidence showing that the order was obtained by fraud and that he had guilty knowledge of the same.
5. ———: ———. The rule that an administrator or executor who pays out money in pursuance of an order made by the county court cannot be personally charged with reimbursement of the same, in the absence of evidence showing that the order was obtained by fraud and that he had guilty knowledge of the same, does not apply in a case where the order of distribution is complied with and a distributee appeals and obtains a reversal and a new decree is entered in the county court in conformity with the judgment of reversal, and which new decree fails to disclose the distribution made under the original order or decree, but orders such executor or administrator to make distribution in accordance with the judgment on reversal.
6. ———: ———. In the final distribution of an estate, the county court may find whether a distributee's share of an estate is in the hands of the administrator or executor or some other person or persons. On such finding the distributee entitled to such share shall be entitled to recover against the person who holds such share.
7. ———: ———. On entry of a final decree in the county

court, the executor or administrator and all parties interested in the distribution of the estate, whether present or not, are parties and are bound by any final order within the jurisdiction of the court, and any such judgment is not subject to collateral attack.

8. ———: ———. A final decree of the county court fixing the rights of the distributees and the liabilities of the executor or administrator, and not appealed from, is a valid and binding judgment, and cannot be collaterally attacked in an action at law on the bond of the executor or administrator to enforce the liability of such executor or administrator as fixed by the decree of the county court.

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

Frank M. Johnson, for appellant.

R. E. Bannister, D. E. Harper and *Cook & Cook, contra.*

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

YEAGER, District Judge.

This is an action at law which was instituted in the district court for Dawson county by Virgil E. Brownfield, who is appellant herein, against the appellees on the bond of appellee William Edwards, who was executor of the estate of Ewing S. Brownfield, deceased. Appellee Fidelity and Deposit Company, a corporation, was surety on the bond of the executor.

By the terms of the will of Ewing S. Brownfield, the appellant herein, along with certain other persons, was entitled to a distributive share in and to the estate of the said Ewing S. Brownfield. The will was duly probated in the county court of Dawson county, and on April 30, 1934, a hearing was had in the county court fixing the shares and interests of all distributees, including the share of the appellant. Appellant's share was fixed at $115.63. No decree was entered, however, until June 14, 1934. Immediately following the hearing on April 30, 1934, the executor made distributions to all distributees and sent a check to appel-

lant for $115.63, which appellant refused to accept. On June 23, 1934, appellant gave notice of appeal and thereafter perfected his appeal to the district court from the order and decree of distribution wherein he was allowed the sum of $115.63. The appeal was heard in the district court and on the trial the district court found that appellant was entitled to a distributive share of $500.49 and that he was entitled to recover his cost against the executor in the sum of $42.79. The judgment of the district court was not appealed from and on the 19th day of February, 1935, in accordance with the judgment of the district court, an amended decree was entered in the county court finding the condition of the estate on April 30, 1934, and ordered distribution of the balance as follows: Nora Edwards, $453, Carrie Birt Groenewold, $289.70, Gertrude Gayman, $353, and Virgil E. Brownfield, appellant herein, $500.49, and taxed costs in the sum of $42.79 in favor of appellant and against the executor and one of the appellees herein. From this amended decree no appeal was taken and it remains in full force and effect.

Appellant made demand upon both appellees for the sum of $500.49, his distributive share of the estate, and for $42.79, being costs awarded to him, and payment was refused except the sum of $69.84 which remained out of $115.63, or the award allowed in the original decree, after deducting costs of appellant in the sum of $42.79 and executor's costs in the sum of $3. Tender of this amount was made on the trial of this case in the district court. After demand and refusal of payment appellant obtained permission of the county court to bring this action.

After demand and after consent was obtained from the county court, this action was instituted to recover upon the bond of the executor for the said sum of $500.49 and appellant's costs in the sum and amount of $42.79.

The case was tried to the court without a jury on a stipulation of facts, and it may be well to state that in the record there is not the slightest indication of fraud or bad faith as to any party to the controversy and no dispute on

any material fact. The rights and liabilities of the parties must be determined by an application of legal principles to the case as outlined in the pleadings and stipulation of facts.

It appears that a proper determination of this case depends upon the question of the finality of the decree or, as termed, the amended decree entered in the county court on the 19th day of February, 1935; the right to sue on the executor's bond after notice and consent of the county court, and the right to interpose an equitable defense to an action at law on an executor's bond.

Section 30-621, Comp. St. 1929, is as follows: "Whenever a decree shall have been made for the distribution of the assets among the creditors, the executor or administrator of the estate, after the time of payment shall arrive, shall be personally liable to the creditors for their debts, or the dividend thereon, as for his own debts, or he shall be liable on his bond, and the same may be put in suit on the application of the creditor whose debt or dividend shall not be paid as above mentioned."

Section 30-1303, Comp. St. 1929, is as follows: "In such decree the court shall name the persons, and the proportions or parts to which each shall be entitled, and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same."

The first quoted section refers particularly to claimants and the second to distributees. This distinction is not of any significance so far as this case is concerned, except to point out that it is the rule that in case of distribution of estates under decree of distribution, whether it be claimants or distributees, such decree is final, has the force and effect of a judgment, and that any such claimant or distributee may have execution issue thereon and levy may be made on the property of the executor or administrator. *Lydick v. Chaney*, 64 Neb. 288, 89 N. W. 801. It follows therefore that, under the law, when applied to the pleadings in this case and the stipulation of facts on which it was tried, the

amended decree of distribution, wherein the county court found due from the executor to appellant the sum of $500.49 and costs, amounted to and was a personal judgment against the executor on which appellant had the right to have execution issued and to have the same levied upon the property of the executor. This judgment was not appealed from and it was at the time of the commencement of this action in full force and effect.

Appellant, instead of having execution issued has instituted this action agreeable to the provisions of sections 30-1502 to 30-1505, inclusive, Comp. St. 1929, having complied with the conditions precedent therein required. This he had a right to do since this remedy under the statute is alternative. *Lydick v. Chaney, supra.* In so doing, he may have abandoned and may be barred of the right of execution to which he was entitled under the decree of the county court, depending upon the interpretation of the term "action" as used in section 30-1511, Comp. St. 1929. It is not necessary to interpret the term, hence we do not do so. The portion of this section which has application herein is as follows:

"When an action is rightfully brought by any creditor, heir at law, next of kin, or legatee, pursuant to the provisions of this chapter, the same shall, so far as the causes of action therein are concerned, be a bar to any other cause of action which might have accrued under the provisions of this chapter, but no further."

Appellant contends that the liability of the executor, appellee William Edwards, was fixed by the county court, and the stipulation of facts shows without dispute that the executor was ordered to make distribution and in making such distributions to pay to appellant the amount sued for in this case. The appellees contend that the executor should not be required to do so, for the reason that, in good faith and under the decree of the county court before an appeal was taken from such decree, he made distribution and now has nothing to distribute except $115.63 less costs which accrued after the first decree of distribution was entered.

The fact of such distribution is admitted by the appellant in the stipulation on which the case was tried. Is that such a defense as will deny the appellant his right of recovery in this suit on the bond of the executor? We think it is not.

In support of their position that appellant must proceed against the other parties to whom distribution was made in good faith appellees cite *Weeke v. Wortmann,* 84 Neb. 217, 120 N. W. 933. In that case the court held:

"An administrator who pays out money in pursuance of an order made by the county court cannot be personally charged with the reimbursement of the same, in the absence of evidence showing that the order was obtained by fraud and that he had guilty knowledge of the same."

The rule as applied to that case was undoubtedly correct, and the same rule, no doubt, if timely steps had been taken, could have been made to apply in this case. That case was one wherein a petition was filed in the county court in the estate of Henry W. Weeke, deceased, under the equity powers of the county court, to set aside a decree of distribution and a distribution under such decree and to charge the administrator personally on account of the claimed improper distribution. The administrator and all distributees were made parties to the action. The decree was set aside and the distributees ordered to return the distributive shares previously received by them. The executor was held to be not personally liable since there was an absence of guilty knowledge shown. In that case power was exercised, not only under the equity powers of the county court, but under specific statutory authority. Comp. St. 1929, sec. 30-1303. An analysis of this section clearly shows that in the final distribution of an estate the county court may find whether a distributive share is in the hands of the administrator or executor or some other person, and if the court finds that some person other than the executor or administrator has the share of a distributee, then such distributee has the right to recover from such other person. In the case of *Weeke v. Wortmann, supra,* which was an appeal from the county court through the district court to

this court, and wherein the court had jurisdiction of all the parties, this court made the foregoing pronouncement. That pronouncement fixed the liability of the parties. The county court in entering the final or amended decree which is in controversy here made no like or similar finding and judgment. Apparently no such relief was sought, and, so far as the record discloses, the matter of distribution under the first decree was never called to the attention of the court until it was set forth in the answer herein collaterally attacking the judgment of the county court. This collateral attack cannot be allowed. It then becomes apparent that the case of *Weeke v. Wortmann, supra,* is different in legal principle from the case at bar and cannot be accepted as authority herein.

In the county court, when the amended decree was entered, all the parties, that is the executor, the appellant herein, and all other parties interested in the distribution of the estate, were parties and bound by any final order entered within the jurisdiction of the court. Moreover, any such judgment was not and is not subject to collateral attack. *In re Estate of Creighton,* 91 Neb. 654, 136 N. W. 1001. Perhaps, if the appellee William Edwards had called attention of the county court to the distribution of the estate made under the first decree, a finding would have been made in the light thereof, and such other distributees would have, in the amended decree, been ordered to refund and pay over to the appellant the amount in excess of what they were entitled to, which would have been binding on the appellant. Such was the executor's duty. Having failed to avail himself of the remedy provided by law and having permitted a valid and binding judgment to be rendered against him, he cannot be permitted in this action to collaterally attack and have the judgment of the county court rendered inoperative and ineffective.

It necessarily follows that the amended decree, which was not appealed from, fixed the liability of the executor and the rights of the appellant herein. By the terms of that decree the appellant obtained a valid, binding and en-

forceable judgment against the executor. Appellant had the right to execution on said judgment or the alternative right to sue on the bond of the executor. Having chosen the latter method of procedure, he is entitled to a recovery against the executor and his bondsman and is entitled to a judgment herein conformable to the liability as fixed by the judgment of the county court; that is, he is entitled to a judgment as prayed for $500.49 and interest from the 19th day of February, 1935, for $42.79 costs sustained in his appeal from the county court, and his costs herein sustained.

The judgment is therefore reversed and the cause remanded, with directions to the district court to render judgment in accordance with this opinion, in view of the fact that the answers of appellees allege no facts which are a defense to plaintiff's cause of action, and the stipulation of facts fully sustains plaintiff's petition.

REVERSED.

PATRICK J. MCANDREWS, APPELLEE, V. PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLANT.
271 N. W. 857

FILED MARCH 12, 1937. No. 29795.

1. Insurance: DISABILITY: PROOF. "Due proof" of disability while the policy is in full force and effect is a condition precedent to waiver of payment of premiums under the following policy provision: "If the insured * * * shall furnish due proof to the company, while this policy is in full force and effect and while there is no default in the payment of premium, that he, at any time, * * * from any cause whatsoever shall have become permanently disabled * * * the company upon receipt of such proof will waive the payment of each premium that may become payable thereafter under this policy during such disability."
2. ———: ———: ———. Due proof of disability required in insurance policy, in the absence of specifications as to the manner in which proof shall be made, does not require any particular form of proof, but only such a statement of facts which, if established in court, would require payment of the claim.

3. ———: ———: ———. Evidence of plaintiff, set out in the opinion, *held* insufficient to establish "due proof" of permanent disability, within the meaning of the policy.

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

Hall, Young & Williams, for appellant.

Brome & Thomas and *James J. Fitzgerald, contra.*

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

GOOD, J.

This is an action to recover for disability benefits under the provisions of a life insurance policy issued by defendant. Plaintiff had judgment, and defendant has appealed.

Plaintiff in his petition alleged the issuance of the policy, which contains the following provision: "If the insured, after the first premium on this policy has been paid, shall furnish due proof to the company, while this policy is in full force and effect and while there is no default in the payment of premium, that he, at any time after payment of such first premium, while less than sixty years of age, from any cause whatsoever shall have become permanently disabled or physically or mentally incapacitated to such an extent that he by reason of such disability or incapacity is rendered wholly and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value, the company upon receipt of such proof will waive the payment of each premium that may become payable thereafter under this policy during such disability."

Plaintiff further alleged that on the 25th of May, 1933, he was permanently disabled and physically incapacitated, and that he gave verbal notice to the managing agent of defendant corporation that he was permanently disabled and unable to perform any kind of work for compensation; that on or about June 15, 1933, he once more orally advised said agent that he was permanently and totally disabled, and

that at the time said notice was given said policy was in full force and effect. Plaintiff prayed for recovery of the benefits as provided by the terms of the policy.

Defendant admitted issuance of the policy and that it contained the provisions alleged by plaintiff, and, by way of defense, alleged that the annual premium on said policy, due May 25, 1933, was not paid and that said policy lapsed on August 3, 1933, for nonpayment of that premium; and, further, denied that insured had furnished due proof to it that he had become permanently disabled or physically or mentally incapacitated while said policy was in full force and effect and while there was no default in the payment of premium. Defendant then admitted that insured was permanently disabled as early as May 25, 1933. In a reply plaintiff alleged defendant had waived due proof by denying liability under the provisions of the policy in municipal court where the action was begun.

After all the evidence was adduced, each party moved for a directed verdict. Thereupon, the jury were discharged and the cause was submitted to the court, which made the following findings of fact:

"The court further finds that the defendant's answer in municipal court, wherein defendant 'denies that plaintiff was totally and permanently disabled within the terms of said policy on June 25, 1933,' was not a waiver of its defense that due proof of disability had not been furnished to it while said policy was in full force and effect and while there was no default in the payment of premium.

"The court further finds that whether or not the alleged oral statements of plaintiff to defendant's agent Murphy in May or June, 1933, were sufficient to constitute due proof of disability within the terms of said policy, is a question of law for the court.

"The court further finds that said statements of plaintiff to defendant's agent Murphy, if made, constituted due proof of his disability. * * *

"The court further finds that plaintiff did make such statements to defendant's agent Murphy, and that plaintiff

thereby furnished due proof of disability within the terms of said provision while said policy was in full force and effect and there was no default in the payment of premiums."

After the appeal was lodged in this court, plaintiff departed this life, and the action was revived in the name of his personal representative.

Plaintiff filed no motion for a new trial and no cross-appeal. The finding of the trial court against him on the question that defendant waived the making of due proof by denial of liability in a municipal court has become conclusively settled in favor of defendant.

As a condition precedent to insured's right to recover, it was incumbent upon him to establish by evidence that he had furnished due proof of permanent disability, as provided in the policy, while the policy was in full force and effect and while there was no default in the payment of premium. This proposition is supported by the following, among other, authorities: *Cochens v. Prudential Ins. Co. of America*, 4 Cal. App. (2d) 172, 40 Pac. (2d) 902; *Orr v. Mutual Life Ins. Co. of New York*, 57 Fed. (2d) 901; *Franklin Life Ins. Co. v. Fisher*, 164 Okla. 193, 23 Pac. (2d) 151; *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489.

In the *Bergholm* case it was determined that the disability existed and would have been sufficient to require the waiver of payment of premiums by the insured, provided due proof of such disability had been made during the life of the policy, but that making of due proof after the lapse of the policy would not avail to permit a recovery.

It is true that the term "due proof of disability," as used in the policy, does not require any particular form of proof which the insurer might arbitrarily demand, but only a statement of fact as, if established in court, would require payment of the claim. *Wray v. Equitable Life Assurance Society*, 129 Neb. 703, 262 N. W. 833; *Schollman v. Prudential Ins. Co.*, 130 Neb. 662, 266 N. W. 75.

In the instant case, the facts relied upon by plaintiff to constitute "due proof" were oral statements of the insured,

made to one Murphy, agent of the defendant. The real question here is whether the statements which insured testified he made are sufficient to constitute "due proof." The record discloses that the premium was due on the policy on May 25, 1933, and shortly prior to that date the insured called upon Mr. Murphy, agent of defendant, to ascertain whether a further loan could be made upon the policy with which to finance or pay the premium then about to become due. He testified: "I spoke to him (Murphy) down there when I went down to see him, if I had a loan value, another loan value on the policy. * * * I asked him about getting a renewal on the policy. * * * I know I told him I was sick and that I had pleurisy, I had pleurisy pains in my throat there; I didn't know, I thought it was bronchial trouble, I didn't know it was tuberculosis at the time." On redirect examination, he further testified: "Yes, I told Mr. Murphy I had not been working and was unable to work for some time."

The testimony given by Mr. Murphy, the agent, contradicts, in almost every essential particular, that given by the insured. However, in view of the trial court's finding, we must assume the truth of every statement made by the insured. If every statement testified to by insured is true, is it sufficient to constitute "due proof?" We do not think so. First, it is apparent that the insured had no thought that he was making proof or giving notice of permanent disability. His thought in going to the agent was for the purpose of procuring an additional loan upon his policy with which to meet the premium soon to become due. There is nothing in any statement made by him that would justify a finding that he was permanently disabled.

Plaintiff suggests that, if the statements made by the insured were insufficient or unsatisfactory, then defendant might have asked for an additional and more complete statement. However, it is certainly plain that Mr. Murphy, the agent representing the company, had no thought or information that the insured was attempting to furnish due proof of permanent disability. There would, then, have

been no occasion for him to suggest additional statement or additional proof. The insured testified that at that time he had not consulted a physician about his ailment and did not do so until October following. Evidently, neither he nor the agent of defendant had any thought that his statements were intended to indicate that he was permanently disabled, within the meaning of the policy. We are of the opinion that the evidence is wholly insufficient to show that "due proof" was given to the defendant of insured's permanent disability. "Due proof" being lacking, the premiums were not waived and the policy lapsed.

It may be remarked that at a subsequent time insured did make, or attempted to make, "due proof," not only under this but under another policy held by him in the same company. As to the other policy, the proof was made within the time required, but, as to this policy, it was not made until after the policy had lapsed, and, therefore, cannot avail the plaintiff.

Plaintiff appears to place much reliance upon the following authorities: *Barrett v. Northwestern Mutual Life Ins. Co.*, 124 Neb. 864, 248 N. W. 391; *Hilmer v. Western Travelers Accident Ass'n*, 86 Neb. 285, 125 N. W. 535; *Western Travelers Accident Ass'n v. Tomson*, 72 Neb. 661, 103 N. W. 695; *Omaha Fire Ins. Co. v. Dierks & White*, 43 Neb. 473, 61 N. W. 740; *Hablutzel v. Home Life Ins. Co.*, 52 S. W. (2d) (Mo. App.) 480; *Mid-Continent Life Ins. Co. v. Tackett*, 149 Okla. 147, 299 Pac. 862.

We have carefully examined all of these citations, and, in our opinion, none of them is controlling in the disposition of the instant case. In some of them the evidence as to permanent disability was much stronger than in the instant case and was sufficient to indicate permanent disability, and that due proof was made within the proper time. In one of the cases, the proof was alleged to have been made in a letter sent to the company. It denied receipt of the letter. It was not questioned that the statements in the letter, if received by the company, were sufficient. The only question was as to whether the company received the letter. In an-

other of the cases, the policy required notice of an accident to be given within a specified time. Insured was unconscious from his injuries and was not personally able to give notice within the time, but such notice was given by another for him, and the company acted upon it. We think the court properly held that the notice was sufficient and given in time. In another case, the policy required written notice to be given within a specified time. Such notice was not given. There was a judgment for plaintiff which was reversed by the appellate court. Certainly, this case lends no comfort to plaintiff. Another case was a suit on a policy of fire insurance. The company denied liability on the ground that the policy was not in force. It was held that such defense waived the policy provision requiring insured to give notice of the loss and made that issue immaterial. None of the cases relied upon is in point.

Clearly, due proof was not furnished in the instant case while the policy was in full force and effect and while there was no default in the payment of premium. It follows that the judgment for plaintiff is erroneous. Judgment

REVERSED.

ROBERT MILLER, APPELLEE, V. GEORGE AND MARY REISCH COMPANY, APPELLANT.

271 N. W. 853

FILED MARCH 12, 1937. No. 29948.

1. **Master and Servant: WORKMEN'S COMPENSATION LAW.** When an employee is assaulted by his foreman and injured while eating dinner furnished as a part of his wages, compensation may be allowed.
2. ———: ———. Eating such dinner was a service growing out of, and incidental to, his employment.
3. ———: ———. "Where an employee received an accidental injury while upon the master's premises and subject to the master's directions, though at the time not actually engaged in doing any work for the master, the accident occurred in the course of the employment." *Boyce v. Burleigh*, 112 Neb. 509, 199 N. W. 785.

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

Chambers & Holland, for appellant.

Craft, Edgerton & Fraizer, contra.

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

PAINE, J.

This is an appeal from an affirmance of the district court of an award allowing compensation, after a hearing by one member of the compensation court, for eight weeks at the rate of $6 a week, and an allowance of $65 for medical expense, and $68 for hospital expense.

The two assignments of error are that the judgment is contrary to the law and contrary to the evidence. The defendant filed a certificate of waiver and election to appeal directly to the district court from such award of one of the judges of the Nebraska workmen's compensation court, as provided in section 48-174, Comp. St. Supp. 1935.

The plaintiff, Robert Miller, was employed by the George and Mary Reisch Company, the defendant corporation, in August to work on its ranch near Richland, Colfax county, at $20 a month, together with his board and room. Plaintiff was required to live on the ranch and to eat and room at the house of the ranch foreman, who was paid $15 a month for the board and room of each man. The foreman heard that some of the men, including the plaintiff, were dissatisfied with the meals, and on October 29, 1934, upbraided the plaintiff during the noon meal. The plaintiff replied, "Yes, I have been kicking, but I am not alone," and thereupon the foreman in great anger jumped up from the table and started for the plaintiff, saying, "You son-of-a-bitch, I'll make you smoke for it." The plaintiff, in trying to get away, stumbled and fell, and the foreman jumped on him, his knee coming down on the hip-bone and sliding into the abdomen. The plaintiff said he put his hands over his head and let the foreman hit him. One of the other employees

took the foreman off, and plaintiff immediately went to town to notify Mr. Reisch of this assault at his residence, where he was eating his noonday meal.

In response to the question, "What did you say to him?" he replied: "I told Mr. Reisch the occurrence that had happened at the table, and that I had been hurt, and he said he wasn't liable for his foreman's doings, but that he would think the matter over, and told me to go back out and go to work, and he would come out and talk it over with the boys."

Mr. Reisch on direct examination testified that plaintiff told him that "he didn't get any scratch at all," but on cross-examination admitted that the plaintiff had told him at that time about the same story he had told on the witness-stand.

Anton Hartman testified that he separated them, and that the foreman, Kerr, hit the plaintiff with his fist, but did not remember that he pummeled him with his knees on his body; that three or four days afterward he noticed plaintiff was limping, and claimed he got hurt in the fight. Hartman also testified that Mr. Reisch came out to the ranch the same afternoon and investigated the trouble.

The record also shows that plaintiff talked with Adolph Saalfeld, a storekeeper at Richland, about the assault, and Saalfeld said: "Why he come over to our place and he wanted board at our place; he said him and Mr. Kerr had a fight, and he wanted to know if he couldn't board over there." He further testified that plaintiff did not mention any injury he had sustained in the assault.

The record further shows that, prior to this assault, the plaintiff had run a nail into his foot and had received medical attention from the insurance company. After the assault he had filed another claim for compensation for injuries received on the ranch, which was also paid by the insurance company.

The plaintiff had, prior to that time, a very small hernia, and as a result of this assault the hernia immediately increased in size, pained him constantly, and he could not do

any heavy work without pain, but he did not seek medical attention until two or three weeks after the assault, but the doctor did not make an examination of the hernia at that time. The plaintiff later consulted a surgeon at Aurora, who on May 2, 1935, reduced the rupture by an operation, and he was unable to work for two months after the operation.

The assault which it was charged caused the hernia occurred October 29, 1934, and the petition was filed with the compensation court at Lincoln within one year thereafter, as required by section 48-138, Comp. St. 1929, and the hearing was held thereon before Judge Jackman, of the compensation court, on November 7, 1935.

The defendant insists that an assault by a fellow workman does not arise out of the employment, and cites *Urak v. Morris & Co.*, 107 Neb. 411, 186 N. W. 345, and *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321, 156 N. W. 509, but this last case is overruled in *Socha v. Cudahy Packing Co.*, 105 Neb. 691, 181 N. W. 706.

In *Stanolind Pipe Line Co. v. Davis*, 173 Okla. 190, 47 Pac. (2d) 163, an employee was assaulted by discharged employees who were drunk, and it was there held that the injury did not arise out of the employment.

Also, in *Indian Territory Illuminating Oil Co. v. Lewis*, 165 Okla. 26, 24 Pac. (2d) 647, where an employee was shot and robbed by a desperado while working on his books at the office in the evening, compensation was denied, as there was no causal connection between the conditions under which the work was to be performed and the resulting injury.

Each of these cases can be clearly distinguished from the case at bar.

In *Willis v. State Industrial Commission*, 78 Okla. 216, 190 Pac. 92, an employee was warming himself by a fire on the premises of his employer and was injured by the explosion of a dynamite cap thrown in the fire by a fellow employee, and it was held that he could recover. It is set out in that opinion that the correct rule is that, where a

workman is injured in horseplay in which he is an active participant, he is not entitled to recover, but if while he is going about his duties he is a victim of another's prank, to which he is not in the least a party, he should not be denied compensation.

An erecting engineer, working in the refrigerator room of a hospital, where he had been sent by his employer, was given some ice cream by the janitor, from which he contracted smallpox and died. The employer defended on the ground that eating ice cream was outside the scope of his employment. The Wisconsin court allowed compensation and held that eating ice cream was simply a refreshment, the same as taking a drink of water, and was not forbidden by the employer, and was within the scope of his employment. *Vilter Mfg. Co. v. Industrial Commission,* 192 Wis. 362, 212 N. W. 641, 57 A. L. R. 627.

An employee, going to get a drink of water, was injured in alighting from a truck. The court held that he was at the moment of injury engaged in performing services growing out of, and incidental to, his employment. Compensation will not be denied because at the moment the injury is received the employee is not actually doing specific work assigned him. *Widell Co. v. Industrial Commission,* 180 Wis. 179, 192 N. W. 449. See, also, *Tragas v. Cudahy Packing Co.,* 110 Neb. 329, 193 N. W. 742; *Boyce v. Burleigh,* 112 Neb. 509, 199 N. W. 785.

A case very closely in point recites that, when an employee was eating his lunch in a factory, in accordance with long-existing custom, and a pile of crude rubber fell upon him and injured him, it was held that he was performing a service growing out of, and incidental to, the employment. *Racine Rubber Co. v. Industrial Commission,* 165 Wis. 600, 162 N. W. 664.

In *Struve v. City of Fremont,* 125 Neb. 463, 250 N. W. 663, we held that the city was liable when a fire chief was working on his own car in his own garage and was asphyxiated, as he used the car in his work as fire chief. In *Perry v. Johnson Fruit Co.,* 123 Neb. 558, 243 N. W. 665, a

traveling man, who used his own car in soliciting orders, was fatally burned while taping up a leaking gasoline line. This court held that his dependent was entitled to compensation. Perhaps the case of *Speas v. Boone County*, 119 Neb. 58, 227 N. W. 87, is as close as can be found in the state of Nebraska. A farmer was dragging roads for the county with his own teams, and stopped opposite his own driveway at 11:30 a. m., unhitched, and while putting his four horses in his own barn to feed them, he was kicked and injured by one of his horses. It was held that it was his duty to feed them and that the county was liable for compensation for the injury. In the case at bar, it was not only necessary for the plaintiff as a ranch hand to eat his dinner to keep up his strength, but he was required to eat such dinner in the home of the foreman, as such dinner was furnished as a part of his wages, so that the eating of the dinner was in the regular course of his employment. He had not abandoned his employment, he was at a place where he might reasonably be, and was fulfilling the duties of his employment, or doing something closely incidental thereto. The injury resulting from the assault of his foreman, while he was eating dinner furnished as a part of his wages, was not independent of the relation of master and servant, and the employee, under the liberal construction proper in such cases, was entitled to compensation as awarded by the compensation court and again by the district court.

Finding no error in the record, the judgment of the lower court is hereby affirmed, and attorney fees are allowed the plaintiff's attorney in this court in the sum of $50.

AFFIRMED.

CARTER, J., dissenting.

The record in this case shows that the physical encounter, which was alleged to have been the cause of the injury complained of, occurred on October 29, 1934. The claimant admits that he had a hernia prior to that time, but testifies that as a result of the encounter it was aggravated to such an extent that his intestines immediately passed into the

scrotum. It therefore stands admitted that any injuries sustained were immediate and in no way progressive. Claimant testifies that he notified Walter Reisch, the ranch manager, of his injuries on the day of the encounter. Walter Reisch positively denies that Miller at any time claimed that he was injured or that he had any notice of an injury until he received a letter from Miller's attorney on May 1, 1935.

Walter Reisch testified that Miller told him about the assault on October 29, 1934, and that Miller at that time stated that he "didn't get any scratch at all." The ranch foreman testified that Miller never complained to him that he had been injured, although he continued working on the ranch for six months after the injury is alleged to have occurred. The record also shows that Miller talked to W. A. Saalfeld, a storekeeper at Richland, about the assault on the day it occurred, and that claimant said, "I came out of it without a scratch; no ill effects or anything."

The record further shows that, prior to this alleged assault, the claimant had run a nail into his foot and had received medical attention from the insurance company. After the date of the alleged assault herein mentioned he had filed another claim for compensation for injuries received on the ranch and was paid by the insurance company. At the time of the filing of this claim for compensation he did not mention the fact that he had suffered a hernia nor claim compensation therefor. Claimant also testified that he consulted Dr. Evans of Columbus concerning his hernia about three weeks after the accident, but that Dr. Evans made no examination to determine whether there was a rupture or the extent of it if one existed.

Claimant's whole case, including the question of the giving of notice within six months of the date of the injury, is based entirely upon his own oral evidence. His evidence is totally lacking of corroboration. The testimony of defendant's witnesses, the long delay in filing his claim, the failure to corroborate the extent of his injury at a time when it would have been easy to have done so, the failure

to claim compensation when he filed a subsequent claim on another injury, the fact that he continued to work for six months and filed his claim immediately thereafter, all lead to a single conclusion—that claimant did not suffer the injury as alleged.

The writer of the majority opinion says that Walter Reisch admitted on cross-examination that the claimant had told him about the same story as he told on the witness-stand. This statement is not borne out by the record and I must emphatically state that the majority opinion is in error when it places such a construction on the cross-examination of the witness Walter Reisch. Permit me to quote the record, bearing in mind that Mr. Kerr is the ranch foreman and not the claimant: "Q. Mr. Reisch, Mr. Kerr was in that same afternoon, wasn't he? A. Yes, sir; he was. Q. And he described what the altercation was too, did he? A. Yes, he told about the same story. Q. And was that about the same story that the men have told here this afternoon, that he told you? A. Yes, sir. Q. Each one told it to you about as he has told it here? A. Yes, sir." It is quite evident that the writer of the majority opinion confuses notice of the altercation with the notice of injury that the statute requires.

If the notice required by section 48-133, Comp. St. 1929, may be proved by the evidence of the claimant as in this case, the provisions of the statute are completely nullified and become a meaningless jumble of words. The burden of proof is upon the claimant to prove that notice was given and that the injury arose out of and in the course of his employment. In my judgment, claimant has failed to establish either of these allegations by a preponderance of the evidence. It is quite evident that he wants the insurance company to now pay for an injury for which it is in no way responsible. For these reasons I respectfully dissent.

HENRY J. BERNHARDT, ADMINISTRATOR, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

272 N. W. 209

FILED MARCH 12, 1937. No. 29862.

1. **Master and Servant: WORKMEN'S COMPENSATION LAW: NEGLIGENCE.** In an action for the wrongful death of a person under the employers' liability act, it is necessary for plaintiff to plead and prove negligence; and a verdict which is based only upon conjecture, surmise or speculation will not be permitted to stand.
2. **Witnesses: IMPEACHMENT.** Where a party calling a witness is surprised by such witness refusing to testify to a state of facts which he has led such party to believe he would, the one surprised by such testimony may impeach such witness, upon proper foundation, by showing that the witness, to other persons, at another time, made inconsistent statements; such impeaching testimony cannot be considered substantive evidence, but only as it affects his credibility.
3. **Trial.** In cases where the established facts give equal support to two inconsistent inferences, in such event, neither of them being established, judgment, as a matter of law, must go against the party on whom rests the necessity for sustaining one of these inferences as against the other. *Wheelock v. Freiwald*, 66 Fed. (2d) 694.
4. **Evidence** examined and *held* insufficient to support verdict.

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

Beghtol, Foe & Rankin, J. W. Weingarten and *W. P. Loomis*, for appellant.

Frank A. Dutton and *Sanden & Anderson, contra.*

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

CHASE, District Judge.

This is an action brought by the administrator of the estate of one George Metzler to recover damages alleged to have resulted from the wrongful death of his intestate while employed by the defendant. The case was submitted to a jury, resulting in a verdict for plaintiff. From the order

overruling a motion for new trial, the defendant presents the record to this court for review. The case is governed by the provisions of the federal statute known as the "Employers' Liability Act."

For convenience the appellee will be designated as plaintiff; the appellant as defendant; and George Metzler, the plaintiff's intestate, as the deceased.

The facts may be summarized as follows: On March 17, 1935, and for sixteen years prior thereto, the deceased had been employed by the defendant. During the seven years immediately preceding his death his employment was designated as car inspector in the switching yards of the defendant at Lincoln, Nebraska. His duties as such were to inspect cars and trains, do light repair work in and about cars and trains arriving and departing from the railroad yards, and sometimes couple air hose and safety chains. About 10 o'clock on the night of March 17, 1935, freight train No. 68 was brought into the defendant's yards at Lincoln. This train consisted of a number of loaded freight cars, most of which originated at Denver, Colorado, and destined to points east of Lincoln, Nebraska. In the section of defendant's switch yards where this accident occurred which resulted in the death of the deceased, there are tracks numbered from 1 to 11; track numbered 1 being on the south and track 11 being on the north of the section, all being connected by a lead track. Immediately adjacent to track 1 is the running track. It was on this track that train No. 68 was brought to a stop. It was there that the deceased and a fellow employee by the name of Stern, in the performance of their duties as car inspectors, passed along the train in search of defective cars, the deceased on the north side and Stern on the south. The deceased discovered that in this train there was a refrigerator car which had a broken brake shoe, a part of which was missing. This was at the east end on the north side of the car. A brake shoe consists of a heavy piece of cast iron weighing about 20 pounds, one surface being concave so that when inserted in the proper position the pressure in the braking

operation will be equally distributed over the convex surface of the wheel. It is held in place by a metal key inserted through a hole in the brake head. The deceased reported the defect to his fellow servant, Stern, and directed him—using the language of the deceased—to "throw me over a shoe and I will put the shoe on." There was a material box a few paces from where Stern was then standing. Upon receiving this command Stern walked to the material box, procured a new shoe, handed it across the track between the cars to the deceased. The deceased, after removing the remaining portion of the broken shoe, undertook to install the new one, but discovered the brake head was so near the surface of the wheel that the shoe could not be forced into place. The deceased suggested that perhaps by pulling the brake rod under the car the beam would recede from the wheel a sufficient distance to permit the repair to be made. Stern advised against the procedure, making the counter suggestion that, since it appeared from the symbol placed upon the car by the yardmaster the car would soon be switched from its present location to track 10 for the purpose of placing it where train No. 68 east would be made up, there would be plenty of time to make the repairs when it came to rest on that track. The deceased then placed the new brake shoe upon the truck bolster of the car. Very shortly the train was cut in two by the switch engine and in pulling out the cut of cars to the west the defective car was taken away in the operation. Stern and the deceased walked across the tracks from track 1 to a point near the material box north of track 11, where they waited for the defective car to arrive, since from the previous information they were aware that the refrigerator car would soon be switched on track 10. After talking there for four or five minutes Stern suggested to the deceased that it would be wise to let the switching crew finish switching before any attempt should be made to make the repair. At this time the men separated. The deceased started east, stating that he would go down and see about the broken shoe. Stern started west to attend to some other matters

and proceeded to track 8. The evidence is not clear as to whether the defective car had been pushed by the point where the men were standing before they separated. Stern testified he believed the deceased must have seen the refrigerator car pass, which provoked the suggestion he would go down and look after the shoe. The switch engine at this time was working up and down the lead track west and south of track 6. Stern and the deceased were only separated about four minutes when Stern noticed the lantern which the deceased had been carrying sitting on the ground on the south side of track 10 between tracks 9 and 10, facing north. Upon discovering this circumstance Stern called to the deceased but got no response. He then started toward the lantern and as he approached he saw blood on the snow inside the south rail of track 10. A moment later he found the body of the deceased under a car wheel about four car-lengths east of where the lantern stood and approximately 150 feet east of these blood spots. During his absence deceased had been run over and killed. When the body was discovered there were five cars on track 10. The car furthest east was an empty which had stood there for some hours. The next car was the defective refrigerator car, then three freight cars loaded with grain. The deceased had been run over by some car in this group. In what manner he was killed, except as indicated from the physical facts, is unknown. His body lay across the south rail of track 10, part on one side and part on the other. He had not inserted the brake shoe in the brake head of the refrigerator car. The new brake shoe that had been previously placed on the bolster was not there and was never discovered afterward. Since they had separated deceased had crossed both track 11 and track 10 and was killed by car wheels running on the south rail of track 10.

The principal ground urged by defendant for reversal is that the evidence is wholly insufficient to support a verdict. Should this question be resolved in favor of the defendant it will sufficiently dispose of the entire case.

The federal employers' liability act, which is admitted

to be applicable to the case, paraphrased, provides that common carriers by railroad, engaging in interstate commerce, shall be liable to any person when employed by such carrier in such commerce, for injury or death arising in whole or in part from the negligence of any of its officers, agents or employees.

It will be observed that recovery under this statute must be predicated upon the negligence of the carrier which in whole or in part was the proximate cause of the plaintiff's damage; and the burden of proving such negligence by a preponderance of the evidence is cast upon the plaintiff.

The theory relied upon by the plaintiff, as gleaned from the pleadings and the evidence, seems to be that the witness Stern was the lead car inspector and consequently the deceased's superior; that Stern, in a conversation had with the deceased at the material box north of track 11, knew the deceased was going to make repairs upon the refrigerator car by inserting the new brake shoe; that Stern told him to go ahead, make said repairs, and he, Stern, would inform the switching crew not to run cars on this track while such repairs were being made; that knowing the deceased was in a position of danger and failing to protect the deceased under such circumstances constituted negligence.

The evidence does not establish such a situation. The only evidence that Stern was the superior must be assumed from his testimony, in which he stated he was lead inspector. If the record shows anything as to the relation these two fellow workmen sustained toward each other it indicates the contrary. It appears that the deceased first discovered the defective brake shoe and directed Stern to procure another from the material box near by and hand it to him and he would put it in place, which Stern did. If either party occupied a position of superiority over the other it was the deceased over Stern since his statement carried with it the element of command. The evidence is undisputed that four minutes before the deceased was found dead Stern had left him at the material box north

of track 11. The only manner in which the repair of the defective car could have been accomplished was for the deceased to pass along the north side of track 10 to a point where the car was standing. The evidence further shows it was unnecessary to go under the car to insert a brake shoe in the brake head, that this operation can be, and usually is, accomplished by standing on the outside of the rails. The physical facts dispute entirely that at the time the deceased met his fatal accident he was engaged in the operation of repairing the defective car. He was killed by car wheels running on the south rail of track 10. Why he was at the time on the south side of track 10 the record is entirely silent. The new brake shoe which he had previously placed upon the bolster of the defective car was gone—the inference being that it must have fallen off somewhere in the switching operation before the car came to rest on track 10. From the place where the deceased was when the accident occurred it was impossible for him to have been engaged in making the needed repairs on the defective car. The evidence also shows that the deceased had been employed by the defendant for sixteen years and had taken an examination on all the safety rules provided by the company in which the dangers of working in switch yards were fully called to his attention. For nearly seven years he had been performing the identical service in which he was engaged at the time of his death. From these facts the inference must be drawn that he was fully acquainted with all the safety rules of the company, among which is a rule that where an attempt is made to make repairs upon defective cars, before such repair is to be made or danger incurred, if in the daytime, a blue flag must be displayed, and if at night, a blue lantern. No such warning light was displayed by deceased.

The witness Stern was called on behalf of plaintiff and testified that when he and the deceased separated at the material box the deceased did not state he was going to replace the broken brake shoe, neither did the witness state to the deceased to go ahead and make the repair, nor that

he would signal the switching crew the danger to which the deceased was then exposed.

Upon this point the plaintiff sought to impeach his own witness, Stern, by the wife of the deceased, and himself, both testifying, over objection of defendant, that the morning following the accident Stern, while at the home of the deceased, told the wife of the deceased that he instructed the deceased to put the brake shoe on; that he would have plenty of time to do so, and that he, Stern, would tell the switching crew not to switch any cars in on that track while such repairs were being made.

The reception of this testimony was strenuously resisted on the part of the defendant. It is quite evident that at this juncture the plaintiff realized he was confronted with a like poverty of material with which to construct a case as were the industrious but disappointed Israelites when they undertook to manufacture bricks without straw. The law will not permit one to bolster up a weak case by supplying the elements of negligence through impeachment of a witness not a party to the case. Such impeaching testimony should never be received without first laying the foundation therefor. The reception of such testimony is based upon surprise or entrapment. In order to lay the foundation the surprise or entrapment should appear. If the party calling the witness had been previously advised that the witness would not testify to such state of facts, then such party cannot claim the benefit of surprise. Such foundational facts should appear before the testimony is admitted. We find no such foundational testimony in the record. While the trial court in its instructions limited the effect and purpose of the receipt of this testimony, yet we entertain grave doubts as to whether the jury comprehended the significance of this instruction. Without treating such as substantive evidence there was nothing upon which to base their verdict; hence, the fact that they found for the plaintiff forces the conclusion they did regard that testimony as substantive evidence, notwithstanding such instruction.

Impeaching testimony on the ground of surprise, when

competent, cannot rise to greater dignity than to permit the jury to determine whether a witness who has made inconsistent statements is worthy of credibility. Had the witness Stern testified that he directed the deceased to make such repairs and he would see that he was protected while so doing, it would have had a direct bearing upon the element of negligence; but when he denied such a state of facts this left the plaintiff wholly without substantive proof on that point. These essential facts could not be supplied by simply calling impeaching witnesses to prove that Stern at another time made such statements. This testimony would have no force as substantive evidence to establish negligence, as it was held in the following cases that such evidence could not be supplied by simply calling impeaching witnesses to prove that Stern at one time made such statements. Such testimony could only be considered for the purpose of contradicting or discrediting Stern as a witness and was in no sense substantive evidence from which it could be inferred that Stern's negligence resulted in the death of the deceased. *Zimmerman v. Kearney County Bank,* 59 Neb. 23, 80 N. W. 54; *Southern Ry. Co. v. Gray,* 241 U. S. 333; *Barrett v. Virginian Ry. Co.,* 244 Fed. 397.

Further, it may be stated that negligence will never be presumed from the fact of injury or death. Negligence, to support a verdict, must be established either by direct proof or by physical facts of sufficient potency from which a reasonable inference of the same may arise. Neither can negligence be based upon surmise, speculation or conjecture.

"A verdict cannot be permitted to stand, which rests upon conjecture, surmise, or speculation, but plaintiff must produce substantial affirmative proof that the negligence of the carrier caused the injury, and 'where proved facts give equal support to each of two inconsistent inferences; in such event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of those inferences as against the other, before he is entitled to recover' "—citing cases. *Wheelock v. Freiwald,* 66 Fed. (2d) 694.

While the record furnishes no information as to the reason why the deceased was upon the south side of track 10 when the fatal accident occurred, however, it is quite certain that he was not there making the repairs upon the defective car. Assuming that he was there in the performance of some service for his employer of a character different from making needed repairs, with the knowledge he had of the rules of the company in which the dangers of his employment are pointed out, he would be held, under the law, to have fully assumed all the risks necessarily incident to the particular service.

In *Seaboard Air Line Co. v. Horton*, 233 U. S. 492, the court said: "Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not."

The conclusion we are compelled to draw from the entire record is that the plaintiff utterly failed to assume the burden of proving negligence of the defendant in connection with the death of deceased. The trial court should have sustained the request for a directed verdict, and failure to do so constitutes error. The judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

GEORGE V. WILTSE ET AL., APPELLANTS, V. ROBERT O. BOLTON ET AL.: IRA HAGGERTY ET AL., APPELLEES.
272 N. W. 197

FILED MARCH 12, 1937. No. 29830.

1. Appeal. Where an issue is tried by both parties without objection, neither will be heard to complain on appeal that such issue was not sufficiently pleaded.

2. **Evidence** examined and *held* to establish that land in controversy was formed by accretion.
3. **Public Lands.** General land office of the United States has no jurisdiction to transfer lands which are not at the time public property.
4. **Waters:** RIPARIAN OWNERS: EROSION. If public lands bordering on Missouri river are cut off by erosion, the government loses title thereto the same as would a private owner.
5. **Estoppel.** To establish estoppel by conduct, it must be made to appear that the facts, upon which it is sought to make the estoppel operate, were known to the party against whom the estoppel is urged, and unknown to the party urging it, and that latter has relied upon such conduct and has been led thereby to change his position for the worse.

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

William J. Maher, for appellants.

Thomas & Thomas, contra.

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

KROGER, District Judge.

Plaintiffs filed an action in equity for the purpose of quieting title to the southeast quarter of the northeast quarter and the southeast quarter, all in section 20, township 19 north, range 12 east of the sixth P. M., in Washington county, Nebraska, and all legal accretions thereto, which are described by metes and bounds, and alleged that they were the owners in fee simple of all the premises and in actual possession thereof, and alleged that the various defendants to the action were each making some claim to a part of said premises adverse to plaintiffs' title, and prayed for a decree quieting title in them and that defendants and all persons claiming under them be enjoined from interfering with plaintiffs' possession of said lands.

Some of the defendants defaulted, but separate answers were filed by Verne Pfeiffer and Ira Haggerty. Verne Pfeiffer in his answer denies the allegations of plaintiffs' amended petition, and further alleges that the southwest

quarter of the southeast quarter of said section 20 was government land, subject to homestead entry, and that in December, 1930, he made entry on said land under the homestead laws of the United States, and has since been in possession thereof and has made valuable improvements thereon, and that said last described tract never was the property of the plaintiffs, nor had they any claim thereto as accretion to lands owned by them, and further alleged that, if plaintiffs had any claim to said land, they are guilty of laches in that they failed to assert it, but allowed defendant to make valuable improvements thereon, and are now estopped from asserting any claim thereto by reason of laches.

The separate answer of Ira Haggerty is similar to that of Verne Pfeiffer, excepting that he alleges that he is in possession of a tract of sand-bar land bordering on the Missouri river, which lies between the tract claimed by defendant Pfeiffer and the east bank of the Missouri river, and he does not claim that he entered by any color of title or right, but apparently is holding under what has been termed "squatter's rights."

Trial was had in the district court for Washington county, and a decree was entered in said action, finding generally in favor of defendants Pfeiffer and Haggerty, and against the plaintiffs, and dismissing plaintiffs' action at their costs. From this decree, plaintiffs prosecute this appeal.

The plaintiffs trace their title to the southeast quarter of the northeast quarter and the north half of the southeast quarter and the southeast quarter of the southeast quarter of section 20, township 19 north, range 12, east of the sixth P. M., through mesne conveyances to the original patentee who obtained patent in the year 1897, and now claim title to the southwest quarter of the southeast quarter and additional lands to the south and west by reason of their being accretions to the deeded land owned by them.

It appears from the evidence that in 1856 the United States government caused a survey to be made of lands

adjoining the Missouri river in Washington county. At that time the Missouri river, at a point somewhat north of the land in controversy, turned in an easterly direction and then bent in a horse-shoe form to the south and back to the west, so that the main channel of the river was some considerable distance to the north and east of the tract we are now concerned with. At some later date a new channel was made by the Missouri river which cut across a large portion of said section 20 and eliminated the horse-shoe bend hereinbefore mentioned. The parties seem to be agreed that as late as 1908 the southwest quarter of the southeast quarter of said section 20 (hereinafter referred to as the Pfeiffer tract) was entirely in the channel of the Missouri river, and that the river, along its east bank, had eroded its way into the deeded lands now owned by the plaintiffs. In the spring of 1908 the main channel of the Missouri river changed to a point approximately one-half mile west of its former channel, and the evidence is in conflict as to what brought about this change, the plaintiffs claiming that it was caused by the formation of accretions to their shore line and defendants claim that it was due to an avulsion primarily induced by an ice jam forming near the east shore line. While the evidence is somewhat conflicting, a fair appraisal of same would indicate that, after the change in 1908, the river gradually eroded the easterly banks thereof until in 1913 it had again eroded all but a few acres of the Pfeiffer tract, and then, by gradual stages and processes, again moved in a westerly direction until at the present time it is approximately one-half mile south and west of the southwest corner of the Pfeiffer tract.

On the basis of these facts, which are quite conclusively established by the evidence, the plaintiffs contend that the court's findings and judgment are contrary to law and contrary to the evidence.

Defendants contend, first, that plaintiffs have not pleaded or proved any accretions; second, that the general land office of the United States has decided that plaintiffs' lands were not riparian at any time since 1897, when patent was

issued to the same, and consequently could not have any accretions; and, third, that plaintiffs are estopped by their conduct from questioning defendants' title.

The petition of plaintiffs, in so far as it refers to accretions, is very brief, and if timely objection had been made, no doubt the court would have required the plaintiffs to set out their claims to accretions with more particularity. No complaint was made, however, but, on the contrary, defendants in their answer elaborately pleaded facts negativing plaintiffs' claim of accretions and tending to establish the creation of the land in controversy as the result of an avulsion. The case was tried on the theory that plaintiffs had sufficiently pleaded their claim to the land as accretions to riparian lands owned by them, and defendants cannot now raise the objection that the petition did not properly plead facts establishing the formation of the land in controversy as accretions.

The evidence was quite voluminous and deals almost entirely with the history of the Missouri river as it affected the lands in controversy since the year 1908. The parties seem to be agreed that as late as the spring of 1908 the east bank of the river was entirely on the deeded land now owned by the plaintiffs, so it necessarily follows that plaintiffs' lands, at that time, were riparian. In the spring of 1908 an ice gorge formed along the land now owned by plaintiffs and for some distance to the north thereof. As a result of this ice gorge the river shifted its main channel westward, and when the ice disappeared there was a narrow channel, called Boyd's slough, along plaintiffs' land and then a large sand-bar between Boyd's slough and the main channel of the river. As a result of the deposit of soil-building material during high water, Boyd's slough had gradually filled, so that there is no channel there now and has not been for many years. By the same process the sand-bar to the west of Boyd's slough has been built up until, at the present time, a large portion of the same is suitable for cultivation. The formation of land by accretion has been repeatedly defined and we are not going to add to

that long list. For definition see *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N. W. 647.

We have carefully examined all of the evidence in this case and are convinced that the action of the river in the spring of 1908 was not an avulsion, but the shifting of the main channel from the east to the west side of the river bed, and that the lands in controversy were formed by accretion, and not by an avulsion.

This leads us to a consideration of what effect is to be given to the finding of the general land office that plaintiffs' lands have not been riparian since patent to same was issued in 1897.

It may be noted that this finding was made after the courts of this state had obtained jurisdiction of the parties and subject-matter, and had been called upon to decide the precise question. If this finding is binding on this court and the parties to this action, then the fact that all parties seem agreed that as late as 1908 the land was riparian would be immaterial. We believe it will be conceded that the general land office has jurisdiction only where government lands are concerned, and if, in this case, the Pfeiffer tract was not government land at the time Pfeiffer filed on the same, and at the time of the purported ruling by the general land office, the action of the land office would be a nullity.

Thus, in 22 R. C. L. 305, sec. 59, we find it stated: "Though the officers of the land department exercise functions in their nature judicial, this has reference to cases in which individuals have, as between each other, contested the right to a patent before those officers. In no case have documents, with the recitals therein, and the presumptions of law and fact arising thereon, shown to have been executed by officers of the government, within the apparent scope of their authority, been held sufficient, where the fact in issue was whether the government at that time had any title to convey, to establish the fact in dispute, as against parties claiming a preexisting, adverse and paramount title in themselves. The land department has no

jurisdiction to transfer lands which are not at the time public property, having been previously disposed of. All that can be reasonably or lawfully claimed as the effect of documents of title issued by the department is that they pass such estate, and such estate only, as the government itself, in whose name and on whose behalf the official acts appear to have been done, had at the time."

In 1859 the Pfeiffer tract was government land. At some time subsequent, due to an avulsion of the Missouri river, this tract was entirely obliterated and washed away; a soil survey map made by the agricultural department of the government in 1915 conclusively establishes that fact. That this tract was a part of the bed of the Missouri river as late as the spring of 1908, long after patent had issued to plaintiffs' deeded land, cannot be seriously disputed. If the Pfeiffer tract had been homesteaded before it was taken by the river, the private owner would have lost his title by such action of the river, and even though at a later date the river receded and the boundaries of the land could again be established, it would not go to the former owner. *Yearsley v. Gipple,* 104 Neb. 88, 175 N. W. 641.

Does a different rule apply to lands owned by the government? This precise question was before the supreme court of Iowa in the case of *Bigelow v. Herrink,* 200 Ia. 830, 205 N. W. 531, and the court there held: "The title of the government to land bordering on the Missouri river is subject to the same laws as that of a private owner. If it is cut off by erosion, the government loses title thereto, and, if accretions are added, they become a part of the government tract." And citing *Jefferis v. East Omaha Land Co.,* 134 U. S. 178; *Rice v. Minnesota & N. W. R. Co.,* 1 Black (U. S.) 358; *Coulthard v. McIntosh,* 143 Ia. 389, 122 N. W. 233. Our attention has not been called to any decisions to the contrary. The case of *First Nat. Bank of Decatur v. United States,* 59 Fed. (2d) 367, relied upon by defendants, is not in point, as in that case the erosion and subsequent accretion of the lands involved had occurred before the United States parted with title to any of the land,

either that which was eroded or that which became riparian by reason of the erosion. The government was at all times the riparian owner and, because of the particular circumstances surrounding the conveyances of the lands there involved, the conveyances were held to convey no more property than described in the instruments of conveyance.

Under the facts in this case, we find that in 1930, when the defendant Pfeiffer made his homestead entry, the government did not own any lands known as the southwest quarter of the southeast quarter of section 20, township 19 north, range 12, east of the sixth P. M., in Washington county, Nebraska, but that said lands, long prior to that time, had been eroded and destroyed by the action of the Missouri river, and any title which the government at one time had was thereby lost, and that, by the subsequent action of the river, the lands in controversy became accretion lands to the riparian land owned by the plaintiffs.

We now consider the question of estoppel raised by the defendants. According to the testimony of the defendant Pfeiffer, he was living at Odebolt, Iowa, over 100 miles from the land in controversy when, in the fall of 1930, through some relative, he was informed that the land we have hereinbefore referred to as Pfeiffer tract was government land and subject to homestead entry; that he made his filing thereon and about December 5, 1930, entered upon the land and commenced building a small house for shelter. It was not until after he had moved onto the land that he met either of the plaintiffs. He testifies that plaintiffs did not protest against his occupying the land and that he assisted one of the plaintiffs in building a fence along the east line of the forty acres claimed by him, and that plaintiffs pointed out to him what they claimed was the northeast corner of his tract, and that plaintiffs agreed to build a fence along the east line of said forty if he would build a fence along the north side of the same, which he did. The improvements made by defendant Pfeiffer are valued by him at $200, exclusive of his own labor.

The defendant Haggerty did not testify to any facts that

would have any bearing on the question under consideration.

This court, in the case of *Nash v. Baker*, 40 Neb. 294, 58 N. W. 706, held: "In order to constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts, upon which it is sought to make the estoppel operate, were known to the party against whom the estoppel is urged and unknown to the party urging it."

And, in 10 R. C. L. 692, sec. 21, we read: "But to effect an estoppel by silence it must also appear that the person had a full knowledge of the facts and of his rights, that he had an intent to mislead, or at least a willingness that others should be deceived, and that the other party was misled by his attitude."

Applying those rules to the facts in this case, we find that the defendant Pfeiffer made entry before he had even met the plaintiffs, and that in making entry he in no manner relied upon any representations or conduct on the part of the plaintiffs. At the time of his entry, plaintiffs were litigating with one McFerrin over the ownership of this particular tract. No decree was entered in that litigation until March, 1931, and, before decree was entered, defendant Pfeiffer knew of that litigation. This action was commenced in December, 1933, and the only conduct on the part of plaintiffs that might be considered on the question of estoppel is the testimony regarding the fences. In considering that testimony, it must be borne in mind that the defendant Pfeiffer was claiming under his homestead entry, and no doubt the plaintiffs were somewhat in doubt as to whether their claim was superior to that of the defendant Pfeiffer. At any rate, the defendant Pfeiffer had knowledge of all the facts affecting the title to this land, and there was no concealment of any material facts from him, and his filing on the land and the making of such improvements as were made cannot be charged to any conduct on the part of the plaintiffs tending to mislead the defendant. The burden was upon the defendants to establish estoppel by conduct and in this they failed.

It follows from what has been said that the findings and judgment of the learned trial court were erroneous, and the judgment of the trial court is reversed and remanded, with directions to enter decree in conformity with this opinion.

REVERSED.

GLENN MAJOR, APPELLEE, V. J. N. HARRISON, APPELLANT.
272 N. W. 201

FILED MARCH 12, 1937. No. 29848.

1. Appeal. When evidence is conflicting and there is sufficient to support the finding made by the jury, the court will not assume to usurp the province of the jury by passing upon the credibility of the witnesses and weighing the conflicting testimony introduced on the trial of the case.
2. 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, these issues must be submitted to the jury.
3. Trial. It is not error to extend lines across the page of an instruction which lines separate specific claims of negligence from the other parts of the instruction where no sentences, phrases, or words are pointed out or emphasized.
4. ———. It is not error for the court in an instruction to assume as true facts that are established by the evidence without controversy.

APPEAL from the district court for Washington county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Henry Mencke and *John A. McKenzie,* for appellant.

William J. Maher and *Alfred D. Raun, contra.*

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

YEAGER, District Judge.

This is an action wherein plaintiff, appellee, sued to recover damages for personal injuries growing out of an automobile accident which occurred on a highway in Wash-

ington county, Nebraska. The highway was known as Highway No. 73 and the scene of the accident was at a point about five miles north of the city of Blair, Nebraska. At the point of the accident the highway runs almost straight north and south and is paved to a width of 20 feet. From the scene of the accident the highway can be seen north for a distance of about a half mile and to the south about 50 or 60 rods. At the time of the accident the plaintiff was driving a 1929 Model A Ford sedan in a southerly direction on the said highway and was, at the time of the accident, accompanied by his wife, his daughter, his brother and his sister-in-law. The defendant was driving along in a northerly direction in a Terraplane sedan. The trial resulted in a verdict and judgment in favor of plaintiff, appellee, for $1,000.

The defendant has appealed and has, in his appeal, made three assignments of error. In his first assignment he sets forth that the court erred in refusing to grant a new trial for the reason that the verdict was not supported by sufficient evidence.

There is a very sharp conflict in the evidence on the question of what was the cause of the collision between the two cars. The plaintiff and his witnesses have stated that the accident occurred on the west side of the highway, and defendant, on the other hand, contends that it occurred on the east side. One fact stands out in the testimony of all witnesses, and that is that the cars were going in opposite directions and that the right front fenders or wheels are the parts of the two cars which came into collision. Plaintiff's version is that when defendant was 60 or 70 feet away he was driving on the west or wrong side of the highway, and that he was approaching at a high rate of speed, estimated at 50 miles an hour. He stated that to avoid a head-on collision he swerved to the left. Defendant, on his part, testified that he was at all times traveling on his right side of the highway at a low rate of speed and had brought his car to a complete stop at the time of the collision. Defendant said that he looked ahead and saw plaintiff's car

weaving from one side of the road to the other and traveling at the rate of at least 60 miles an hour, but that he did not see the actual impact because he had lowered his head to protect himself. This is, in general, the conflict we find in the evidence. No good purpose could be served in referring to it in greater detail.

No question is raised that this conflicting evidence was not submitted to the jury under proper instructions.

This court has repeatedly held that, when evidence is conflicting and there is sufficient to support the finding made by the jury, the court will not assume to usurp the province of the jury by passing upon the credibility of the witnesses and weighing the conflicting testimony introduced on the trial of the case. *Lammers v. Boehmer,* 62 Neb. 159, 86 N. W. 1067; *Henry v. Omaha Packing Co.,* 81 Neb. 237, 115 N. W. 777; *In re Estate of Charles,* 118 Neb. 634, 225 N. W. 869; *Luther v. Farmers Union Cooperative Ass'n,* 119 Neb. 676, 230 N. W. 662; *Clausen v. Johnson,* 124 Neb. 280, 246 N. W. 458.

This court has further repeatedly held that, 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. *Perrine v. Union Stock Yards Co.,* 81 Neb. 790, 116 N. W. 776; *Leon v. Chicago, B. & Q. R. Co.,* 102 Neb. 537, 167 N. W. 787; *Casey v. Ford Motor Co.,* 108 Neb. 352, 187 N. W. 922.

This case comes clearly within these rules and the ruling on this first assignment must be adverse to the appellant.

In his second assignment of error appellant complains of error in the giving of instruction No. 1, or more particularly he complains about two parallel lines which appear on the instruction. He attaches a significance to these lines which we cannot discern and which significance is not apparent from an examination of the instruction or the record in this case.

The instruction is in four paragraphs. The first paragraph contains a general statement as to the claim of plain-

tiff and concludes with the following sentence: "He states that the collision was due to the negligence of the defendant, claiming such negligence to be the following:" This is followed by a line extending the full width of the page, then follows two numbered paragraphs each containing a single and specific charge of negligence. These paragraphs are followed by another line also extending the full width of the page. No words are underlined and no sentences, phrases or words are pointed out or emphasized. What the purpose of the lines may have been is not apparent. The probable purpose was a desire on the part of the judge to separate the specific from the general statements in the instruction.

There having been found nothing prejudicial in the form in which instruction No. 1 was given, no error can be predicated thereon.

The third assignment of error is predicated on the assumption in instruction No. 11 of certain physical impairments of the defendant. No complaint is made that the instruction does not correctly state the rule when there is a finding of the existence of physical impairment of a driver of an automobile. In a case where there is a dispute as to the existence or nonexistence of physical impairment the rule contended for by appellant would be correct. In this case there is no such dispute. In this case appellant is the only witness for either party to the action testifying on this point and he specifically testifies to physical impairment on his part. Appellant testified as follows: "Q. Well, that condition you have had for a year or two, haven't you, Mr. Harrison? A. I have been getting weaker every year for a number of years, I presume. Q. In the legs? A. Yes, sir; and all over. * * * Q. I am not asking you about any other man, I am asking you about your condition. A. Well, my condition has been failing for the last five years. * * * Q. Have you ever had a paralytic stroke, Mr. Harrison? A. Not that I know of. Q. Or anything of that nature? A. Not that I know of. I never went to a doctor to get examined, and what happened to me I don't know. Q. You

say what happened to you, what do you mean, what happened to you? A. Well, my right side seemed to get weaker than the left side, kind of numb. Q. And that came on you more or less suddenly? A. It come on in my sleep, and when I woke up I thought my arm and leg was asleep. Q. And when was that, Mr. Harrison? A. About two years ago. Q. About two years ago. And since that time that right side has given you considerable trouble, hasn't it? A. Not a great deal of trouble, but clumsy and numb. Q. Clumsy and more or less useless and numb, is that a fact? A. Yes, sir; that is it. * * * Q. But during all that period of time your legs were weakening, weren't they, Mr. Harrison? A. I presume they were. Q. Well, you know they were, don't you, Mr. Harrison? A. I do."

From this evidence it becomes apparent that appellant did have certain physical impairments, and it follows that the rule that it is not error for the court in an instruction to assume as true facts that are established by the evidence without controversy applies in this case. *Gibson v. Glens Falls Ins. Co.*, 111 Neb. 827, 197 N. W. 950; *Fitzgerald v. Union Stock Yards Co.*, 91 Neb. 493, 136 N. W. 838; *Oelke v. Theis*, 70 Neb. 465, 97 N. W. 588.

For the reasons set forth herein, the judgment of the district court is

AFFIRMED.

CLARA O. HOWIE, APPELLANT, V. COSMOPOLITAN OLD LINE LIFE INSURANCE COMPANY, APPELLEE.

272 N. W. 207

FILED MARCH 19, 1937. No. 29889.

1. Insurance: POLICY: CONSTRUCTION. "An insurance policy is a contract and, if couched in unambiguous and clear language, should be construed as other contracts." *Omar Baking Co. v. Employers Liability Assurance Corporation*, 130 Neb. 365, 264 N. W. 873.
2. ———: ———: FORFEITURE. In considering the rights of parties under a life insurance policy, forfeitures are not favored and will be enforced only where the contract requires.

3. ———: ———: ———. The term "forfeiture" need not be used in the policy in order to preclude recovery. Language meaning the same as a forfeiture will be so interpreted.
4. ———: ———: ENFORCEMENT. "Where there is no uncertainty as to the meaning of an insurance contract, and the same is legal and not against public policy, it will be enforced as made." *Rye v. New York Life Ins. Co.*, 88 Neb. 707, 130 N. W. 434.

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

Ginsburg & Ginsburg, for appellant.

Perry, Van Pelt & Marti, contra.

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

GOSS, C. J.

Plaintiff appeals from an order entering judgment for defendant on the pleadings and dismissing the action.

The case was evidently tried first in the municipal court because the pleadings are devised for that court and a stipulation in the transcript provides that the petition and answer in the municipal court shall constitute those pleadings in the district court.

The petition alleges that defendant was incorporated as Cosmopolitan Thrift Association at the time plaintiff purchased and received the certificate of membership on which her suit was based; thereafter by amendment it changed its name to Cosmopolitan Old Line Life Insurance Company; on October 29, 1926, plaintiff purchased and received a certificate of membership for two units and paid the monthly premiums thereon from that date to and including July 29, 1931; on each unit she was required to deposit or pay one dollar each month or three dollars each quarter in advance; if she failed to pay this amount when due, the contract allowed thirty days of grace from the date the payment came due, but provided that, if she failed to make the payments prior to the expiration of the thirty-day grace period, the certificate should automatically lapse. There was

a reinstatement provision, but nothing is claimed under it. The table of values provided that at the fifth year, if the certificate was in good standing, and before the expiration of the grace period, the owner of the certificate might withdraw $39.70 for each unit, and so she sued for $79.40.

The petition further alleged that plaintiff had paid monthly premiums on her policy and certificate from October 29, 1926, to and including July 29, 1931; that thereby plaintiff became entitled to the cash value shown in the certificate for the fifth year in the sum of $79.40, which had been demanded and refused.

The petition purported to attach as an exhibit the whole certificate, but some of its provisions were omitted. However, the amended petition supplies that lack by attaching the entire contract.

The amended answer also attaches as an exhibit the purported full copy of plaintiff's certificate with all of its provisions; alleges that paragraph 6 of the contract or certificate, in providing for the cash or loan value of $79.40 at the end of the fifth year of plaintiff's certificate, gives that amount while the certificate is in good standing, but the value does not apply in the event the certificate is not in good standing and after the expiration of the grace period as provided in the certificate, quoting and pleading sections 7 and 8 of the certificate as follows:

"7. In case the member fails to make his regular payments as prescribed on the face of this certificate, and in advance, he shall have thirty days' grace from the date the payment became due, during which period this certificate shall remain in good standing. If the insured die during the grace period, the unpaid amounts completing the current year's payments shall be deducted from any settlement under this contract.

"8. If the member fails to make the payments prior to the expiration of the thirty-day grace period, this certificate shall automatically lapse; provided, that in case the lapsed member desires to reinstate this certificate he may do so within two years from the date the last payment became

due by paying an amount equal to all omitted payments plus six per cent. compound annual interest thereon."

The amended answer further alleges failure to pay any premiums after July 29, 1931 (which we have already derived from the petition), alleges failure to reinstate during the two-year period allowed for that purpose, alleges that the certificate has lapsed and plaintiff has no right of action thereon.

Plaintiff's reply is a general denial.

It is a well-established rule in this jurisdiction that forfeitures of insurance policies are not favored, that a forfeiture clause in such a contract will not be aided or given effect by construction in a case where the plain meaning of the language used does not require it, that contracts of insurance will be most strongly construed against the insurance company by which they have been drafted, and that, where a policy contains provisions making it susceptible of different constructions, one of which will work a forfeiture, and the other will not, that construction should be adopted which will prevent the forfeiture. *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682, 121 N. W. 996; *Arendt v. North American Life Ins. Co.*, 107 Neb. 716, 187 N. W. 65; *Coad v. London Assurance Corporation*, 119 Neb. 188, 227 N. W. 925.

"But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense." 14 R. C. L. 926, sec. 103.

The entire contract between the parties should be considered and interpreted. It is not like the ordinary old line insurance policy where, by regular payments through a long course of years, the insured is building up a reserve and surplus in which he has a continued property right for a considerable time, but, as the original name under which this policy was written indicates, it was called a thrift policy, wherein the investor engaged to make his

payments promptly for a definite number of years and the contract contemplated and provided that, if he so continued to make his payments, he would profit by the lapses of others. He himself, like all others, had thirty days of grace and if the current premium was paid within that time the contract was kept in force. There was no fund provided by his payment and by the payment of others to make good for his lapse and to keep the policy in force. Under paragraph 8 of the contract, which we have quoted, he had for two years a method of reinstatement even if he failed to pay the premium within the thirty days of grace after it was due.

While in some respects it may seem harsh, it is in no way illegal or against public policy. It seems very evident that the contract sued upon is one in which the holder expected and had contracted to profit by the lapsations of the contracts of others who would be unable to complete their contracts to their maturities.

"An insurance policy is a contract and, if couched in unambiguous and clear language, should be construed as other contracts." *Omar Baking Co. v. Employers Liability Assurance Corporation,* 130 Neb. 365, 264 N. W. 873. See, also, *Williams v. Union Central Life Ins. Co.,* 291 U. S. 170, 78 L. Ed. 711, 92 A. L. R. 693.

"Where there is no uncertainty as to the meaning of an insurance contract, and the same is legal and not against public policy, it will be enforced as made." *Rye v. New York Life Ins. Co.,* 88 Neb. 707, 130 N. W. 434.

"A condition in a policy of life insurance, that if the stipulated premium shall not be paid on or before a certain day the policy shall cease and determine, is of the very essence and substance of the contract. Against a forfeiture caused by failure so to pay, a court of equity cannot relieve." *Klein v. Insurance Co.,* 104 U. S. 88, 26 L. Ed. 662. It is not necessary to use the term "forfeiture" in the policy. In the case just cited the expression was "cease and determine."

In the case before us the provisions are clear. There is

no reserve value on the policy; there is only a cash value and that is dependent upon the policy being kept in force. It was permitted to lapse and was never reinstated. Plaintiff asks a cash value in direct opposition to the terms of the policy.

The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF ANNA C. KING.
NELLIE P. DOWNS ET AL., APPELLANTS, V. WILFORD MYERS, ADMINISTRATOR, APPELLEE.
272 N. W. 205

FILED MARCH 19, 1937. No. 29847.

1. **County Courts**: JURISDICTION. The validity of a contested assignment of adjudicated claims against the estate of a deceased person, as collateral security for a debt owing from heirs at law to other heirs at law, is not cognizable in the county court in the exercise of exclusive jurisdiction to settle such estate, the contested issue being entirely outside of such jurisdiction.
2. **Executors and Administrators**: APPEAL: ISSUES. An appeal from a judgment of the county court, in the exercise of exclusive jurisdiction to settle the estates of deceased persons, does not remove to the district court subject-matter entirely outside of such jurisdiction.

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

Will H. Thompson, Verne W. Vance and *Chatt & Ellenberger,* for appellants.

Hall, Young & Williams, contra.

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

ROSE, J.

This controversy arose in the county court of Burt county

over items in the approved account of Wilford Myers, administrator of the estate of Anna C. King, deceased. Among many claims against the estate there was one in favor of Wilford Myers, not as administrator, but as an individual, for $1,037 for care and support of Anna C. King during a period of years. Another claim of a similar nature for $1,798 was filed by Anna Myers, wife of Wilford Myers. To the account allowing these claims in reduced amounts, objections were filed by Nellie P. Downs, Scevolia A. Myers and Charles W. Potter, heirs at law of decedent. The county court, in the exercise of jurisdiction to settle the estate, allowed the first claim to the extent of $500 and the second to the extent of $1,500. Afterward the administrator paid both. The three heirs named appealed to the district court from the approval of the final account containing the two items described, but later dismissed the appeal as to them.

In the district court on appeal, Will H. Thompson, trustee for Nellie P. Downs, Charles W. Potter and Scevolia A. Myers, three heirs at law, offered for the first time a claim for $900. The district court declined to entertain the appeal as to this 900-dollar item on the grounds that the trustee did not appeal from the judgment of the county court and that the general appeal of the aggrieved heirs, the beneficiaries of the trust, did not include their claim. From the judgment denying the relief sought by the trustee and the beneficiaries, they appealed to the supreme court.

Referring to the 900-dollar claim, there was an extended argument on the proposition that, contrary to the rulings in the district court, the trustee and beneficiaries were entitled to a hearing there and to a finding in their favor on the general appeal of the aggrieved heirs and that for the purposes of such relief a special appeal by the trustee was unnecessary. The position thus taken is based on decisions to the effect that such an appeal from the county court to the district court brings up the whole case. Opinions so holding are challenged by the administrator as inapplicable to the present inquiry, since the subject-matter was beyond

the county court in the exercise of its power to settle decedent's estate and not removable to the district court on appeal. If this position of the administrator is tenable, the relief sought by the trustee was properly denied, regardless of the reasons stated by the district court for its decision denying him relief. The solution of this problem involves the nature of the claim for $900. Was it within the original jurisdiction of the county court or within the appellate jurisdiction of the district court in the settlement of the estate of Anna C. King, deceased?

Wilford Myers and Anna Myers, February 6, 1931, signed a paper purporting to assign the allowed claims of $500 and $1,500 to Will H. Thompson, trustee for Nellie P. Downs, Charles W. Potter and Scevolia A. Myers. The assignment recited that it was nonnegotiable and given to secure payment of $900. If the trustee did not realize from the assignment payment in full, assignors promised to pay the deficiency. The assignment was executed after the account of the administrator was approved but before he paid the claims against the estate. The record of the county court disclosed the existence of the assignment, but the issue of its validity was never presented, considered or adjudicated there or elsewhere. If valid, it was in effect collateral security for a debt of $900 owing by the individuals, Wilford Myers and Anna Myers, to Thompson, trustee for the individuals named as heirs. It was argued by the trustee that a consideration for the assignment was the dismissal of the appeal to the district court as to the items assigned, but it is contended by assignors that there was in reality no appeal as to the assignment and that consequently there was no consideration for it. In any event assignors condemned the assignment as invalid. This controversy was not properly involved in the settlement of the estate. There is nothing in the record to show that Anna C. King in her lifetime was indebted to Thompson as trustee or to the beneficiaries of the trust. None of them filed a claim against her estate. Their claim was against the assignors individually, not against the estate which was in-

debted to Wilford Myers for $500 and to Anna Myers for $1,500, claims adjudicated in the county court in their favor. Since the claims were valid they did not interfere with any right of heirs or illegally diminish any inheritance. The dismissal of the appeal as to these items left the adjudication in full force. The acceptance of the assignment by assignee was a recognition of the indebtedness of the estate to assignors. The cases upon which the trustee relies are inapplicable. The estate should not be drawn into or burdened with an extraneous controversy like the one under consideration. The debt evidenced by the assignment was outside of jurisdiction to settle the estate and judicial power was not enlarged by appeal. For the settlement of estates a special tribunal was created by law. That forum is the county court. This was necessarily taken for granted in decisions to the effect that an appeal brings up the whole case, meaning subject-matters within the jurisdiction of the county court to settle estates. Litigable controversies outside of that jurisdiction are not cognizable therein nor in the district court on appeal. The conclusion is that the district court did not err in denying relief to the trustee, regardless of the reasons given for the decision below.

On the appeal by the heirs at law and on an appeal by the successor of Wilford Myers as administrator, other assignments of error were presented but are found upon examination of the record to be without merit.

There remains for consideration a cross-appeal by Wilford Myers, administrator. The county court charged him with $107.50, the purchase price of a barn sold at public auction. In the district court on appeal he was charged in addition to that sum $100 as the difference between the value of the barn and the sale price. The increase in this item is assailed as erroneous. On the evidence this point is well taken. The sale was authorized by the county court and was advertised. The barn was sold at public auction for $107.50. There was no evidence of fraud in the sale or proof that the administrator profited by the transaction. The evidence does not sustain the finding that its value was

$207.50 or any amount in excess of the sale price. There is evidence, however, that the value was $107.50. The charge of $207.50 is therefore reduced to $107.50. Error in other respects has not been found.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF MADS PETER NELSON.
ALFRED E. NELSON, EXECUTOR, ET AL., APPELLANTS, V. ANENA FREY ET AL., APPELLEES.
272 N. W. 219

FILED MARCH 19, 1937. No. 29922.

Wills. Where the language in a will is clear and unambiguous, there is no room for construction, and it becomes the duty of the executor to carry into effect the plain provisions of such a will.

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

Leamy & Leamy, for appellants.

Spillman & Ptak, contra.

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

GOOD, J.

This is an action for the construction of a will for the information and guidance of the executor. It originated in the county court, and the executor, being dissatisfied with the ruling of the county court, appealed to the district court, and also, being dissatisfied with the order and judgment of the district court, has appealed to this court.

The record discloses that one Mads Peter Nelson departed this life testate in 1933. His will was duly admitted to probate. The testator left surviving him a widow and six children. In the second paragraph of the will he expressed a desire to treat all of his children equally and recited that he had advanced to three of the children the sum of $10,000 each, and to a fourth child, Anena Frey, the sum of $5,575,

and to two other children, namely, Ole C. Nelson and Marie Nelson, he had advanced nothing. He thereupon bequeathed to Anena Frey the sum of $4,425, and to the son Ole C. and the daughter Marie, each, the sum of $10,000, and provided: "And in the event there should not be enough personal property at the time of my death to pay said legacies I authorize and direct my executor hereinafter named to sell so much of my real estate as may be necessary for the payment of said legacies." By the third paragraph of the will he gave, devised and bequeathed all the rest and residue of his property to his son, Alfred E. Nelson, the executor named, to hold in trust and to use the income therefrom and provide thereafter for the support and maintenance of his wife, Ida Nelson, for and during her natural life.

From the evidence it appears that testator died possessed of three farms in Holt county and a residence property in Pierce county, Nebraska, and considerable personal property, including a mortgage on land in Pierce county. It appears that the executor was authorized to compromise the mortgage on realty in Pierce county by surrendering the note and mortgage and taking the mortgaged premises in full discharge thereof. This land consisted of about 128 acres. It also appears that all of the children and the widow undertook, in part at least, to make a partition of the real estate, and one of the farms was conveyed to the son, Ole Nelson, and the land in Pierce county was conveyed to Marie Nelson, in satisfaction of their legacies of $10,000 each; that they accepted the deeds executed by all the other heirs and the widow, have been in possession of their respective tracts of land, and have received the rents and profits thereof. There still remain in the possession of the executor two quarter sections of land in Holt county and the residence property situated in Pierce, Nebraska, which is occupied by the widow.

It also appears that there is one debt against the estate which is unsatisfied, in the sum of approximately $900. The executor appears to think and believe that it is his duty to retain a sufficient amount of the land and property

to bring an income sufficient to support the widow, and to hold the property during her lifetime, and that there is not enough property on hand at this time to pay the remaining debt against the estate and the legacy to Anena Frey and leave a sufficient amount of property on hand that the income therefrom will be sufficient to support the widow of testator.

By the fourth paragraph of the will Nelson devised and bequeathed all of his property that should remain after payment of debts and specific legacies to his son Ole and his daughters Marie and Anena to his executor in trust, the income therefrom to be used for the support of his widow. The only property devised in trust to the executor, the income from which he was to use for the support of the widow, is that which remains after all debts of the estate and specific legacies to his children, Ole, Anena and Marie, have been paid. At the time of commencement of this proceeding, the legacies to Ole and Marie had been discharged by conveying to them certain tracts of realty. There remain unpaid one debt against the estate and the legacy to Anena. Clearly, it is the duty of the executor to sell the remaining property, or so much thereof as may be necessary, to pay the remaining debt, costs of administration and the legacy to Anena Frey, and the remainder, be it little or much, is that which the executor is to hold in trust and use the income therefrom for the support of testator's widow.

The will is plain and unambiguous. Where the language in a will is clear and unambiguous, there is no room for construction, and it becomes the duty of the executor to carry into effect the plain provisions of such a will. The trial court so held, as did the county court, and directed the executor to proceed as herein indicated.

The judgment of the district court is right and is

AFFIRMED.

CONSERVATIVE SAVINGS & LOAN ASSOCIATION, APPELLEE, V. SAMUEL MANCUSO ET AL., APPELLANTS.
272 N. W. 223

FILED MARCH 19, 1937. NO. 29913.

Mortgages. In a mortgage foreclosure, evidence that payments on the mortgage debt are delinquent for more than twenty months and that the plaintiff has been compelled to pay delinquent taxes is sufficient to sustain the decree of foreclosure.

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

Thomas E. Conley, for appellants.

William Baird & Sons, contra.

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

DAY, J.

This is a suit to foreclose a real estate mortgage. The defendants appeal from a decree of foreclosure entered March 3, 1936.

There are no assignments of error, but it would appear from the brief which sets out a portion of the motion for new trial that the appellants' complaint against the decree is that it is not sustained by sufficient evidence. The evidence discloses that this was originally a mortgage for $12,000, covering two pieces of property, executed in 1923, and that it was reduced to $6,000 in 1933, when one parcel of real estate was released from the mortgage. The mortgage provided for monthly payments of $60 a month. The petition alleges that there has been no payment since January 15, 1934, and that the plaintiff had been compelled to pay taxes prior to the commencement of this action on November 23, 1935, in the sum of $360.87. The evidence in the record is conclusive that there were no payments by defendants either on the mortgage debt or taxes from January 15, 1934, to the date of the trial March 3, 1936. The decree found that there was due the plaintiff the sum of

$7,058.92. The evidence is abundantly sufficient to support the decree of foreclosure.

It is also claimed by the appellants that an action was brought to recover on the note in January, 1934. At that time the defendants had only paid $30 a month for a period of six months, and the payments were delinquent in the sum of $180, which was delinquency equivalent to three months. The contract provided that, upon a failure to make the monthly payments for three months, the mortgagee could declare the whole amount due and foreclose the mortgage. That case was dismissed by the court without prejudice on June 27, 1935. It is at least suggested in the briefs that this was an adjudication and binding upon the parties, and that this foreclosure was prematurely brought because the dismissal was an adjudication that the loan was not in default in January, 1934. This foreclosure was brought almost two years later and alleges other and different defaults from the one upon which the action at law upon the note was brought. So even if this question is raised by the record (and we think it is not) it is not a bar to this action.

After careful examination of the entire record, it appears that the judgment of the district court is regular and proper.

AFFIRMED.

CENTRAL MARKET, INC., APPELLEE, V. ALBERT E. KING: HOME OWNERS LOAN CORPORATION, GARNISHEE, APPELLANT.
272 N. W. 244

FILED MARCH 19, 1937. No. 29843.

1. **Garnishment.** The Home Owners Loan Corporation was formed by an act of congress as a governmental agency to refinance certain loans, its entire capital stock being owned by the government. Such act gave the corporation authority to sue and be sued in any court, without reservation, express or implied; therefore, the Home Owners Loan Corporation must respond to service of garnishee process.
2. **Corporations.** The Home Owners Loan Corporation does not have the powers of either the executive, judicial, or legislative

branches of government. It was granted no immunity from civil process. It provides emergency relief to home owners to refinance mortgages, and is subject to the same liabilities as other corporations similarly employed.

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

Hawthorne Arey, for appellant.

Monsky, Grodinsky, Marer & Cohen and *J. Harold Saks, contra.*

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

PAINE, J.

This is an appeal from a judgment of the district court on a proceeding in error, reversing an order of the municipal court sustaining the special appearance of the Home Owners Loan Corporation, garnishee. In this opinion Central Market, Inc., will be styled the plaintiff, and is the only appellee in this court; Albert E. King was the defendant in the lower court, and the Home Owners Loan Corporation, garnishee, is the appellant in this court.

The Central Market, Inc., plaintiff, brought suit in the municipal court of Omaha and obtained a judgment on a grocery and meat bill against Albert E. King, an employee of the Home Owners Loan Corporation for the sum of $102.02 and costs. An execution was returned unsatisfied, showing that the said defendant, Albert E. King, had no property liable to seizure under execution. An affidavit was thereupon filed for garnishee summons, and the same was served by the constable upon the Home Owners Loan Corporation by serving I. S. McFarlane, its regional manager, in Omaha, Nebraska. The Home Owners Loan Corporation, garnishee and appellant, filed a special appearance, and after several continuances Judge Neble sustained the special appearance. Thereupon, a petition in error was filed in the district court for Douglas county by the plaintiff, and the garnishee and appellant filed its special appearance. The

same was argued and briefed in the district court, and the district judge overruled the special appearance and gave the garnishee 14 days to answer the summons. The motion for new trial being overruled, and supersedeas bond being fixed, said ruling of the district court is brought to this court. The parties have filed extensive briefs in this court.

As this is the first time that this important question has been presented to this court for determination, it might be of assistance, before discussing the authorities, to present a summary of the respective claims made by the parties to this lawsuit.

In the first place, there is no dispute between the parties as to the rules relative to the Nebraska law of garnishment, which is a purely statutory remedy, and will be interpreted more strongly against the garnishor. While the action was originally brought under the municipal code of Omaha, it is admitted that the section of that code is in all respects the same as the general statute of Nebraska in this regard.

Now, on its part, the appellant says that in 1932 congress established the Home Loan Bank, with a board of five members to conduct its affairs. It acted as a rediscounting agency for those holding mortgages on loans which could not be paid off, and its duties were very similar in many respects to those of the Federal Reserve Bank. In 1933 there was an amendment made to the original Home Owners Loan Act, providing for the Home Owners Loan Corporation, of which the entire capital stock was subscribed and paid for by the treasury of the United States for and on behalf of the United States government. Its business was to issue bonds against the mortgages which it held, and these bonds were guaranteed, both as to principal and interest, by the United States government. It had but a limited time to run, and when its purposes were completed all of the surplus funds in its hands were directed to be paid into the treasury of the United States. It was given the privilege of franking all of its mail in the same manner as all executive agencies of the United States. The provisions and rules under which it operated provided that it

could only refinance mortgages which could not be handled in any other way or by any other corporation. Its life as a loaning corporation having been limited, and having now expired, the Home Owners Loan Corporation is not making new loans, but is now in process of being liquidated. It can be seen from this very brief statement that it is the contention of appellant that this corporation was not, and is not now, in competition with any other loan corporation, for no other corporation could or would handle so-called "frozen" loans.

Now, on the other hand, it is claimed by the appellee that the Home Owners Loan Corporation was organized to engage in the business of loaning money on homes, which loans were evidenced by mortgages, and if any mortgage is not paid, and becomes in default, said corporation forecloses these mortgages and, if necessary, takes the title to the property in its name and later sells said property, the same as any other loan corporation. It is admitted that the government is exempt from garnishment when it acts in its sovereign capacity, but not when it is engaged in a business capacity. It is admitted that the Home Owners Loan Corporation is an agent or instrumentality of the United States government, but it is insisted that by its very form of organization it is, and has been, doing a commercial business in loans, and therefore appellee claims it is not entitled to any of the immunities to which the government itself is entitled, and that the Home Owners Loan Corporation should under the Nebraska law be made to answer a summons in garnishment, just the same as any other corporation. It is further admitted that one is required to go into the court of claims to bring an action against the government itself, but that the Home Owners Loan Act, 48 St. at Large, 128, ch. 64, title 12, U. S. C. A., sec. 1463, provides: "Creation of Home Owners Loan Corporation. Sec. 4. (a) The Board is hereby authorized and directed to create a corporation to be known as the Home Owners Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in

any court of competent jurisdiction, federal or state, and which shall be under the direction of the board." Therefore, the appellee insists that such corporation does not have the immunity that the government has. In reply thereto the appellant insists that the waiver of immunity granted to the United States government is never to be implied, but must be clearly proved, and if this court holds that the Home Owners Loan Corporation must respond to the garnishee summons it can only be supported on the theory that said corporation was not performing a governmental function.

From this brief statement of the legal claims made by the parties, this court believes that the decision can be arrived at by finding the answer to this question: Was the Home Owners Loan Corporation engaged in a governmental function at the time the garnishee summons was served upon its regional manager in Omaha, Nebraska?

By reason of general public demand made upon our government during periods of economic disaster, several governmental corporations have been devised by congress to perform functions which would relieve many citizens who found themselves unable to save their property in the usual course of business. In several corporations of this nature the entire capital stock was owned by the United States government, yet in several cases where courts have been called upon to pass on this question they have held that when the government adopts the use of such a corporation, which was controlled and managed by its own officers, even though all its stock was owned by the United States, it must be regarded as a separate entity.

The special appearance in the case at bar is based on the theory that the Home Owners Loan Corporation is purely a governmental agency and performing a function of sovereignty, but abundant citations indicate that courts do not agree with this contention.

"When the United States enters into commercial business, it abandons its sovereign capacity, and is to be treated like any other corporation." *Salas v. United States*, 234

Fed. 842. "These precedents seem to warrant the conclusion that (1) it is not sufficient that a private corporation is an instrumentality of the United States to defeat the doctrine of separate entities; nor (2) is it sufficient that the government owns all of the stock in the corporation." *Langer v. United States,* 76 Fed. (2d) 817. See, also, *United States v. Pacific Forwarding Co.,* 8 Fed. Supp. 647; *Federal Land Bank v. Priddy,* 295 U. S. 229.

In the case of the Fleet Corporation, which was organized under the general law of the District of Columbia to purchase and construct merchant vessels, but in which the United States should be the majority stockholder, Justice Brandeis, in delivering the opinion in *United States, ex rel. Skinner & Eddy Corporation, v. McCarl,* 275 U. S. 1, 72 L. Ed. 131, said: "Being a private corporation, the Fleet Corporation may be sued in the state or federal courts like other private corporations; it does not enjoy the priority of the United States in bankruptcy proceedings * * * and its employees are not agents of the United States, subject to the provisions of sec. 41 of the Criminal Code." This holding that such a corporation did not have a priority in bankruptcy, which is reserved to the government, indicates a distinct line of cleavage between the rights and liabilities of such a corporation and the government.

Especially in point is the case of *Commonwealth Finance Corporation v. Landis* (Emergency Fleet Corporation, Garnishee) 261 Fed. 440, in which the court held: "In view of the legislation creating the United States Shipping Board Emergency Fleet Corporation, and of the fact that congress saw fit to act through a private corporation, *held* that, although the United States owns the stock of the corporation, it is not exempt from service of process, and may be garnished and sued, even though it may appear at trial that the matter is one relating to which the corporation is clothed with the attributes of sovereignty, and not subject to suit."

To a similar effect is the holding in the case of *Haines v. Lone Star Shipbuilding Co.* (United States Shipping Board

Emergency Fleet Corporation, Garnishee) 268 Pa. St. 92, 110 Atl. 788, also in 275 Pa. St. 260, 118 Atl. 909, from which last trial of this case we quote this holding: "The Fleet Corporation was not put in the place of the sovereign to share its immunity otherwise than as the sovereign allows, and the sovereign did not limit its liability when it engaged in this undertaking."

The question whether or not public policy requires that, even though the Home Owners Loan Corporation has all the attributes of a private corporation, yet, in regard to garnishment process, it must be regarded as governmental in its nature, is debatable. The only theory on which the rule of public policy has been applied is found in the many cases dealing with municipal corporations, wherein the reasoning is placed upon the ground that garnishment process would interfere with the acts of government. After an examination of the act creating the Home Owners Loan Corporation, and the purposes for which it was created, we are unable to find that in any respect it has the powers of either the executive, judicial, or legislative branches of government. The grounds necessary to support the theory of the public-policy rule do not exist in this case, and the rule of public policy is not applicable. By its very nature the Home Owners Loan Corporation is an instrumentality seeking to assist home owners in the payment of debts. An honest debt is always the basis of a garnishment proceeding, and therefore it would seem that this instrumentality of government would not be interfered with, but that it would be regarded as furthering its general purpose in requiring it to respond to a garnishee process, with a view to seeing that its funds are placed in the hands of persons to whom they are rightly due.

We find a very late case in *Gill v. Reese*, 53 Ohio App. 134, which involves the precise question presented in the case at bar. In this case Dr. A. H. Gill recovered a judgment in the municipal court of the city of Cleveland against Jacob Reese and garnisheed the Home Owners Loan Corporation. Upon being served, it filed a motion to quash the

service of garnishment process, which motion was sustained in the municipal court. Upon appeal it was said that it appears to present one issue: Is the Home Owners Loan Corporation subject to service of garnishment within the state of Ohio? The court says that congress passed an act June 13, 1933, effective that day, creating such corporation. The purpose of the act was to provide emergency relief with respect to mortgages on homes, permitting home owners to refinance mortgages when they could not secure relief elsewhere.

Section 7 of the articles of the Home Owners Loan Corporation provides as follows: "Said corporation shall have power to sue and shall be subject to suit as other corporations, and shall have the usual powers and immunities of corporations of the United States."

The Ohio court reviews many of the authorities cited in the case at bar, and concludes that a motion to quash garnishment proceedings would not lie for the reason that the corporation must be regarded as a private corporation, even though upon an answer being filed it should later develop that the corporation might partake of the character of a sovereign and be exempt from garnishment.

The broad principle of law applicable is set forth in the case of *Gould Coupler Co. v. United States Shipping Board Emergency Fleet Corporation,* 261 Fed. 716, wherein it is said that it is highly desirable that governmental agencies be subject to the same liabilities as other corporations similarly employed.

In *Graves Bros. v. Lasley,* 190 Ark. 251, 78 S. W. (2d) 810, decided in 1935, it was held that a check payable to a tenant by the secretary of agriculture, and in the hands of his local agent, was subject to garnishment in an action by his landlord for rent.

We admit some difficulty in arriving at the conclusion reached in this case, in view of some of the decisions cited by appellant, such as *McCarthy v. United States Shipping Board Merchant Fleet Corporation,* 53 Fed. (2d) 923, decided in 1931 by the court of appeals of the District of Co-

lumbia, in which case a motion of Miss Margaret M. McCarthy *pro se* to proceed further in *forma pauperis* was denied on March 21, 1932 (285 U. S. 547, 52 Sup. Ct. Rep. 408), and process of garnishment denied.

Appellant relies on *Emergency Fleet Corporation, United States Shipping Board v. Western Union Telegraph Co.*, 275 U. S. 415, in which Justice Brandeis held that the Emergency Fleet Corporation was entitled to the right of priority in transmission of messages and the government rate extended to all executive departments of government, "not because it is an instrumentality of the government, but because it is a department of the United States within the meaning of the Post Roads Act." The facts are so entirely different that we cannot see how it would authorize us to refuse a garnishee process in the case at bar.

The appellant has furnished us a certified copy of an opinion rendered July 6, 1936, in the supreme court of Tennessee, entitled *Home Owners Loan Corporation v. Hardie & Caudle*, which discusses many of the same authorities, and decides adversely to our holding in the case at bar on the ground that the act does not disclose an express or implied intention to subject the Home Owners Loan Corporation to garnishment. With all due respect to that court, we have, after a careful examination of the same authorities, arrived at a different conclusion.

The appellant cites in its reply brief the case of *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 65 L. Ed. 577. We admit the importance of this case, in which the United States supreme court restored it to its docket for two rearguments, and in which Charles Evans Hughes and George W. Wickersham appeared as opposing counsel, and in which appears one of the dissents of Justice Holmes; yet a decision that the land banks have governmental power to the extent that the bonds they issue shall be exempt from federal, state and local taxation does not convince this court that the Home Owners Loan Corporation is exclusively engaged in carrying out a governmental function.

Because of the importance of the question to be deter-

mined, and the length and excellence of the briefs submitted, we have given much time to the examination of authorities in point, and can scarcely resist the temptation to further extend this opinion.

However, this court has reached the opinion that the Home Owners Loan Corporation is a distinct and separate entity from the government of the United States, and has conducted a very extensive loan and mortgage business, which is not an ordinary function of government. This corporation has the power to sue and be sued in all courts without reservation, expressed or implied. If the appellee eventually prevails, this corporation will simply be required to pay into court money in which it has no longer any interest, to meet a judgment obtained on a just debt of one of its employees.

In our opinion, the action of the trial court in directing the Home Owners Loan Corporation to answer as garnishee was right, and is

AFFIRMED.

FRED L. JOHNSON ET AL., APPELLEES, V. PERMELIA JANE LOEWEN, APPELLANT.
272 N. W. 217

FILED MARCH 19, 1937. No. 29927.

1. **Contracts.** It is not the province of the court to make a new contract for the parties by construction; its duty is confined to the interpretation of the one which they have made for themselves.
2. ———. The contract of the parties set out in the opinion examined, and *held* not to convey an interest in the lands involved in this suit.

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

Kirkpatrick, Good & Dougherty and *W. W. Wycoff*, for appellant.

W. W. Norton, contra.

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

CARTER, J.

This is a suit in equity brought by the plaintiffs, Fred L. Johnson and Henry W. Johnson, against the defendant, Permelia Jane Loewen, to quiet title to 80 acres of land in Polk county. From a decree quieting the title in plaintiffs as against the claims of defendant, the defendant appeals.

The record shows that on August 29, 1918, Lafayette Dowers died testate leaving surviving his widow, Permelia Jane Dowers, now Permelia Jane Loewen, defendant herein, and two daughters, Celestial Ethel Bond and Leonia Ellen Jacobson. By the provisions of the will, the widow was to have a life estate in the 80 acres herein involved, subject to a provision that her life interest should terminate in the event of her remarriage. The remainder was devised to Leonia Ellen Jacobson by the will. Other lands not involved in this suit were devised to the other daughter, Celestial Ethel Bond, subject to a similar provision providing for a life estate in the widow. The record further shows that on January 31, 1929, Permelia Jane Dowers remarried, and it is conceded that her life estate in the lands herein was terminated at that time. On June 27, 1929, the widow, now Permelia Jane Loewen, and the two daughters entered into a written agreement which the widow now contends conveyed an interest in the 80 acres to her and of which interest she still claims to be the owner. Many contentions are raised by the parties, but we find it necessary only to construe the contract to properly dispose of the case.

The first part of the contract that is material here is as follows: "The second party (the defendant herein) shall have the use of the property in Surprise, Nebraska, during her natural lifetime, and she shall also have control of the real property in Polk county, Nebraska (which includes the land involved herein), and shall have the right to lease

the same and to collect the rental, to choose the crops that shall be put on the premises and to have the right to determine as to rotation of crops and the sowing of grass seeds. She shall also have the right to look after the repair of the buildings on all of the property. The buildings are to be insured. From the gross amount of rental collected, the second party shall pay the taxes, the insurance premiums and the repair bills and the proceeds are to be divided into three equal parts and each of the parties of the first part and the party of the second part to share equally, that is to say Celestial Ethel Bond shall receive one-third of said proceeds, Leonia Ellen Jacobson to receive one-third of said proceeds and Permelia Jane Thomas to receive the remaining one-third of said proceeds."

Under this provision of the contract, Permelia Jane Loewen was to have "control" of the 80 acres involved in this action. The giving of control of real estate is not a conveyance of an interest therein. The fact that the duties of Permelia Jane Loewen are specifically set out, together with a provision in the agreement for payment of her services out of the net proceeds of the lands included in it, makes it appear to us that this part of the contract provides for nothing more than a contract of employment. Certainly if it had been intended to convey a life estate to Mrs. Loewen, it would not have been necessary to set out the duties she was to perform, the obligations she was to assume or the compensation she was to receive, for the reason that as to all these the law itself makes provision.

Difficulty arises, however, when we attempt to construe the next paragraph of the contract, which is as follows: "It is not the purpose of this instrument to convey any title to any of the real property hereinbefore described but it is only to give to the second party to this agreement the right to control and use said property during her lifetime." That this paragraph is ambiguous to such an extent as to require construction is quite apparent. We are faced with the anomalous situation of having one section of the contract clear and concise, with a subsequent section inserted

for the purpose of explaining the intent of the former, but which in fact makes the intent of the parties ambiguous. The contract was prepared by one not learned in the law and we can only assume the words used were given their ordinary and usual meaning. The word "title" is ordinarily defined as "the union of all the elements which constitute ownership, at common law divided into possession, right of possession, and right of property, the last two now, however, being considered essentially the same." Webster's New International Dictionary. The statement in the contract that "it is not the purpose of this instrument to convey any title to any of the real property" would ordinarily mean that an interest in the realty was not to be conveyed. But the following words, "but it is only to give to the second party to this agreement the right to control and use said property during her lifetime," would ordinarily amount to a conveyance of a life estate. Necessarily, these two provisions are absolutely conflicting. It is therefore necessary that we look elsewhere in the contract to determine the intent of the parties. The section of the contract first quoted plainly shows that Mrs. Loewen was to have "control" over the lands involved in this suit, as distinguished from the "use" of the premises, while as to other lands she was to have their use during her lifetime. This undoubtedly accounts for the use of the words "control and use said property" in the last quoted section of the contract. We therefore find the intent of the parties plainly set forth in the first quoted paragraph of the contract, and, under the situation existing in this case, we will give it effect rather than either of the conflicting and ambiguous statements contained in the subsequent paragraph.

As a text-writer has aptly said: "It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, without regard to its wisdom or folly, as the court cannot supply material stipulations or read into the contract words which it does not contain." 13 C. J. 525. Ap-

plying this principle to the case at bar, we are convinced that the intent of the parties, drawn from the contract as a whole, was not to convey any interest in the lands involved herein to the defendant, Permelia Jane Loewen. The judgment of the trial court is therefore correct and it is

AFFIRMED.

GEORGE DOANE KELLER, TRUSTEE, APPELLEE, V. LOA S. GRIFFITH ET AL., APPELLANTS.
272 N. W. 203

FILED MARCH 19, 1937. No. 29912.

Mortgages: FORECLOSURE: MORATORIUM. When it appears from the evidence the amount due under contract of purchase of real property, wherein strict foreclosure of said contract has been had, exceeds the value of said property, moratory stay must be denied.

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

Loa S. Griffith and *Roscoe C. Griffith, pro se.*

Edgar B. Zabriskie and *George Doane Keller, contra.*

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

MESSMORE, District Judge.

This is an appeal from an order and decree of the district court for Douglas county, wherein that court denied appellants a further continuance of a moratory order, vacated the moratory stay, and overruled a motion for a new trial.

The evidence discloses that appellee is trustee of the estate of one Charles B. Keller, deceased; that a decree of strict foreclosure was entered September 27, 1933, and was stayed under the provisions of the moratory act, with rental fixed at $60 a month. Decree was entered for $7,-

203.69. The motion to set aside the moratory stay was heard February 24, 1936, which motion was sustained, decree to take effect within thirty days. On February 26, 1936, a motion was made by appellants to vacate the order theretofore made setting aside the moratory stay and asking for a new trial, which motion was overruled on March 2, 1936, hence this appeal.

Certain testimony was offered by appellee of real estate men and of a next-door neighbor, fixing the value of the property at $6,500; that the property was suffering waste and had materially depreciated in value since the date of the decree of strict foreclosure. Further, in behalf of appellee, two affidavits of one G. B. Robertson, state manager of the Home Owners Loan Corporation, were offered and received in evidence, one dated November 10, 1934, to the effect that said corporation could not approve the appraisal of the property in excess of $7,250, of which amount it would lend 80 per cent. in bonds of said corporation, and from which amount would have to be deducted sums for necessary repairs, taxes and costs of the loan; and the second affidavit, dated December 12, 1935, to the effect that there was no change of circumstances that caused him to alter or modify his former statements.

The payments of $60 a month were insufficient to reduce substantially the amount of the indebtedness or the amount due under the contract of purchase, which amount had increased from $7,203.69 on the date of the decree to more than $8,500 at the time of the writing of this opinion; that said monthly payments had been made substantially as ordered, with perhaps the exception of the payments due January 27, 1936, and February 27, 1936, up to the time of the filing of the application to vacate the moratory stay; that at different times certain repairs had been made to the house on the premises by appellants in lieu of certain payments due under the moratory order.

Appellants' testimony relative to the value of the property relates the history of the original purchase in 1928 on term payments under the contract; that said property had

a reasonable cash value of $12,000 at that time; shows the amount of insurance carried on the house and garage; that $2,000 was expended on repairs and payments due under the moratory order; that values of properties in the immediate vicinity of the property in question range from $9,000 to $15,000 and the cost to reproduce the premises in question of $12,000.

In view of the law as stated by this court in actions of this kind, the court below, having had the opportunity to hear this matter and having entered the decree fixing the amount of payments appellants were required to make under the original moratory order, obviously believed that the amount due under the contract of purchase of the real property involved exceeded the value of said real property, that appellants had no equity in said real property and the same was suffering waste.

This court has held: "When it appears from evidence that the amount of the mortgage liens on the land exceeds its value, a moratory stay * * * must be denied." *Srajhans v. Mares,* 130 Neb. 924, 267 N. W. 82. See *Luikart v. Graf,* 130 Neb. 736, 266 N. W. 641; *First Trust Co. v. Airdale Ranch & Cattle Co.,* 131 Neb. 475, 268 N. W. 362; *American Central Life Ins Co. v. Brown,* 131 Neb. 761, 269 N. W. 904; *American Central Life Ins. Co. v. Brown,* 131 Neb. 764, 269 N. W. 905; *First Trust Co. v. Rathbone, ante,* p. 211, 271 N. W. 428.

The district court has analyzed all the evidence in this case, ruled adversely to appellants and set aside the moratory stay. This court, having examined the record, concludes that the order and decree of the lower court are correct and therefore affirms the same.

Appellants are given a right to redeem the real property in question at any time before mandate issues.

AFFIRMED.

PLAZA HOTEL COMPANY, APPELLANT, V. HOTEL STRATTON ET AL., APPELLEES.
272 N. W. 224

FILED MARCH 23, 1937. No. 29917.

1. **Bills and Notes: CONSIDERATION: BURDEN OF PROOF.** In an action on a promissory note, the burden is on the defendant to establish the defense of want of consideration.
2. ———: ———. It is not essential to a valid consideration that it should move to the promisor. It is sufficient if it causes a loss, disadvantage, or imposes a legal obligation upon the promisee.

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

C. H. Hendrickson, for appellant.

H. D. Addison, contra.

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

GOOD, J.

This is an action on a promissory note. Defense relied on is want of consideration. Trial of the cause to court and jury resulted in a verdict and judgment thereon for defendant. Plaintiff has appealed.

Plaintiff contends that the court erred in giving certain instructions, one of which informed the jury that the burden was on the plaintiff to prove by a preponderance of the evidence that there was a good and valuable consideration for the promissory note. Counsel for defendant contends that this is a correct statement of the law and cites in support of his contention *Search v. Miller,* 9 Neb. 26, 1 N. W. 975; *Smith v. Kinney,* 32 Neb. 162, 49 N. W. 341, and *In re Estate of Hoagland,* 126 Neb. 377, 253 N. W. 416, as well as cases from other jurisdictions. *Search v. Miller, supra,* was decided in 1879 and long prior to the adoption of the uniform negotiable instruments act. In that case it was held that the burden was upon the plaintiff to satisfy the jury by a preponderance of the evidence that there was

a valid consideration. *Smith v. Kinney, supra,* was decided in 1891, also long prior to the adoption of the uniform negotiable instruments act, and, moreover, in that case the question of burden of proof was not passed upon. The case of *In re Estate of Hoagland, supra,* was decided since the adoption of the uniform negotiable instruments act, but does not squarely pass upon the question here involved. In the opinion in that case there are quoted holdings from other jurisdictions, some of which tend to support the contention of defendant, but the question was not squarely passed upon and cannot be said to be a precedent. The question has been, indirectly at least, before this court in other cases since the adoption of the uniform negotiable instruments act.

The uniform negotiable instruments act contains the following provisions: Section 62-201, Comp. St. 1929, reads: "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value." Section 62-205, Comp. St. 1929, is in part as follows: "Absence or failure of consideration is matter of defense as against any person not a holder in due course." These provisions impose upon the defendant, in an action based upon a promissory note, the burden of establishing the defense of want of consideration. In effect, this court has so held.

In *Elmcreek Ditch Co. v. St. John,* 127 Neb. 253, 255 N. W. 16, it was held:

"In an action by payee on a negotiable promissory note, against the maker, 'failure of consideration' is a defense authorized by statute. * * *

"The right to make the statutory defense of 'failure of consideration' in an action on a negotiable promissory note implies the right to prove that defense by competent evidence."

This holding clearly indicates that the burden was upon the defendant to prove failure of consideration.

In *Farmers & Merchants State Bank v. Kuhn,* 125 Neb.

457, 250 N. W. 652, in the opinion (p. 461) it was said: "The presumption is that a promissory note is a valid obligation based upon a good and legal consideration, and the burden of showing that there was a want of consideration rests upon the defendant."

An examination of the authorities from other jurisdictions shows that, prior to the adoption in those jurisdictions of the uniform negotiable instruments act, many of the courts held that, where want of consideration was pleaded as a defense in an action on a negotiable instrument, the burden was upon the plaintiff to establish that there was a valid consideration, and in many of the same jurisdictions, since the uniform negotiable instruments act has been adopted, the rule now is that, where want of consideration is pleaded as a defense to a negotiable instrument, the defendant has the burden of establishing such defense by a preponderance of the evidence. We think this was clearly the intention of the legislature in adopting the uniform negotiable instruments act, and apparently this view is concurred in by most of the courts of other jurisdictions where the uniform negotiable instruments act has been adopted.

Attention is called to the case of *First State Bank v. Radke,* 51 N. Dak. 246, 199 N. W. 930, 35 A. L. R. 1355. Appended to the opinion in the latter report is a voluminous note, giving the holdings of many of the courts upon the question; and in *First Nat. Bank v. Doschades,* 47 Idaho, 661, 279 Pac. 416, 65 A. L. R. 900, there is appended to the latter report a note, giving a number of the decisions of the various courts upon the question. From these notes it is clear that the great weight of authority and the better reasoning support the proposition that the burden is upon the defendant to prove want of consideration, where it is pleaded as a defense to an action on such an instrument.

In another instruction the court properly defined what was meant by the term "consideration," but in the closing part of the instruction the jury were told: "In this case it is the claim of the defendant that he received nothing of

value for the execution and delivery of said note and if you fail to find by a preponderance of the evidence that he did receive a sufficient consideration therefor as above defined, then your verdict should be for the defendant." This part of the instruction was clearly at variance and in conflict with the previous part of it. It is not essential to a valid consideration that the consideration move to the promisor. It is sufficient if a loss, disadvantage or obligation is imposed upon the promisee. The benefit or advantage need not inure directly to the benefit of the promisor to constitute a valid consideration. Clearly, the court erred in each of the instructions referred to.

Plaintiff contends that the evidence was wholly insufficient to sustain a finding of want of consideration under any circumstances. We think there was sufficient evidence, if the cause had been properly submitted to the jury, to warrant them in finding that there was no consideration, but, as observed, the cause was not submitted to the jury on proper instructions, and these instructions were no doubt prejudicial to the plaintiff.

Other errors are assigned which it is not necessary to consider, as they are not likely to occur on another trial.

For errors pointed out, the judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

CRAWFORD STATE BANK, APPELLEE, V. CHRISTENA C. MCEWEN ET AL., APPELLANTS: INTERNATIONAL HARVESTER COMPANY, APPELLEE.

272 N. W. 226

FILED MARCH 23, 1937. No. 29790.

1. Contracts: CONSIDERATION. "The consideration sufficient to support a promise may be a detriment suffered by the promisee in reliance upon the promise, as well as a benefit accruing to the promisor." *Henry v. Dussell*, 71 Neb. 691, 99 N. W. 484.

2. **Mortgages: FORECLOSURE: LIMITATIONS.** "Under our statute an action to foreclose a mortgage executed by the deceased in his lifetime * * * is not barred, as to the property which it covers, by a failure to present it to the (probate) court for allowance as a claim against the estate." *Null v. Jones*, 5 Neb. 500.
3. ———. The mortgaged property is the primary fund for the payment of the decree of foreclosure, and not a mere surety.
4. ———. Evidence examined, and *held* insufficient to impeach the certificate of acknowledgment of the mortgage in controversy.
5. **Subrogation.** "The holder of a subordinate mortgage may pay a superior lien to protect his own lien and be subrogated to the rights of the prior encumbrancer to the extent of the payment, where equity requires such relief." *Allyn v. Dreher*, 124 Neb. 342, 246 N. W. 731.
6. ———. "As soon as the right to subrogation arises, equity makes the assignment, and hence the right of the person entitled by no means depends on, or is affected by, the willingness or unwillingness of the creditor to transfer the security." 25 R. C. L. 1320, sec. 8.
7. **Proof.** So much of the decree entered in the trial court as relates to the payment of taxes on the mortgaged premises by the Federal Land Bank of Omaha *held* unsupported by the evidence.

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

Fisher & Fisher and *Greydon L. Nichols*, for appellants.

Porter & Skaggs, E. D. Crites and *F. A. Crites, contra.*

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

EBERLY, J.

This action, commenced on May 28, 1932, is based upon a petition in equity containing two causes of action for the foreclosure of real estate mortgages.

The first cause of action alleges that on April 15, 1931, the defendant Christena C. McEwen was the owner in fee simple of lots 1, 2, 3, 4, and 5, and the S.E.¼ of the N.W.¼, and the S.½ of the N.E.¼, and the S.E.¼ of section 6, all in township 30 north, range 49 west of the

6th P. M. in Dawes county, Nebraska; that on said day, for "valuable consideration," she made and delivered her promissory note for $3,500, bearing said date, due and payable one year thereafter to the order of the Crawford State Bank, Crawford, Nebraska, with interest at 8 per cent. per annum from said date until paid. To secure the payment of said note, on the same day, she executed and delivered to the Crawford State Bank her mortgage deed mortgaging to said bank the premises above described. This real estate mortgage was expressly "subject to Federal Farm Loan in amount of $3,000, with unpaid balance of $2,800," and contained, among others, the following covenants and agreements on part of the mortgagor:

"And shall pay all taxes and any interest on, or maturing instalments of principal, due on any prior mortgage and assessments levied upon said real estate and all other taxes, levies and assessments levied upon this mortgage or the note which this mortgage is given to secure, before the same becomes delinquent. * * * It is further agreed (1) that if the said mortgagor shall fail to pay such taxes and such interest on, or maturing instalments of principal, due on any prior mortgage * * * then this mortgagee may pay such taxes and such interest on, or maturing instalments of principal, due on such prior mortgage * * * and the sum so advanced with interest at ten per cent. shall be paid by said mortgagor, and this mortgage shall stand as security for the same. (2) That a failure to pay any of said money, either principal or interest on this or any prior mortgage, when the same becomes due or a failure to comply with any of the foregoing agreements, shall cause the whole sum of money herein secured to become due and collectible at once at the option of the mortgagee. It is further agreed that said mortgagee, pending foreclosure of this mortgage and after decree and pending stay thereon or appeal therefrom and pending sale of premises mortgaged, may pay such taxes and maturing interest or maturing instalments of principal, on prior mortgages, * * * and such sums shall be added to the amount due on decree and upon confirmation

of sale by the court ordered taken out of proceeds of sale; or if redeemed during stay, appeal or sale, such amounts shall be collected the same as though it were a part of such decree."

And plaintiff further pleaded that no action at law had been instituted upon the indebtedness secured thereby, a breach of the conditions thereof, the amount due and unpaid thereon, and prayed for a foreclosure and sale of the mortgaged premises to satisfy the amount so adjudged to be due.

The second cause of action set forth in this petition alleged that on June 17, 1926, Frank A. McEwen and defendant Christena C. McEwen, husband and wife, for a valuable consideration, made and delivered to the Federal Land Bank of Omaha, Nebraska, their promissory note for $3,000, with interest, payable in 71 semiannual equal payments on the amortization plan; that simultaneously therewith said Frank A. McEwen and his wife, defendant herein, executed and delivered to the said Federal Land Bank of Omaha, Nebraska, their mortgage deed, thereby mortgaging to that bank the premises hereinbefore described to secure the payment of the promissory note last referred to; that the conditions of this mortgage were also alleged, and further set forth, as a breach of such conditions, "that the semiannual instalments of interest and amortization instalments on the principal of said indebtedness maturing on the first day of March, 1932, and on the first day of September, 1932, being amortization instalments numbers 11 and 12, each in the sum of $93.75, having duly matured, and the taxes levied and assessed for the year 1931 against said land were not paid by said mortgagors or their heirs or assigns as provided in said mortgage, but were suffered and permitted to become delinquent, in consequence of which the said Federal Land Bank of Omaha, Nebraska, did pay said taxes amounting to $121.50," and that thereupon this plaintiff, to protect its security, paid said Federal Land Bank the instalments numbered 11 and 12, and the taxes of $121.50, with lawful interest. The plaintiff, Crawford

State Bank, prayed for a decree subrogating it to the rights of the Federal Land Bank of Omaha in and to such bank's mortgage, and, subject to the rights of the Federal Land Bank of Omaha, the foreclosure thereof for the satisfaction of these instalments.

To this pleading all of the defendants filed answers setting forth special defenses, but all of which contained general denials.

To the new matter set forth in the answers, the plaintiff filed a reply, in effect a general denial.

The facts disclosed by the record are that, at the time of the mortgage to the Federal Land Bank of Omaha on the premises herein described, the title to the real estate was vested in "Frank A. McEwen and Christena C. McEwen" as "joint title owners" thereof. But sometime before April 15, 1931, Frank A. McEwen died intestate, a resident of Dawes county, Nebraska, leaving surviving him his sons and daughters, following: Elmer McEwen and Ethel Nixon, nee McEwen, who had attained their respective majorities, and Calvin E. McEwen and Isobelle P. McEwen, minors, and whose minority had not terminated at the time of this trial. The estate of Frank A. McEwen has never been administered. The homestead of Frank A. McEwen and Christena C. McEwen was located on the mortgaged premises at the time of the former's death, and continued and was the home of the family until the time of the trial. Said defendant Christena C. McEwen was the owner in fee simple of an undivided one-half interest in the premises hereinbefore described, and on the death of her husband Frank A. McEwen intestate, on February 8, 1931, by inheritance she acquired title from him to an undivided one-third of his interest in the premises so herein described; and, also, though the mortgage set forth as the first cause of action was executed in good faith, she was actually the owner of an undivided two-thirds interest in the lands so mortgaged. The rights of intervening defendant and cross-petitioner, the International Harvester Company, are predicated upon a judgment made and entered in the county

court of Dawes county, Nebraska, on August 23, 1932, for the sum of $347.50, in favor of the International Harvester Company and against the defendant Christena C. McEwen and Elmer McEwen, a certified transcript of which was filed in the district court for Dawes county on August 23, 1932.

There was a trial to the court upon the issues made by the pleadings, upon the conclusion of which the court found, in substance, for plaintiff and against Christena C. McEwen on the first cause of action; found that defendant and Frank A. McEwen on June 17, 1926, made mortgage to Federal Land Bank as joint owners on described land, each of their undivided moiety to secure $3,000 in 71 semi-annual instalments; that he died intestate on February 8, 1931, in said county; that heirs are defendants McEwen and Ethel Nixon; that his estate has never been administered, nor his property assets distributed nor assigned to the several heirs; that Christena C. McEwen executed mortgage dated April 15, 1931, and duly recorded; that she never acquired the interest of children of Frank A. McEwen; owners of undivided one-third of said land, but she is owner of two-thirds of said land, subject to mortgage of the land bank, and her mortgage debt under first cause of action is $4,666.67 with 8 per cent. per annum interest but not a lien on the other defendants' one-third interest.

The court also found in favor of plaintiff against all defendants on cause of action for assigned instalments and taxes under the land bank mortgage whereon is now due $351.10 with 8 per cent. interest per annum; found there is due International Harvester Company judgment against Christena C. McEwen and Elmer McEwen for $442.10 and costs, which is a third lien against their undivided interests, with order of sale and order of distribution regardless of homestead exemption to judgment creditor.

From the order of the trial court overruling their respective motions for new trial, Christena C. McEwen, Elmer McEwen, Calvin E. McEwen and Isobelle P. McEwen, severally appeal.

The appellants challenge the validity of the note and mortgage set forth as the first cause of action, on the ground that it is without consideration. This claim cannot be sustained. The evidence discloses that for a considerable period prior to his death Frank A. McEwen had been suffering from the effects of a "stroke." Previous to the commencement of this affliction, the business of the family was carried on upon the premises described, which were owned by the husband and wife "in equal shares," by both of them. It appears that over a period of time they had borrowed various sums of money from the institution of which plaintiff was the successor, and also from plaintiff. Sometimes these loans were made upon notes signed by the husband, sometimes on notes signed by the wife, and sometimes on notes signed by both. When Frank A. McEwen became incapacitated by reason of the "stroke" to transact business, the defendant Christena C. McEwen renewed these obligations in her own name, extending the maturities thereof, and the notes thus renewed were canceled by the bank and surrendered to and accepted by her. After the death of her husband, the obligations so contracted were merged into the note and mortgage set forth as the first cause of action. Thus, the history of the transactions reveals ample consideration for the obligations in suit.

"The consideration sufficient to support a promise may be a detriment suffered by the promisee in reliance upon the promise, as well as a benefit accruing to the promisor." *Henry v. Dussell,* 71 Neb. 691, 99 N. W. 484. See, also, *Mack v. Mack,* 87 Neb. 819, 128 N. W. 527; *Faulkner v. Gilbert,* 57 Neb. 544, 77 N. W. 1072.

Appellants further challenge the foreclosure proceedings for the reason that Frank A. McEwen died intestate, and no administration of his estate has ever been had in a county court having jurisdiction of the same. In support of this contention, they cite *Sutherland v. Harrison,* 86 Ill. 363, and *Schade v. Connor,* 84 Neb. 51, 120 N. W. 1012. Neither case may be applied to the situation before us here. The *Sutherland* case proceeded on the theory that, "In the

administration of assets (of a decedent) the personal estate is the natural and primary fund for the payment of debts and legacies," etc. This court refused to follow the doctrine of that case as applied to the facts presented in *Smullin v. Wharton,* 86 Neb. 553, 568, 125 N. W. 1112, and likewise it is wholly inapplicable to the facts alleged in defendants' pleadings and established by their testimony in the instant case. In *Schade v. Connor, supra,* we held: "Where in a foreclosure suit brought against a devisee and the heirs of a deceased purchaser of the mortgaged premises, who is personally liable for the payment of the mortgage debt, it appears from the cross-petition of the devisee that the executor of the will, who is also the residuary legatee, has received personal property belonging to the estate of the testator exceeding the amount of the lien sought to be enforced, such executor may be compelled to pay off and remove the mortgage lien."

In the instant case defendants' pleadings contain no allegations as to the amount and value of the personal property owned by Frank A. McEwen at the time of his death, nor that any of such property ever came into the possession of Christena C. McEwen, the mortgagor. Neither does any information as to these facts appear in the evidence.

Therefore, it is obvious that the disposition of the instant case is in no manner affected by the rule announced in *Schade v. Connor, supra.*

On the contrary, we have long been committed to the rule that, "Under our statute an action to foreclose a mortgage executed by the deceased in his lifetime * * * is not barred, as to the property which it covers, by a failure to present it to the (probate) court for allowance as a claim against the estate." *Null v. Jones,* 5 Neb. 500. See, also, *Jones v. Null,* 9 Neb. 57, 1 N. W. 867.

The mortgaged property is the primary fund for the payment of the decree of foreclosure, and not a mere surety. *Colby v. Place,* 11 Neb. 348, 9 N. W. 564. See, also, 11 R. C. L. 207, sec. 231.

A careful examination of the record fails to disclose any

evidence of fraud or duress on part of the bank in securing the execution of the note and mortgage set forth as plaintiff's first cause of action.

As to the legality of the acknowledgment, the evidence has been carefully examined, and is held insufficient to impeach the certificate of acknowledgment of the mortgage in controversy. *McGuire v. Wilson,* 5 Neb. (Unof.) 540, 99 N. W. 244; *Phillips v. Bishop,* 35 Neb. 487, 53 N. W. 375; *Rouse v. Witte,* 81 Neb. 368, 116 N. W. 43; *Coe v. Talcott,* 130 Neb. 32, 263 N. W. 596; *Young v. Duvall,* 109 U. S. 573, 3 Sup. Ct. Rep. 414.

As to the second cause of action, the execution and delivery of the note and mortgage to the Federal Land Bank of Omaha is admitted. The payment of the two amortization instalments, numbered 11 and 12, by the Crawford State Bank, after default of the mortgage, and for the purpose of protecting its own mortgage herein, is established by the evidence in the record. As to the payment of these two instalments, this bank, unquestionably, is within the rule, viz.: "The holder of a subordinate mortgage may pay a superior lien to protect his own lien and be subrogated to the rights of the prior encumbrancer to the extent of the payment, where equity requires such relief." *Allyn v. Dreher,* 124 Neb. 342, 246 N. W. 731. See, also, *First State Bank v. Niklasson,* 116 Neb. 713, 218 N. W. 744; *United States Trust Co. v. Miller,* 116 Neb. 25, 215 N. W. 462; *Meeker v. Larsen,* 65 Neb. 158, 90 N. W. 958.

Nor is the right to a foreclosure on the second cause of action dependent on the validity of the two "special receipts for semiannual amortization payments," executed by the Federal Land Bank of Omaha, Nebraska, evidencing payment of the same by the Crawford State Bank. The fact that the payment was actually made, and the relation of the parties thereto, and of their respective liens on the premises, is amply established in the record. This brings the matters involved within the scope of the rule, viz.: "As soon as the right to subrogation arises, equity makes the assignment, and hence the right of the person entitled

by no means depends on, or is affected by, the willingness or unwillingness of the creditor to transfer the security." 25 R. C. L. 1320, sec. 8.

Except as to the item of taxes, viz., $121.50 with interest as provided by law, alleged to have been paid by the Federal Land Bank of Omaha, the finding and judgment of the trial court in sustaining the first and second causes of action are, in all respects, approved. This item of taxes is challenged by appellants. A careful search of the record discloses that no competent evidence was introduced during the trial that the Federal Land Bank of Omaha paid any "taxes levied and assessed for the year 1931" against the mortgaged lands. It follows that the decree entered, to the extent it embodies the item of taxes paid, viz., $121.50 and interest thereon, is wholly unsupported by the evidence, is erroneous, and excessive.

However, if appellees shall, within 20 days, file a remittitur of the said sum of $121.50 with interest thereon at 8 per cent. per annum from June 3, 1932, the judgment so diminished will stand affirmed. Otherwise, the judgment will be reversed and the cause remanded for further proceedings in harmony with this opinion.

AFFIRMED ON CONDITION.

PENN MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. ADAM J. KIMBLE ET AL., APPELLEES: RUDOLPH KRAUSE, APPELLANT.

272 N. W. 231

FILED MARCH 23, 1937. No. 29820.

1. **Mortgages: POSSESSION: NOTICE.** One who takes a mortgage from the owner upon real estate in possession of another takes the title encumbered with all the equitable rights of the party in possession.
2. ———: ———: ———. For the possession of real estate is constructive notice to all of whatever claim the possessor asserts, whether legal or equitable.
3. **Statute of Frauds.** An agreement to give a lien on real estate,

which should have the same effect as a mortgage, is within the statute of frauds (Comp. St. 1929, sec. 36-103,) and invalid if not in writing.

4. **Landlord and Tenant.** A tenant who has erected certain sheds and fencing upon leased premises, under an agreement with his landlord that they are to remain the tenant's property and not become a part of the real estate, may remove them at the termination of his tenancy.

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

J. H. Barry and *H. V. Kanouff*, for appellant.

Good, Good & Kirkpatrick, Mark Simons and *Sidney W. Smith, contra.*

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

PAINE, J.

This is a foreclosure action, brought by the Penn Mutual Life Insurance Company, plaintiff and appellee, against the owner of the land, Adam J. Kimble, and his wife, the Fremont Joint Stock Land Bank, second mortgagee, and Rudolph Krause and his wife, who are the tenants in possession. From the decree of foreclosure, the only party filing a motion for a new trial is Rudolph Krause, the tenant, who is the appellant in this court.

The decree of the trial court, entered on November 12, 1935, found that there was due the plaintiff from Adam J. Kimble and his wife the sum of $20,618.07, with interest at 10 per cent. from the date of the decree, upon a mortgage given by them upon 220 acres of land, more or less, in Saunders county, Nebraska, and that this mortgage is a first lien upon said property.

The decree further finds that the Fremont Joint Stock Land Bank is the owner of a note in the original sum of $35,000, dated July 7, 1920, which was secured by a first mortgage upon 5,120 acres of land in Loup county, and by a second mortgage upon the land in Saunders county, upon which note there was a balance due of $9,959.35, with in-

terest at 8 per cent., which is a second lien upon said real estate.

The decree further found that the defendant and appellant, Rudolph Krause, had, by virtue of permanent improvements placed upon the property during his tenancy, a lien upon said property as against the owner, Adam J. Kimble and wife, in the sum of $2,449.88, with interest at 7 per cent. from February 3, 1933, to the date of the decree and 6 per cent. thereafter, and that said lien of the appellant is a third lien against said real estate, to which finding tenant Rudolph Krause and the Fremont Joint Stock Land Bank severally except.

The decree further found that Rudolph Krause, tenant and appellant, was the owner of certain fixtures, consisting of 200 creosoted posts, 90 galvanized posts, 200 rods of woven wire, considerable hog fencing, gates, one garage, one machine shed, one furnace, electric light bulbs, a feed rack, and a garden fence, and that all of said articles were personal property owned by Rudolph Krause, the tenant, as removable fixtures, and that he has the right to remove said articles on or before the date that he abandons possession of said premises. To which findings the first and second lienors severally except, and it is ordered that the property be sold by the sheriff and the proceeds brought into court.

It will be seen from this summary of the decree entered in this case that the questions brought to this court for determination are based entirely upon the separate answer and cross-petition of the defendant and appellant, Rudolph Krause, and the replies thereto.

The allegations in said cross-petition set out that the said Rudolph Krause has been a tenant on and occupied said farm continuously since March 1, 1912, on which day he entered into an oral contract and agreement with the owner, Adam J. Kimble, by which it was agreed that Krause should build, erect, and place on said real estate such improvements, buildings, repairs, and additions as he might deem necessary, and at the termination of his occupancy he

could remove from said real estate all of such improvements which he had placed thereon as could be removed without damage to the freehold, and that as to such buildings, improvements, additions, or repairs as he might be unable to remove, the said owner, Kimble, was to pay Krause the value thereof at the time the same were placed on the real estate, and that the amount so due was to be a first and valid lien upon said real estate; that pursuant to said agreement and contract the said Krause built, erected and constructed a garage, machine shed, chicken house, windmill, bathroom fixtures, pipeless furnace, and a large amount of fencing, all of the value of $2,036.38, and that all of said improvements can be removed from the farm without damage or injury to the freehold, and that none of said improvements are a part of the real estate. That in addition the said Krause constructed a corn-crib and granary, at a cost of $740, put tiling in the basement, constructed a cement floor in a shed, erected a horse barn, constructed a cesspool and cistern, added two porches to the house, a bathroom, cupboards, and sidewalks, all of which cost $2,186.29, none of which improvements can be removed without damage to the premises, and, therefore, the said Krause prays that he be permitted to remove the improvements first set out herein from the real estate, and that he be decreed to have a first lien for the value of the articles which the court finds cannot be removed from the real estate.

To which cross-petition the plaintiff filed an answer, denying that said Krause had any lien superior to the first mortgage of the plaintiff, or that he had any right to remove any of the buildings or improvements on said premises, and alleging that all of such claims are barred by the statute of limitations, and that no notice of any kind was given the plaintiff of any of such claims, and that on March 2, 1923, the owner, Adam J. Kimble, made application to Frank H. Binder for the first mortgage of $15,000, which Binder assigned to the plaintiff, and represented in said application that all of the improvements thereon were

the property of said Adam J. Kimble, and that at the time of said application there was a first mortgage of $10,000 on said property owned by the Bankers Reserve Life Insurance Company of Omaha, Nebraska, which said mortgage was prior and is superior to all claims of said Krause, and plaintiff asked to be subrogated to the rights of the Bankers Reserve Life Insurance Company, as the plaintiff's money paid off said mortgage. That when the application for a loan was made to Frank H. Binder, he caused the premises to be inspected by his associate, R. R. Otis, and that at the time of such inspection Otis talked with Krause, and Krause made no mention of any claim of ownership or lien upon the premises for the value of any of the improvements thereon, and that Krause is now estopped from claiming or asserting any such ownership or lien.

The evidence of said Rudolph Krause was to the effect that he was living on his father's place, and his father-in-law, Adam J. Kimble, asked him to rent the property in suit; that objection was made that there were very few improvements on the place, and the testimony of Mr. Krause of his conversation with Mr. Kimble appears on direct examination in the bill of exceptions as follows: "Q. Did you have a talk with Mr. Kimble about that, and what did he say and what did you say? A. He told me 'Now whatever you put on this place is yours, and whatever you can't move off you'll get paid for it.' Q. When would you get paid for it? A. Whenever this land was sold. Q. Anything said about you moving off? A. No, sir. Well, if I ever had to move off of it, why I would get paid. Q. You were to be paid for it at that time? A. Yes, sir. Q. Did he say anything about what security you would have for the payment of that? A. He said it would be just the same as a mortgage on the farm. Q. And the improvements that you made that could be moved off, what was said about that? A. Well them that I could move off, I could take them. Q. Move them off? A. Yes, sir. Q. Now then did you make some improvements there after you went there, Mr. Krause? A. Yes, sir." The direct examination of Mr.

Kimble sustains the testimony of his son-in-law, Mr. Krause, on these points.

We will first consider the right of the tenant to remove certain fixtures and personal property which he has placed upon this farm, and was given the right to remove before he abandoned possession of the premises.

Kellogg v. McDonald, 122 Neb. 613, 240 N. W. 922, holds: "Possession of land by a third person does not put a mortgagee upon inquiry with reference to anything which he would not have learned if he had made inquiry as to the ownership from such occupier."

The English rule is that a purchaser of land, neglecting to inquire into the title of the occupier, is not affected by any other equities than those which such occupier may insist on. *Hunt v. Luck* (1901) 1 Ch. Div. (Eng.) 45, 70 L. J. Ch. n. s. 30; *Daniels v. Davison,* 16 Ves. Jr. *249, 33 Eng. Reprint, 978. Or, to state it another way, the possession of real estate is constructive notice to all the world of whatever claim the possessor asserts, whether legal or equitable.

In *Smoke v. Pope,* 119 Neb. 432, 229 N. W. 330, it is said: "Possession of land may be notice to the world of possessory rights of which inquiry of the occupant would elicit knowledge."

In *Ogden v. Garrison,* 82 Neb. 302, 117 N. W. 714, it is held: "A purchaser is chargeable with notice of a tenant's rights, when the latter is in the actual possession of the real estate at the time it is sold."

In view of these Nebraska decisions, the trial court was right in permitting the tenant to remove such personal property as described in the decree.

Now, the more serious question is presented, i. e., will an oral contract between a tenant and his landlord, made on March 1, 1912, to the effect that the value of permanent improvements which could not be removed should be a lien in the nature of a real estate mortgage, be decreed to be a valid mortgage lien in favor of the tenant, and to which the two other mortgages are junior and inferior?

We have examined all of the cases cited by the appellant, and do not find among them any Nebraska case in which such an oral contract was given the same effect as a written mortgage. Therefore, in so far as the contract with the tenant, Krause, attempted to give him a lien which should have all the effect of a mortgage for the value of permanent improvements which he placed upon the land while in possession of the same as tenant, it violates the Nebraska statute, section 36-103, Comp. St. 1929, and cannot be upheld.

It could well be argued that such a contract, fully performed by the tenant, might be held valid as against his landlord, but as soon as the rights of third parties intervene, their equities are fully protected by the statute of frauds.

This matter is discussed in 25 R. C. L. 570, sec. 168, and we find that such an agreement could only be binding upon the landlord. See *Sleeth v. Sampson,* 237 N. Y. 69, 142 N. E. 355, 30 A. L. R. 1400, an opinion by Judge Cardozo upon this point.

In the case of *Herring v. Whitford,* 119 Neb. 725, 232 N. W. 581, an oral agreement to give a mortgage was held to be ineffective even though the money had been advanced. In considering this case on rehearing, it was said by our court that equity could not require a mortgage to be made because they had promised to do so, nor because one party had performed his part of the oral agreement and had advanced the money, for under the circumstances it would sanction a constructive fraud against creditors. See, also, *Roden v. Williams,* 100 Neb. 46, 158 N. W. 360.

There is a long discussion of this same matter by Commissioner Irvine in *Bloomfield State Bank v. Miller,* 55 Neb. 243, 75 N. W. 569, and it is held: "A court of equity cannot give effect to an oral contract declared void by the statute of frauds, under pretense of aiding an imperfect attempt to execute a contract." It is clearly shown in this case that it is the rule in this state, created by statute, that mortgages should be in writing and duly recorded, and that this law has merit, for secret liens are thereby prevented.

See *Newman v. Newman,* 103 Ohio St. 230, 133 N. E. 70, 18 A. L. R. 1089.

The occupancy by the tenant in the case at bar will hold all of the rights which he has in the property which are not in violation of the statute of frauds, and inquiry from him would have shown that when he leased this farm it was very inadequately provided with buildings, and that he was given the right by the landlord to put in certain fencing, build sheds and other improvements, which were not to become a part of the real estate, and which would remain his property and could be removed by him before he vacated the place. These facts could all have been learned by the plaintiff-mortgagee when its agent was upon the place and investigated the application for a loan, but he failed to make any inquiry whatever from the tenant as to these facts.

It is our opinion that under these circumstances the trial court went as far as the law would allow in protecting the tenant by allowing him to remove certain improvements which he had placed thereon under his oral agreement with the landlord, and, finding no error in the decree of the trial court, the same is hereby

AFFIRMED.

EARL BELDER, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

272 N. W. 220

FILED MARCH 23, 1937. No. 29919.

Carriers. Where a passenger in alighting from a street car stepped upon a banana peel upon the steps and was thrown from the car, the carrier was not liable for the injury to the passenger in the absence of any evidence as to when or by whom the peel was placed upon the steps, or that the carrier knew of its presence upon the steps, or that it was there for such a length of time that notice might be imputed to the company's employees.

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

Kennedy, Holland, De Lacy & Svoboda and *Edson Smith*, for appellant.

W. G. Badham, contra.

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

CARTER, J.

In this case, plaintiff sued for damages for personal injuries sustained when he slipped on a banana peel on the step of a street car owned and operated by defendant. The jury returned a verdict for plaintiff for $400 and judgment was entered thereon. From the overruling of its motion for a new trial, the defendant appeals.

The plaintiff alleges in his petition that the proximate cause of the injury was the negligence of the defendant "in failing to remove from the rear platform of said street car foreign substances which had accumulated there, the presence of which defendant knew or should have known, and particularly the banana peel heretofore referred to, thereby rendering the use of said rear platform by passengers, and particularly this plaintiff, dangerous and unsafe." The defendant denied any negligence on its part or that of its employees.

The record discloses that, immediately prior to the accident, the plaintiff was a passenger on one of defendant's street cars. As the plaintiff was leaving the car, he slipped on a banana peel and fell from the car to the pavement causing the injuries for which this action was brought.

It is shown by the evidence that the street car involved in the action ran from Forty-second and Q to a point north of Thirtieth and Laurel streets, the latter being the scene of the accident. The distance between these two streets is 151 blocks. The motorman testifies, and it is not disputed, that he inspected the car at the beginning of the run and that inspections are made at each end of the run. The car was operated by one man who was required to be in the front of the car during its operation. Passengers came into

the car at the front but could leave at a front or rear exit as they chose. The rear door was opened automatically after the car stopped when the passenger stepped upon the step or treadle just inside the door. The accident in question occurred as plaintiff was leaving by the rear exit, the banana peel upon which he slipped being on the step just inside the door.

The evidence does not disclose how the banana peel happened to be on the step or when it was placed there. There is evidence that no one left by the rear exit during the time the car was traveling the 64 blocks immediately before the happening of the accident. The motorman testifies, however, that two girls got off at the rear exit at a point 8 or 10 blocks back from the point where the accident occurred. But, regardless of what these facts may be, it is not shown how or when the banana peel came to be upon the step. For aught the evidence shows, it might have been thrown there by a passenger, dropped by a passenger in leaving the car, or thrown into the car at a time when the door was open. The only direct evidence regarding this banana peel was that it was not there at the beginning of the run. The question for determination is whether the defendant, under these circumstances, is guilty of actionable negligence.

Appellee contends that the case is governed by the rule stated in *Griffen v. Lincoln Traction Co.*, 118 Neb. 459, 225 N. W. 232, as follows: "Bus companies operating after the manner of the defendant herein are common carriers of passengers and are liable as other common carriers upon common-law principles. They are required to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged for the safety of the passengers, and they are liable for the slightest negligence." The foregoing rule, imposing the more extreme liability upon a common carrier, is undoubtedly correct in so far as the special perils of transportation are concerned. In *Bassell v. Hines*, 269 Fed. 231, the court said: "The reason of the rule is that the passenger delivers himself into the

custody and control of the carrier, that he is helpless against these perils, and that he is compelled to, and rightly does, rely upon the carrier for protection. This reason extends to and supports the great bulk of the cases where the rule of the highest practicable care has been enforced. * * * Plainly, the reason of the rule does not extend to those comparatively trifling dangers which the passenger meets while upon a railway car only in the same way and to the same extent as he meets them daily in his home or in his office or on the street, and from which he easily and completely habitually protects himself. * * * There is, in our judgment, no sound reason why anything more than ordinary care, fitted to the circumstances, should be required, nor why the rule of highest practicable care should be applied to such a subject; we do not find any controlling authority, or any weight of authority, which so requires." See, also, *Pittsburgh, C., C. & St. L. R. Co. v. Rose,* 40 Ind. App. 240, 79 N. E. 1094; *Livingston v. Atlantic Coast Line R. Co.,* 28 Fed. (2d) 563.

The applicable rule is that a common carrier is not liable for injuries to a passenger slipping on a banana peel on a street car step while alighting, unless the operators of the car knew of its presence on the step, or it had been there such a length of time before the accident as would impute notice to them. *Louisville & N. R. Co. v. O'Brien,* 163 Ky. 538, 174 S. W. 31; *Rhodes v. Houston, E. & W. T. R. Co.,* 242 S. W. (Tex. Civ. App.) 263; *Jones v. St. Louis-San Francisco R. Co.,* 222 Mo. App. 1220, 5 S. W. (2d) 101.

In the case at bar, there is no evidence that the operator of the street car knew that the banana peel was on the step. Does the evidence show that it was there such a length of time as to impute knowledge?

It goes without saying that the street car company is not required to keep up a continuous inspection of its cars. The liability of the company in such a case as we have before us is not that of an insurer. The company can be chargeable for plaintiff's injury only on the theory that, in the exercise of ordinary care, it should have discovered the

presence and dangerous character of the banana peel and removed it from the step. The danger to be apprehended from this cause was certainly not a peril reasonably to be expected. In determining whether ordinary care had been exercised, the opportunity of employees to inspect the car is not controlling. Liability can only be predicated on a duty to inspect, as distinguished from opportunity to inspect. In the instant case, inspection was made at the beginning of the run. The motorman, after the trip began, had other duties which demanded his constant attention, and the presence of a banana peel dropped by a passenger during the course of the trip could hardly be sufficient to charge the defendant with negligence. This is especially true when the evidence is silent as to the time the banana peel became lodged on the step.

In *Tevis v. United Rys. Co. of St. Louis,* 185 S. W. (Mo. App.) 738, the court said: "There is no evidence even tending to show that the conductor either saw it or that he ought or could have seen it. There is no evidence how long this banana peel had been lying there; who threw it there; for anything that appears to the contrary, it may have been dropped on the floor immediately before plaintiff stepped on it, conceding that she did step on it. With the evidence in this condition as to this matter of negligence, it is impossible to say that the verdict of the jury was against the weight of the evidence. When there is no evidence, there is none to weigh."

In *Casale v. Public Service Co-ordinated Transport,* 10 N. J. Misc. Rep. 611, 160 Atl. 326, the court in a like case said: "It would appear that the banana peel was observed on the floor of the bus by another passenger before the accident happened, but during the course of the trip; just how long before or at what distance from the point in the trip where the accident happened does not appear. The defendant's proofs established that there had been an inspection of the bus by the driver before the trip began and that at that time anything on the floor was removed and thrown out. The banana peel was presumably dropped by

some passenger on this particular trip. * * * There was no proof of knowledge in the driver of the presence of the peel on the floor, nor was there proof that it had been there for such a length of time as to impute notice to the driver. * * * We think the case should have been controlled by the court and a verdict directed in favor of the defendant."

Also, in *Jones v. St. Louis-San Francisco R. Co., supra,* the court said: "In the case at bar there is no evidence that any one at any time saw a banana peeling on the floor of the car. There is evidence that plaintiff saw a banana being eaten, but she was unable to state how long this was prior to the accident and in fact plaintiff did not see what was done with the peelings after the banana was eaten. She gave the matter little attention at the time. No one apparently knew what became of the banana peelings. Under such state of facts the conclusion is irresistible that plaintiff failed to make a case. That she was severely injured there can be no doubt, but to recover from this defendant she was required to prove the negligence alleged caused her injury. Defendant's servants may have been guilty of negligence in failing to inspect and clean the car, but unless such negligence caused her injury there can be no recovery. The case fails because plaintiff has produced no evidence of probative force in support of her charge of specific negligence."

Since it has not been shown that any of the employees of the street car company knew of the presence of the banana peel upon the steps, or that it had been there such a length of time before the accident happened as would impute notice to them, we are of the opinion that the trial court erred in not directing a verdict for the defendant.

REVERSED.

ELIZABETH JANE LEMON, APPELLEE, V. RICHARD F. HOFFMARK, APPELLANT.
272 N. W. 214

FILED MARCH 23, 1937. No. 29900.

1. **Negligence.** In determining questions of alleged negligence, it is the province of the courts to take a series of facts and circumstances conceded or proved, and to declare what are the rights of the parties arising out of them.
2. ———. Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1935, means negligence in a very high degree, or the absence of even slight care in the performance of a duty.
3. ———. The existence of gross negligence must be determined from the facts and circumstances in each case.

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

Hall, Cline & Williams, for appellant.

Chambers & Holland, contra.

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

MESSMORE, District Judge.

This is an appeal from a judgment of the district court for Lancaster county entered upon a verdict of the jury in favor of the appellee in the sum of $750.

For a reversal of this judgment appellant contends that Helen Hoffmark, the driver of the car in which appellee was riding at the time she received the injuries complained of, was not guilty of gross negligence, that such finding of the jury was clearly against the weight of the evidence, and that the trial court erred in refusing to direct a verdict for appellant on his motion made at the conclusion of appellee's case and at the conclusion of the trial.

The evidence discloses that the accident occurred on a Sunday afternoon, at about 4 o'clock, on an east and west country dirt road north and west of the village of Emerald, in Lancaster county; that said road was not wide but in

comparatively good condition; that the day of the accident, February 10, 1935, was a clear day, described by one witness as "gorgeous;" that seven girls of high school ages, 16, 17 and 18, were riding in the car at the time of the accident, three in the front seat and four in the rear seat.

The evidence is not clear or definite as to just what the driver of the car did do at or just prior to the accident. The witness, Evelyn Hopkins, seated in the rear seat of the car on the left side at the time of the accident, testified that the driver of the car took her right hand off the steering wheel and moved it to the back of the front seat, turned her body to the right and looked around so the witness could see her face and one but not both eyes; that the driver took her eyes off the road ahead of the car and the accident occurred almost instantly. Describing the course of the car after leaving the road, this witness said: "I was sitting so I could see out of the window and I noticed we were off the road and then it just slid into the ditch very quick." This witness further testified as follows: "Q. Why did she (meaning the driver) turn? A. We were eating and she was going to get something. * * * Q. Who in the back seat gave Helen something to eat? A. Dorothy Van Patten. Q. And when was that? A. It was just a little before the accident happened. Q. How much before? A. It was just before. Q. You mean just instantly before? A. Yes. * * * Q. Well, what did they say * * *? A. They said, 'Here is a sandwich for you.' * * * Q. Did you all have the lunch boxes open at that time? A. Yes. * * * Q. But you do know Dorothy Van Patten handed her (the driver of the car) a sandwich? A. I am quite sure she did. Q. Did Helen Hoffmark get the sandwich? A. I don't know. * * * Q. Then after this remark was made Helen Hoffmark turned, did she, in the seat? A. Yes. Q. And put her right hand up on the back of the seat, did she? A. Yes." This same witness testified that the driver drove 25 feet after she put her right hand on the back of the front seat, that she turned her head slightly, and that the car was going 30 miles an hour at the time of the accident.

Appellee testified that the driver turned her head to the right so she could see three-fourths of the profile of her face, and that the driver looked back toward the back seat; that everything happened so quick, the car just shot across the road, going west, and went into the ditch on the left; that at the time the car started for the ditch and went into the ditch the driver was looking toward the back seat.

Witness Helen Hoffmark, the driver of the car, testified that they had had something to eat about a half an hour before the accident; that just prior to the accident she was not reaching into the back seat to get a sandwich. Her version of the accident is given in her answer to the following question: "Q. Tell the jury in your own words how this accident occurred, what you were doing. A. We were driving along this country road; it was wide enough for one car in the hard center portion and we were going along about 20 miles an hour and some one said, 'Look, Hoffie,' in the back seat, and I glanced around, and as I glanced I believe the car went slightly to the left-hand side of the road and was pulled into this soft part of the road and after that I think we hit the ditch." To the question, "What happened as you glanced back and the wheels hit the soft dirt, what happened to the car?" this witness replied: "The car was pulled to the left-hand side of the road and off into the stubble, I should call it." This witness further answered: "I turned my head, I may have turned my shoulders slightly, but I don't think so." To the question, "How long did you look towards the back seat?" she replied, "Just the fraction of a second."

The witness Betty Orme, seated in the front seat to the right of the driver and between the driver and appellee, said there was a general remark about Mary Margaret, one of the girls riding in the rear seat, and fixed the speed of the car at 25 to 30 miles an hour just before the accident.

The witness Dorothy Van Patten, riding in the rear seat on the right side, fixed the speed of the car at 25 miles an hour at the time of the accident; that she saw the driver glance around when her attention was called to the back

seat, when some one said, "Look around, Hoffie," and that the driver glanced around just for a second; that she was sure, when the driver turned around, she did not take her right hand off the steering wheel and put it on the back of the front seat; that she did not see the driver at any time just before the accident occurred reach back into the back seat for a sandwich; that the driver declined a sandwich.

The testimony discloses that the car did not turn over after leaving the road, but stopped in the deeper portion of the ditch.

The foregoing constitute the pertinent facts in this case as they relate to the accident.

The sole and only issue is the sufficiency of the evidence to warrant the submission to the jury the question of gross negligence on the part of the driver at the time of the accident.

Counsel for appellant have analyzed for the benefit of the court all of the Nebraska decisions involving an interpretation of the guest act. Most of these indicate excessive speed or a continuous course of negligent conduct on the part of the driver or protests made by persons riding in the car to the driver about the manner of his driving.

The Nebraska guest act, section 39-1129, Comp. St. Supp. 1935, reads as follows: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of said motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term 'guest' is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, but shall not be construed to apply to or include any such passenger in a motor vehicle being demonstrated to such passenger as a prospective purchaser."

The use of intoxicating liquors is not involved in the instant case.

In *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96, it was held:

"Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1931, means negligence in a very high degree, or the absence of even slight care in the performance of a duty.

"The existence of gross negligence must be determined from the facts and circumstances in each case.

"The question of gross negligence is for the jury, where the evidence relating thereto is conflicting and from which reasonable minds might draw different conclusions."

In the opinion in case of *Morris v. Erskine, supra,* we find this language: "We are of the opinion that in adopting the guest act the legislature used the term 'gross negligence' as indicating a degree of negligence. Negligence may be slight, ordinary, or gross. Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It may be said that it indicates the absence of even slight care in the performance of a duty, and such, we think, is the meaning intended by the legislature. * * * Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine."

In case of *Thurston v. Carrigan,* 127 Neb. 625, 256 N. W. 39, wherein a directed verdict was entered for defendant by the lower court and the action of the lower court affirmed by this court, without repeating the facts therein shown, the principal fact noted being that of negligence in driving at a high rate of speed, this court stated in its opinion: "In determining questions of alleged negligence, it is the province of the courts to take a series of facts and circumstances conceded or proved, and to declare what are the rights of the parties arising out of them."

In cases of *Covey v. Anderson,* 130 Neb. 702, 266 N. W. 595, and *Heesacker v. Bosted,* 131 Neb. 42, 267 N. W. 177, both citing the case of *Morris v. Erskine, supra,* it was held

that evidence of gross negligence must be determined from the facts and circumstances in each case, as do all the decisions of this court subsequent to the decision in case of *Morris v. Erskine, supra.*

In the case at bar the facts disclose that the existence of danger, if any, was not apparent to the driver of the car; no protests were made to her by her guests in the manner of operation of the car; there was not a continuous course of negligent driving, nor did the driver persist in driving negligently; the driver was not heedless of the consequences nor conscious of the peril; the speed of the car was moderate. Analyzing all the facts pertinent to the accident and as herein set out, Helen Hoffmark, the driver of the car, may have been guilty of negligence, that is, of doing something that a reasonable and prudent person would not ordinarily have done in the situation and under the circumstances in question, or she may have failed to do what a reasonable and prudent person would have ordinarily done in such situation and under such circumstances, yet she was not guilty of gross negligence, as such term has been defined by this court.

It is true that it is not necessary, in order to show gross negligence, to prove several acts of negligence; that is, a continuous course of negligent conduct, or excessive speed combined with such conduct, or protests on the part of the guest to the driver at and prior to the time of the accident.

It is also true that gross negligence may consist, in some cases, in turning the head or taking the eyes off the road, but all the conditions and circumstances in existence at the time of the commission of the alleged grossly negligent acts are to be taken into consideration.

In the case at bar the accident occurred on an ordinary country road and in the absence of traffic. The road was in fairly good condition, though it was not wide, but with about six inches to a foot to spare on each side of the car to the soft dirt, and was in such condition that travel over it under the circumstances was not dangerous. The accident happened perhaps when the driver took her eyes

from the road, as shown by the testimony, for a fraction of a second or not to exceed a second; perhaps the car did travel 25 feet after leaving the road.

We believe that it was error on the part of the lower court to submit the case to the jury, under the evidence, and the judgment of that court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. JAMES H. COVER, APPELLANT: OMAHA TRUST COMPANY ET AL., APPELLEES.

272 N. W. 230

FILED MARCH 23, 1937. No. 29911.

1. Mortgages: FORECLOSURE: MORATORIUM. When it appears from the evidence the amount of mortgage liens on land under foreclosure exceeds its value, moratory stay must be denied.
2. ———: ———: SALE: CONFIRMATION. Mere inadequacy of price will not preclude confirmation of mortgage foreclosure sale unless it is such as to shock the conscience of the court or amount to evidence of fraud.

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

W. A. Stewart, Jr., and *Hoagland, Carr & Hoagland*, for appellant.

Charles D. Hitch and *York & York, contra.*

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

MESSMORE, District Judge.

This is an appeal from a decree of the district court for Dawson county denying a moratory stay and confirming the sale of lands under foreclosure proceedings.

There are 587 acres of land involved in this proceeding, unirrigated, but good land and with good improvements

thereon. On the date of confirmation there were valid and existing liens against the land amounting to $104,998.54. At the sale appellee insurance company originally bid the sum of $36,827.93. Its first mortgage lien with interest thereon was in the sum of $55,012.60, which latter sum it later bid for said land and which was the last and best bid therefor, amounting to $93.63 an acre.

It is proper for the trial court to take into consideration all liens against the property, including unpaid taxes, in determining whether or not defendant had any equity in such land above the liens. *Willson v. Quein*, 131 Neb. 615, 269 N. W. 121.

The evidence discloses that appellant and his son fix the value of the land at $100 an acre; other witnesses for appellant fix it at $75 an acre, while still others fix it at prices ranging from $43,000 to $46,960 for the whole tract. Some of appellee insurance company's witnesses fix it at $60 an acre. It will thus be noted that, with the exception of appellant's evidence and that of his son, the value of the land as fixed by disinterested witnesses for both parties is much less than the bid of appellee insurance company, and in such case, when it appears that the applicant for a moratory stay has no equity in the land and the amount of mortgage indebtedness exceeds the value of the land, it is not an abuse of discretion on the part of the trial court to deny the application. *Clark v. Hass*, 129 Neb. 112, 260 N. W. 792; *Srajhans v. Mares*, 130 Neb. 924, 267 N. W. 82. In the latter case this court held:

"When it appears from the evidence that the amount of the mortgage liens on the land exceeds its value, a moratory stay * * * must be denied.

"Mere inadequacy of price will not preclude a confirmation of a foreclosure sale unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud." See *Luikart v. Graf*, 130 Neb. 736, 266 N. W. 641; *First Trust Co. v. Airdale Ranch & Cattle Co.*, 131 Neb. 475, 268 N. W. 362; *American Central Life Ins. Co. v. Brown*, 131 Neb. 761, 269 N. W. 904; *American Central*

Life Ins. Co. v. Brown, 131 Neb. 764, 269 N. W. 905; *First Trust Co. v. Rathbone, ante*, p. 211, 271 N. W. 428.

The evidence is wholly inadequate to establish fraud in this proceeding.

For the foregoing reasons, the decree and judgment of the lower court are

AFFIRMED.

ADELINE MEDOW, APPELLANT, V. CHRISTOPHER H. RIGGERT, APPELLEE.

272 N. W. 238

FILED MARCH 26, 1937. No. 29884.

1. **Statutes:** CONSTRUCTION. "If a statute adopted from another state had been construed by the courts of that state prior to its adoption here, the same construction should be given ordinarily in this state in the absence of any indication of a contrary intention on the part of the legislature." *Goble v. Simeral*, 67 Neb. 276, 93 N. W. 235.
2. ———: ———. "The reluctance of courts to construe a statute so as to permit it to operate harshly in particular cases, must yield to plain and unequivocal indications of legislative intent." *Goble v. Simeral*, 67 Neb. 276, 93 N. W. 235.
3. **Guardian and Ward.** "A guardian is discharged, within the purview of section 32, chapter 34, Compiled Statutes (now section 20-210, Comp. St. 1929), when the ward becomes of age." *Goble v. Simeral*, 67 Neb. 276, 93 N. W. 235.
4. ———: SURETIES: LIMITATIONS. "As to the sureties upon the guardian's bond, the period of limitation provided in said section begins to run from the date of such discharge, not from the time when a cause of action has accrued upon final settlement. If no cause of action accrues within the period fixed, by reason of failure to take or complete the necessary steps, the sureties do not continue to be liable." *Goble v. Simeral*, 67 Neb. 276, 93 N. W. 235.

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

McKillip & Barth, for appellant.

Erwin A. Jones, contra.

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

GOSS, C. J.

Plaintiff appeals because the district court sustained a demurrer to her amended petition, upon which she elected to stand.

The amended petition, filed January 11, 1936, alleged that on January 13, 1927, a petition was filed in the county court of Seward county asking the appointment of a guardian for the estate of Adeline Sunderman (now Medow, plaintiff herein), a minor; on a hearing letters of guardianship were issued to B. J. Sunderman, conditioned upon his executing a bond, with surety, for $7,000; on January 21, 1927, B. J. Sunderman, as principal, filed the bond with Christopher H. Riggert as surety, and on the same day it was approved by the county judge and Sunderman filed his oath and received property belonging to his ward in the sum of $7,000; plaintiff attained her majority January 1, 1928; on February 7, 1934, the guardian's account was duly settled by the county judge, who found there was due from the guardian to plaintiff the sum of $4,900; the guardian, who was the principal upon the bond, is dead (a decree of the county court, attached to the petition as an exhibit, reciting his death on March 30, 1932), his estate is insolvent, plaintiff has made demand on the surety to pay the amount due, he has refused, and the county court has granted her permission to bring suit upon the bond; she prays judgment against said surety for $4,900 with interest at 6 per cent. from February 7, 1934, and costs.

Section 20-210, Comp. St. 1929, says: "No action shall be maintained against the sureties in any bond given by the guardian unless it be commenced within four years from the time when the guardian shall have been discharged." Defendant argues that the arrival of the ward at her majority on January 1, 1928, was, in effect, a discharge of the guardian and started the four-year statute to running. The district court was of the same opinion

and that is the reason why the demurrer was sustained inasmuch as the action was not commenced for about eight years after the minor ward reached her majority. The exact date when this suit was commenced is not disclosed as the transcript shows the first filing to be that of the amended petition, filed January 11, 1936.

Plaintiff argues that the cause of action accrued on February 7, 1934, when the amount due the ward was ascertained and fixed by decree of the county judge.

The ultimate decision of the controversy depends on the meaning of the word "discharged," heretofore quoted in section 20-210, Comp. St. 1929.

In the chapter on guardianship of minors, section 38-109, Comp. St. 1929, says: "Every guardian appointed as aforesaid shall have the care and management of the estate of the minor, and shall continue in office until such minor shall arrive at the age of twenty-one, or until the guardian shall be discharged according to law." The decision of the trial court gives effect to the word "or" and holds that the cause of action accrued and the four-year statute of limitations started running when the ward became of age on January 1, 1928.

Almost identical facts existed in *Goble v. Simeral*, 67 Neb. 276, 93 N. W. 235. The opinion was written by Pound, C. The opinion traces the history of the statutory provision, now section 20-210, Comp. St. 1929. It recites that this statutory provision "originated in Massachusetts. Afterwards it was adopted by Michigan. Thence it passed to Wisconsin, and from Wisconsin it came to Nebraska. This history is sufficiently clear from inspection of the several statutes themselves, but has been carefully worked out by the supreme court of Wisconsin in *Paine v. Jones*, 93 Wis. 70, 67 N. W. 31 (quotation from Wisconsin case omitted here). But long before the statute was taken over in Nebraska, the courts of Massachusetts had construed it in *Loring v. Alline*, 9 Cush. (Mass.) 68, and the construction adopted in Massachusetts has been followed since in Michigan and Wisconsin." In the opinion by Judge Pound

he demonstrates that "Statutes of limitations running from some specified act or event and not from the accrual of plaintiff's cause of action, are not uncommon." The opinion discusses many cases and holds as shown by these syllabus points:

1. "If a statute adopted from another state had been construed by the courts of that state prior to its adoption here, the same construction should be given ordinarily in this state in the absence of any indication of a contrary intention on the part of the legislature."

2. "The reluctance of courts to construe a statute so as to permit it to operate harshly in particular cases, must yield to plain and unequivocal indications of legislative intent."

3. "A guardian is discharged, within the purview of section 32, chapter 34, Compiled Statutes (now section 20-210, Comp. St. 1929), when the ward becomes of age."

4. "As to the sureties upon the guardian's bond, the period of limitation provided in said section begins to run from the date of such discharge, not from the time when a cause of action has accrued upon final settlement. If no cause of action accrues within the period fixed, by reason of failure to take or complete the necessary steps, the sureties do not continue to be liable."

The court held that an action could not be maintained against the sureties more than four years after the ward became of age and affirmed the judgment of the district court to that effect.

In *Langdon v. Langdon,* 104 Neb. 619, 178 N. W. 178, it was held that no action can be maintained on a guardian's bond until the amount to be due from the guardian is first ascertained on the settlement of the guardian's first account by the county court. No mention is made of *Goble v. Simeral, supra,* but it is to be noted that the ward in this *Langdon* case was under disability and brought the suit against the guardian and her surety almost immediately after his release from the state insane asylum, where he had been confined shortly after reaching his majority.

In *Hughes v. Langdon,* 111 Neb. 508, 196 N. W. 915, in an opinion by the late George A. Day as a judge of this court, *Goble v. Simeral, supra,* seems to be approved, but the opinion held that the case under consideration came under the exception to the ruling statute (now section 20-210, Comp. St. 1929) in that the ward was under disability and the statute had not run "after such disability had been removed."

Wilkins v. Deal, 128 Neb. 78, 257 N. W. 486, is another case cited by appellant to the effect that no action can be maintained on a guardian's bond until the amount is first ascertained on settlement of the final account by the county court. It is not strictly in point with the case at bar because it was a controversy as to whether a succeeding surety was liable for the failure of the guardian to account for money lost under a preceding surety, rather than the controversy arising here between the ward and a surety as to when the statute of limitations began to run.

Ball v. LaClair, 17 Neb. 39, 22 N. W. 118, is relied upon by appellant as holding that the right first accrues to the ward when the amount due from the guardian is ascertained by the county court on the settlement of the guardian's first account. The first syllabus does so announce, but an examination of the case shows that the statute of limitations was not raised and was not involved. The petition did not allege any proceedings whatever in the county court after the guardian was appointed and her bond approved except that the county court granted plaintiff permission to sue upon the guardian's bond. The only point in that case is that on the trial defendant objected to any evidence because the petition did not state facts sufficient to constitute a cause of action. The objection was overruled, the evidence received and plaintiff had a verdict. The judgment was reversed and the cause dismissed.

Bisbee v. Gleason, 21 Neb. 534, 32 N. W. 578, is also relied upon by appellant. That case, too, did not depend on the statute of limitations. The petition shows that there had been no settlement of the guardian's account by the

county court fixing his liability to the ward for any amount in his hands belonging to the ward. A demurrer to the petition was overruled and judgment was entered against defendants. That opinion also held that the right to sue first accrues to the ward when the amount is ascertained by the county court on the settlement of the guardian's first account. The judgment was reversed and the cause was remanded for further proceedings.

Neither *Ball v. LaClair, supra,* nor *Bisbee v. Gleason, supra,* contains the point involved in either *Goble v. Simeral, supra,* or in the case at bar, both latter named cases raising and deciding that when the ward reaches his majority that fact operates to discharge the sureties on the bond of the guardian, if not sued within the four-year period of statute of limitations. Generally, and as applied to the facts appearing in *Ball v. LaClair, supra, Bisbee v. Gleason, supra, Langdon v. Langdon, supra,* and *Wilkins v. Deal, supra,* we think those opinions are sound on the facts there existing, and find no occasion to overrule them but hold them subject to the analysis we have made of them.

But we think that *Goble v. Simeral, supra,* states the true rule and is decisive of the rather identical facts in the case at bar. For that reason, the judgment of the district court is

AFFIRMED.

WILLIAM H. TRIPLETT, APPELLEE, V. OLAF S. LUNDEEN ET AL., APPELLANTS.

272 N. W. 307

FILED MARCH 26, 1937. No. 29907.

1. **Negligence.** One may not recover damages for injury based on negligence of another, unless such negligence is the proximate cause of the injury.
2. ———: INSTRUCTIONS. In an action for damages for negligence, an instruction that plaintiff, to recover, must establish at the trial by a preponderance of the evidence that the injuries to his person or property were caused by the negligence of the

defendant is sufficient relative to the question of proximate cause, where there is no question of a remote or intervening cause.

3. Trial: INSTRUCTIONS. Instructions to the jury must be considered together, and if, when so considered as a whole, they properly state the law it is sufficient.
4. Evidence. In laying a foundation for the introduction in evidence of the statute of a sister state, it is sufficient if the party offering the statute substantially comply with the provisions of section 20-1269, Comp. St. 1929.
5. ———. Under section 20-1269, Comp. St. 1929, which provides that "statutes, code, or other written law, enacted by any other territory or state, * * * proved to be commonly admitted as evidence of the existing law in the courts of tribunals of such territory, state or government, shall be admitted by the courts and officers of this state on all occasions, as presumptive evidence of such laws," and where the evidence shows that the purported statutes were used generally in the practice of law in the state of their enactment, it raises a presumption that such statutes are admitted as evidence of the existing law in the courts of tribunals of such foreign state.
6. Appeal. A judgment will not be reversed for harmless error.
7. ———. One may not complain of misconduct of adverse counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chances of a favorable verdict.

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

Stiner & Boslaugh and *Lester R. Stiner,* for appellants.

Hart & Joyce, R. C. Mullins and *Bruckman & Dunmire, contra.*

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

GOOD, J.

This is an action to recover damages for personal injuries and property damage. The action arises out of an automobile collision. Plaintiff alleged that the collision was due to the negligence of the defendants. Defendants denied negligence on their part and alleged that plaintiff's injuries were the result of his own negligence. The reply

was a general denial. Trial of the issues resulted in a verdict and judgment thereon in favor of plaintiff. Defendants have appealed.

The following summary of facts is disclosed by the record: On the afternoon of March 11, 1935, defendants were traveling east on highway No. 36 between the towns of Meadville and Laclede in the state of Missouri, in an automobile owned by defendant Lundeen and being operated at that time by defendant Kissinger. The scene of the accident occurred in what is designated as the Locust Creek valley between the towns of Laclede and Meadville. The highway at that point runs directly east and west and is paved. There is a concrete slab 20 feet wide, and in addition a strip of asphalt and macadam, on either side of the slab, about three feet in width, and a dirt shoulder about five feet wide lies outside of the asphalt strips, thus making the entire width of the highway about 36 feet. Locust Creek valley lies between two hills, one on the east side and the other on the west side of the valley. From the brow of one hill to that of the other is a distance of about two and a half miles; from the bottom of one hill to that of the other is a distance of about two miles. The point of collision was either about midway between the two hills, or some distance east of that point. Plaintiff fixed the point of collision at about a half mile west of the east hill, while a number of other witnesses placed the location of the accident as near the half-way point between the two hills. The evidence shows that the day was clear, the pavement dry, and the highway a straight road, with nothing to obstruct a clear view of the road or of other vehicles, and it was possible to look directly from the top of one hill and observe the highway across the valley to the top of the other hill.

Defendant Kissinger was driving eastward on the south side of the pavement. When he began to descend the slope of the west hill into the Locust Creek valley he saw in front of him, about a quarter of a mile away, another car traveling east and on the same side of the highway. This car was being driven by one Zancker and will hereinafter

be referred to as the Zancker car. Kissinger testified that he was driving at the rate of about 40 miles an hour. Zancker testified that he was driving between 40 and 50 miles an hour, and the evidence clearly shows that Kissinger was overtaking the Zancker car. Kissinger admitted that he observed a car coming from the east slope, which was, in fact, the car driven by plaintiff. Plaintiff was driving westward and on the north side of the paving at a speed which he estimated at from 35 to 40 miles an hour. In front of the Zancker car, and also proceeding eastward, were a team and wagon driven by one Cross. Cross was likewise driving on the south side of the paving, and his team was walking. Kissinger testified that he did not see the team and wagon which was in front of the Zancker car. As Kissinger proceeded he gained upon the Zancker car, and the Zancker car also gained rapidly upon the team and wagon.

The four vehicles approached the scene of the accident, each being on its proper side of the highway, at approximately the same time. Zancker saw the plaintiff's car coming from the east and did not undertake to pass the team and wagon until plaintiff's car should pass. He slackened the speed of his car. Defendants insist that Zancker suddenly stopped his car, without giving any warning of his intention so to do. The evidence is in conflict as to whether Zancker stopped his car or only slackened its speed. No witness, other than Kissinger, testified that the Zancker car stopped. Other witnesses testified that Zancker only decreased its speed. Kissinger testified that when he saw the Zancker car slow down he applied his brakes, but was unable to stop his car, and that the application of the brakes caused his car to swerve to the left. He admits that the right side of his front bumper came in contact with the left side of the rear bumper of Zancker's car and that this caused his car to swerve still further to the left. He denies that he intended to pass the Zancker car, but alleges that his car swerved to the left solely because of his application of the brakes and his inability to stop his car. Ap-

parently, he observed that the Zancker car was slowing down when he was about 100 feet from it. The collision between the car driven by Kissinger and the plaintiff's car occurred about opposite the Zancker car and on the north side of the highway. Kissinger testified, however, that the front wheels of his car were not more than two or three feet over the center line of the paving, but the pictures of the cars taken after the collision are in evidence. They show that the right front side of defendants' car was crushed in and the right front of the plaintiff's car was crushed in, and that after the accident both cars, of plaintiff and defendants, were on the north side of the highway, partly on the pavement and partly on the north shoulder. We think that the physical facts show that Kissinger must be mistaken when he claims that his car was only two or three feet over the center of the slab.

Defendants admit that there is ample evidence tending to show that defendant Kissinger was negligent and that his negligence is imputable to defendant Lundeen, but complain of a number of the instructions, in that they do not specifically require the negligence of defendants to be the proximate cause of the injuries sustained by plaintiff. We think a slight review of the situation is proper before considering whether the instructions were prejudicially faulty. An examination of the record fails to show any negligence on the part of the plaintiff. It is clear that the accident resulting in plaintiff's injuries was caused by the negligence of defendants, or the negligence of Zancker, or the combined negligence of defendants and Zancker. There is no other explanation of the accident.

In instruction No. 3 the court informed the jury of the allegations of plaintiff's petition, and recited plaintiff's claims in this language: "That the injuries which plaintiff did so sustain if any, were caused by the negligence of the defendants in the particulars claimed by the plaintiff and stated to you in another instruction." And, after a further recital of the material allegations of the petition, the instruction proceeded: "But if the truth of all of said ma-

terial allegations as above stated to you have been established at the trial by a preponderance of the evidence, then your verdict should be for the plaintiff." In instruction No. 4 the court correctly defined what is meant by the term "proximate cause." In instruction No. 11 the jury were informed that if they found from the evidence that the collision and injuries proximately resulted from negligence on the part of the defendants the plaintiff could recover, unless plaintiff was also guilty of negligence proximately contributing to the injury. In instruction No. 12 the court told the jury: "If you find the defendants were not innocent, and that their negligence caused the injury to the plaintiff or his property, * * * and it has not been shown the plaintiff was negligent to any extent, then the plaintiff would be entitled to recover."

It is true that in a personal injury action mere negligence of defendants will not give rise to the right of recovery by the plaintiff, unless the negligence was the proximate cause of plaintiff's injury. However, it is not indispensable that the term "proximate cause" should be used. It is sufficient if it appears that defendants' negligence was the sole cause, or the efficient cause, or was the direct cause. In the instructions we think it clearly appears that the expression, that plaintiff's injury and damage were caused by the negligence of defendants, is equivalent to saying the defendants' negligence was the efficient or direct cause of plaintiff's injury, especially in view of the other instructions to which we will now refer. In another of the instructions the court informed the jury that if plaintiff's injuries were caused by the negligence of Zancker alone then the plaintiff could not recover; and in another instruction the court informed the jury that if plaintiff's injuries were caused by the concurring negligence of Zancker and defendants then plaintiff would be entitled to recover.

It is a rule that the instructions to the jury must be considered together, and if, when construed as a whole, they properly state the law it is sufficient. *Vithen v. Jensen*, 128 Neb. 188, 258 N. W. 267; *Iden v. Evans Model Laundry*, 121

Neb. 184, 236 N. W. 444; *Sheridan Coal Co. v. Hull Co.*, 87 Neb. 117, 127 N. W. 218.

In *High v. Waterloo, C. F. & N. R. Co.*, 195 Ia. 304, 190 N. W. 331, it was said that an instruction that plaintiff could only recover for injury in consequence of defendants' negligence is not misleading as to the question of proximate cause, although the words "proximate cause" were not used. See, also, 45 C. J. 1346.

In *Oliver v. Nelson*, 128 Neb. 160, 258 N. W. 69, this court held: "In an action for damages for negligence, an instruction that plaintiff must establish by the greater weight of the evidence that the negligence of the defendant caused the accident and the damage is sufficient relative to proximate cause, where there is no question of a remote or intervening cause."

Taking the entire charge to the jury, we are of the opinion that the material questions, at least so far as defendants were concerned, were fairly submitted. Criticism might be offered that the trial court submitted to the jury the question of the contributory negligence of the plaintiff and gave the comparative negligence rule which could apply only where there was contributory negligence on the part of the plaintiff, but the evidence did not justify the submission of these questions to the jury. In this respect the instructions were unduly favorable to the defendants.

In the petition plaintiff alleged that his right of recovery was governed by statutes of the state of Missouri, and pleaded certain portions of the statutes of that state. Defendants, by a general denial, put in issue the question as to whether or not the pleaded statutes were a part of the law of Missouri. On the trial plaintiff called a practicing lawyer from the state of Missouri who had practiced law there for many years. He testified that he had used and become familiar with the statutes of the state of Missouri; that they were printed in three volumes numbered 1, 2 and 3. He identified a volume as No. 2 of the Missouri statutes for the year 1929, and testified that such volumes were used generally in the practice of law in that state.

With this foundation, the plaintiff offered certain sections of the statute which he had pleaded in his petition. They were admitted in evidence over the objection of defendants.

Section 20-1269, Comp. St. 1929, reads: "Printed copies in volumes of statutes, code, or other written law, enacted by any other territory or state, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts of tribunals of such territory, state or government, shall be admitted by the courts and officers of this state on all occasions, as presumptive evidence of such laws." It is true that foundation for the admission of the Missouri statute did not literally conform to the requirements of our statute. However, if there was a substantial compliance with the statute that would be sufficient.

In *Stuart v. Pederson,* 41 Utah, 308, 125 Pac. 395, it was held: "Under Comp. Laws 1907, sec. 3379, which provides that statutes or codes purporting to be published under the authority of another state proved to be commonly admitted in the tribunals of such state are admissible in this state as evidence of such law, proof that Mills' Annotated Code of Colorado, properly identified and in evidence, was used by lawyers in that state and used and cited by the supreme court, *held* to show that it was commonly admitted in the courts of Colorado as evidence of the written law of that state." We think the showing in that case is very similar to that in the instant case, and that, under the circumstances, where there is no contrary showing of any sort, the proffered evidence is sufficient to indicate that volume No. 2 of the statutes of Missouri was commonly admitted as evidence of existing law in the state of Missouri and was, therefore, properly admitted in evidence.

Defendants complain of alleged misconduct of counsel for the plaintiff in their attempt to show that defendant Kissinger was arrested, pleaded guilty, and paid a fine in Missouri on the charge of reckless driving, growing out of the accident in this case. The trial court excluded all of the

evidence upon this subject. It is further contended that counsel for plaintiff were guilty of misconduct in attempting to get before the jury, other than by cross-examination of the defendants, the fact that defendants carried liability insurance. It may be conceded that this was an improper way to proceed. The rule in this state at the time of the trial was that, in a personal injury action, defendant might be inquired of and answer whether he carried liability insurance. That question was later propounded to defendants, and it was shown that they did carry liability insurance, so that the attempt to get that question before the jury in another way could not have been prejudicial. A judgment will not be reversed by harmless error.

There is another reason why defendants cannot complain of the misconduct of counsel for plaintiff. Counsel for defendants knew of it at the time. If they were not satisfied that the jury could give defendants a fair trial, they had the opportunity of asking for a mistrial, but elected to proceed and take the chances of a favorable verdict. Defendants are not, therefore, in a position to complain of such misconduct.

The record fails to disclose error prejudicial to the defendants. Accordingly, the judgment is

AFFIRMED.

FRED E. BODIE, TRUSTEE, APPELLANT, V. J. LEONARD EPLER ET AL., APPELLEES.
272 N. W. 249

FILED MARCH 26, 1937. No. 29798.

Appeal. Evidence examined, and *held* sufficient to establish the existence of a question of fact exclusively cognizable by a jury, and the withdrawal thereof from their consideration by the trial court constituted reversible error.

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

John J. Ledwith, Herman Ginsburg and *J. A. Capwell,* for appellant.

Dwyer & Dwyer, contra.

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

EBERLY, J.

This is an action of forcible detainer. It was originally commenced in the county court of Cass county by Fred E. Bodie, trustee, against J. Leonard Epler and Ada A. Epler, to recover possession of a certain farm situated in Cass county, Nebraska. The complaint is in the usual form, seeking a recovery of premises alleged to have been demised to defendants for one year, and the termination of the lease by failure of defendants to pay rental therefor, and service of appropriate notices.

The defendants, in answer, denied each and every allegation of plaintiff's complaint; alleged ownership and occupancy of the premises as their home and homestead by J. Leonard Epler and Ada A. Epler, his wife, defendants, continuously since March 1, 1928. They further allege the conditional settlement of the mortgage indebtedness against said premises by an escrow agreement dated September 19, 1932, the execution and delivery of a warranty deed as required thereby; that the escrow agreement, according to its terms, lapsed at the termination of sixty days after the making thereof; that by fraud and false representations the plaintiff secured the signing of a "correction deed" to replace the deed executed by defendants on October 19, 1932, pursuant to the lapsed escrow agreement, and canceled such former deed; that said correction deed, dated January 29, 1934, though purporting to convey their homestead, was not signed by defendant Ada A. Epler, and was not acknowledged by defendant J. Leonard Epler, was without consideration as to either defendant, and was void; and further challenged the county court's jurisdiction to hear and determine the rights and equities between the parties to the action in this proceeding.

From an adverse decision in the county court, defendants appealed to the district court. There the action proceeded on the pleadings as filed in the county court. A jury was impaneled and a trial of the issues entered upon. At the conclusion of plaintiff's evidence in chief, the trial court sustained the separate motions of the defendants to discharge the jury and dismiss plaintiff's action, because of the insufficiency of the evidence, and because the evidence shows that the question involved in this action is the title to the real estate, and the county court was without jurisdiction to hear and determine said title, and the district court thus acquires no jurisdiction on appeal. From this judgment of dismissal, and the order of the trial court overruling his motion for a new trial, plaintiff appeals.

In determining whether the trial court's action in this case was justified, plaintiff, against whom the judgment was entered, is entitled to have every controverted question of fact resolved in his favor, and to have the benefit of every inference that reasonably can be deduced from the facts in evidence. He is also entitled to the consideration as evidence of all offers of proof which may have been improperly excluded. *Schmelzel v. Leecy*, 104 Neb. 672, 178 N. W. 267; *O'Hara v. Hines*, 108 Neb. 74, 187 N. W. 643.

It appears in this case that at least prior to October 19, 1932, the defendants, husband and wife, were owners of the property in suit, as their home and homestead. The contention of appellant is that defendants, after that date, conveyed the title in fee simple of the premises in suit to plaintiff's *cestui que trust*, and at the time of the original commencement of this action in the county court these defendants were in the occupancy of said premises pursuant to a lease, and that a *bona fide* relation of landlord and tenant then existed between the parties to this litigation.

On the basis of these facts plaintiff contends that the applicable legal principles are: "A lessee who holds over after the expiration of his term is estopped from denying the existence of the relationship of landlord and tenant between himself and his lessor, and may not in an action

for forcible detention attempt to impeach his landlord's title and to assert superior right of possession in himself." In support of the foregoing, the following cases are cited: *Polenske v. Polenske,* 107 Neb. 496, 186 N. W. 530; *Wilson v. Lyons,* 4 Neb. (Unof.) 406, 94 N. W. 636; *Gies v. Storz Brewing Co.,* 75 Neb. 698, 106 N. W. 775; *Hackney v. McIninch,* 79 Neb. 128, 112 N. W. 296; *McAusland v. Pundt,* 1 Neb. 211; *Kouma v. Murphy,* 129 Neb. 892, 263 N. W. 211; *Schroeder v. Bartlett,* 129 Neb. 645, 262 N. W. 447.

In short, the controlling question in this case is: Did the relation of landlord and tenant exist between the plaintiff and the defendants at the commencement of this suit?

It may be conceded that there is an absence of a formal written lease. But, the rule is: "The relationship of landlord and tenant may arise from the implied agreement of the parties, and may be established by proof of circumstances authorizing the inference that the parties intended to assume such relationship toward each other." 35 C. J. 957.

That this principle has been given recognition by this court, may be seen in the following cases:

"Generally, the relation of landlord and tenant is founded upon express contract; but such relation may be presumed from the conduct of the parties in the premises." *Steen v. Scheel,* 46 Neb. 252, 64 N. W. 957.

"The relation of landlord and tenant may be created by implication or by express contract. The law will, in general, imply the existence of a tenancy wherever there is an ownership of land on the one hand and an occupation by permission on the other, for in such cases it will be presumed that the occupant intended to pay for the use of the premises. It will be implied in many cases where there has been no distinct agreement between the parties." *Skinner v. Skinner,* 38 Neb. 756, 57 N. W. 534.

"One in exclusive possession of the real estate of another with the latter's knowledge, in the absence of all evidence on the subject, will be presumed in possession by the owner's permission." *Skinner v. Skinner, supra.*

The following excerpt from *Polenske v. Polenske*, 107 Neb. 496, 186 N. W. 530, may clarify the situation as to the issues under the facts in the instant case:

"If one who is already in possession accepts a lease from a third party, the presumption is that he is yielding the possession which he held under claim of right, and taking possession and holding it thereafter under and by virtue of the lease. * * * Where it is clear that the lessee executed the lease, a justice of the peace may determine all questions as to whether the lessee is wrongfully holding over his term, either by expiration of the term by nonpayment of rent, or by any other breach of the contract which may render his possession unlawful. If the lessee asserts a *bona fide* claim of title, he may still litigate it in the proper forum after he has yielded possession to the lessor. He is not entitled to occupy the inconsistent position of being the owner of the land and at the same time the tenant of another owner."

Taking up now the consideration of the evidence in the record for the purpose of determining the relation of the parties to this litigation, in the light of the principles of law referred to, we find the following situation: Prior to September 19, 1932, the defendants were the owners and occupants of the premises in suit, which were then encumbered by two mortgages aggregating $6,127.50 and interest accrued thereon. On September 19, 1932, defendants, as first parties, entered into a contract in writing with the Federal Trust Company, as second party, with reference to said premises. This contract was duly acknowledged by the several parties thereto on October 19, 1932. It recites the existence of the mortgages above referred to; that "First parties (defendants) feel themselves unable to pay the items due on said loans, hereinbefore described, which fell due July 1, 1932, and feel unable to perform the provisions of said mortgages; and * * * wish to give up said land in consideration for releases of personal liability on said mortgages; and the parties hereto desire to effectuate a settlement thereof; now, therefore, it is mutually agreed

between the parties hereto, as follows: 1. First parties agree to forthwith execute, acknowledge and deliver a warranty deed to the above described real estate conveying the same by full covenants of warranty subject only to the lien of the real estate mortgages hereinbefore described and the taxes; and grantee in said deed shall be blank; and said deed shall be deposited forthwith by first parties with a reputable escrow holder, satisfactory to second party, to be held and delivered in accordance with the provisions of this contract."

By paragraph 2 first parties reserved the right to sell said premises, or furnish a purchaser thereof any time prior to March 1, 1933. By paragraphs 3 and 4 it was provided:

"3. It is further agreed that in the event such a purchaser shall not be obtained by first parties and said deed not be delivered, as provided in the preceding paragraph hereof, prior to March 1, 1933, that then on March 1, 1933, the said escrow holder shall, and he is hereby authorized and directed to, deliver to second party the said warranty deed; and second party is hereby authorized and empowered to insert the name of any person suitable to it as grantee under said deed and to thereby deliver the title to said premises to such grantee; and first parties especially agree that they will vacate said premises and deliver up the possession thereof to second party on or before March 1, 1933, *and that second party* or the grantee by it named, as herein provided, *shall be entitled to* the immediate possession of *said premises on March 1, 1933;* and it is further especially agreed that *first parties release and waive all rights and interest of every nature, including homestead rights,* which they may or might have in or to said premises. (Italics ours.)

"4. It is further agreed that in the event said warranty deed hereinabove described, is delivered to second party, as herein provided, and accepted by it, that first parties shall be released and discharged from all liability on said hereinbefore described real estate mortgages."

Paragraph 5 contained an option for the benefit of the second party which, by its exercise within 60 days, would have secured its discharge from the obligations of this contract.

It appears that neither of the parties exercised their respective options. The contract does not, in express terms, provide that time shall be deemed of the essence of the contract, and it appears that the same never lapsed nor ceased to be in force and effect.

On October 19, 1932, a warranty deed was executed by J. Leonard Epler and Ada A. Epler, and delivered in strict pursuance to such contract. There was also executed and delivered to Ada A. Epler by the second party a release of all claims and demands of every nature, bearing date October 19, 1932; and on the same instrument containing such release, under date of March 1, 1933, signed by Leonard Epler (defendant) is the following: "The said Federal Trust Co., trustee, is hereby authorized to file of record a certain deed signed by J. Leonard Epler and Ada A. Epler, Oct. 19th, 1932."

In the meanwhile the Federal Trust Company became insolvent, and on June 15, 1933, Fred E. Bodie was appointed successor trustee and qualified as such. On August 4, 1933, as such trustee, he mailed a letter to "J. L. Epler," defendant. This letter contained the following: "Will you please advise us by return mail if you are now occupying the land in Cass county, on which you formerly gave a mortgage to the Federal Trust Company. Also please advise us if a lease was ever signed by you and the terms of rental." This letter was returned to the writer, and written thereon was the following: "Plattsmouth, Nebr. Dear Sir: I am still living on the place, and rented it for two-fifths of the crop. Yours Respt. Leonard Epler."

On June 2, 1933, Epler wrote another letter, addressed to the field man of the Federal Trust Company, with reference to a threatened trespass of the Burlington Railway Company on said land, in order that proper steps might be taken by the Federal Trust Company, as owner, or its trustee, to protect its rights.

The two mortgages referred to in the contract have been properly released of record, and these original instruments and the notes secured by the same, being the mortgages and notes settled and satisfied by the terms of the agreement hereinbefore referred to, were enclosed in an envelope, which the evidence in the record indicates was placed in the United States mail for transmission to J. Leonard Epler, the defendant. In addition, releases of mortgages, covering each of the aforesaid mortgages, were duly filed and recorded in the real estate mortgage records of Cass county.

The record further discloses that Mrs. Epler, defendant, in January, 1934, paid $20 "on back rent" for the premises in suit. This testimony was not stricken from the record. However, the trial court wrongfully excluded plaintiff's offer, viz., "We offer to prove by this witness (Bodie) that if permitted to testify he would testify that during the month of January, 1934, the defendant (Ada A. Epler) paid him the sum of $20 to apply on the 1933 rent and agreed to pay the balance of the 1933 rent on or before March 1, 1934."

This witness (Bodie) further testifies that, in the forepart of 1934, he had a conversation with both of the defendants, as follows: "Q. You may state what was said. A. The old barn on the premises was badly dilapidated and Mr. Epler needed a new barn and he had asked me if he could dismantle an old building that was pretty near directly west of the residence property, and I told him that would be agreeable with me. Out of the lumber he wanted to build himself a new barn and he did, and Mrs. Epler asked me if I wouldn't allow them something for the work that they did on the barn and we finally agreed upon the price of $30, to be allowed on the back rental. Q. Did you give them that credit on the rent? A. Yes."

This same witness further testifies that on April 27, 1934, he received the further sum of $57 on the rental of 1933, being the proceeds of "one hundred ninety bushels of corn, sold at thirty cents by Mr. Epler to the Murray Elevator Company." Further, that the taxes on the prem-

ises for the years 1930, 1931, 1932, 1933, and 1934 were paid by plaintiff, who also paid for the insurance on the buildings on the premises.

It also appears that on January 29, 1934, a deed of correction was executed and delivered by the defendants, to be substituted for the deed executed and delivered by defendants on October 19, 1932, which first deed was, by agreement of parties, canceled.

We do not overlook the fact that the testimony of J. Leonard Epler is that this correction deed was not signed by Ada A. Epler, his wife, and was not acknowledged by either his wife or himself. However, this evidence is squarely met by the testimony of the notary public before whom the instrument was executed and by whom the acknowledgment was taken, to the effect that the instrument was signed, executed, and acknowledged by both defendants in his presence. This disputed fact was for the determination of the jury and not the trial judge.

The evidence is uncontradicted that on the 20th or 21st of February, 1934, a representative of the plaintiff called upon the defendants and discussed the rental of the premises to defendants for 1934, as to which the following testimony appears in the record: "Q. You may tell us what was said by Mr. Epler and yourself at that time. A. I told Mr. Epler that I came out there at the request of Mr. Bodie to collect the balance of the rent for the preceding year, and instructed him to sell the corn, the share that belonged to Mr. Bodie, as trustee, and remit the proceeds. Q. Was anything else said, Doctor, about a lease for the year 1934? A. Yes; I was to make a new lease with him for 1934 if he paid up the rent; that is, I told him that Mr. Bodie said that if he would pay the rent that he would lease him the land again for 1934. Q. Just tell us what was said. Finish the conversation. A. I told him that we would have to have more than $75 rent for the pasture because there was too much land there for the amount of money that he was paying, and as the bondholders, or Mr. Bodie, as trustee, would get but very little out of it, and

the taxes and one thing another was such that it would be necessary to have a larger rental, and I told him that he could have the place for the year 1934 upon payment of $125 cash rent, in the place of $75 that he was to have paid for 1933, and two-fifths of the corn delivered to market. Q. What did Mr. Epler say? A. He objected somewhat on the $125 because he said the well wasn't giving as much water as it ought to and he doubted very much whether or not he could run enough cattle in there with the amount of water he had in order to equal the $125, and wouldn't object to it if Mr. Bodie would do something about the well. And I said, 'I have no authority to make any contract about a well or promise anything of that kind.' I said, 'However, I will speak to Mr. Bodie about the well, but the rent will be $125 cash and two-fifths of the corn.' Q. What did he say to that? A. It seemed to be perfectly satisfactory. * * * Q. Now then Doctor, did you later have another conversation with Mr. and Mrs. Epler in the month of March, 1935? A. I did. Q. Who was present at that time? A. Mr. Epler and Mrs. Epler. Q. Now you may state what was said. A. I went out there and told them that I was instructed by Mr. Bodie to collect the rental from 1934. I said, 'I have instructions to accept $100. You owe a balance from 1933, and you owe $125 for 1934, but if you will pay us $100 we will cancel the entire obligation for the cash rental, for the balance of 1933, and the year 1934, and would rent them the land again for 1935. Q. You may state what was said. A. Mrs. Epler stated that they couldn't do it. She said, 'I have $20, and if you will take $20, and cancel what we owe you, I will give you that now, and if you will do that we will rent the land for 1935, and that will give us some opportunity and time to look elsewhere for a location, because we wouldn't like to dispose of our live stock at this time and we have no place to go. Q. Did you accept the $20 in full of the rent for 1934? A. No; I did not. * * * Then shortly I left there and came in to town. Then later, over the telephone, I had a conversation with Mrs. Epler. Q. You

may state what that conversation was. A. She called—I don't know how she knew I was there—but she called me up at Mr. Davis' office, and I happened to be sitting in that gentleman's office there (indicating). I don't remember his name, he is an attorney but he wasn't there, and I was sitting in his office and Mr. Davis called me and I answered the phone and it was Mrs. Epler, and she said, 'Doctor, I have got $20 as I told you before, and I am willing to give you the $20 if you will let us keep the place for the year 1935, and cancel the balance of it,' and I told her, I said, 'Mrs. Epler, I can't do it. I will telephone in to Lincoln to Mr. Bodie, and I am going to relate to him what you have said to me, with reference to the payment of $20, and the terms upon which you lease it again for the next year, and if you don't hear from me again, and if I don't call you up, why you will know that Mr. Bodie will not accept it, and I am going to instruct the attorney to bring ouster proceedings to get possession of the farm.' "

Also, we do not overlook the fact that the correction deed is signed, "Ada A. Reed," though acknowledged as "Ada A. Epler."

The rule is: "The fact that a party's name is misspelled in the signature to a deed will not enable him to avoid the instrument where its execution by him is shown. *This is also true where he has signed by a wrong name.*" (Italics ours.) 18 C. J. 190.

As relating to the general effect of the evidence hereinbefore referred to, the following additional authorities are in point:

"While the presumption of a relationship of landlord and tenant arises from an occupancy of land under an agreement with the owner to pay rent or accompanied by the payment of rent, it is not essential that there be a definite agreement for such payment, and the relationship may arise, although the occupant refuses to agree upon any particular amount or to pay any sum whatever, if he occupies with the owner's permission and with the understanding that rent would be demanded." 35 C. J. 959.

"The burden of proving the relation of landlord and tenant ordinarily rests on the party asserting it. Accordingly, this burden rests on the party asserting the rights of a landlord or the rights of a tenant, as the case may be. If the relation of landlord and tenant is shown to have been created, the burden of proving its termination rests on the party asserting that fact, since the relation, once established, is presumed, within logical limits, to continue. The relation of landlord and tenant may be presumed as a matter of fact from circumstantial evidence as in other cases." 35 C. J. 968.

To show the former existence of the relation of landlord and tenant, and to raise the presumption of its continuance, a lease, the term of which has expired, may be introduced. *Longfellow v. Longfellow,* 54 Me. 240.

It would therefore follow that evidence of a lease terminating March 1, 1934, in the present case, and the actual payment of rent thereunder, as evidencing the existence thereof, would be competent evidence to establish plaintiff's case.

In view of all the evidence in the record, we are of the opinion that at least an issue of fact was established thereby, which was properly for the jury to determine, and in the withdrawal thereof from their consideration the trial court committed reversible error.

Therefore, the judgment of the trial court is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

IN RE ESTATE OF WILLIAM B. HUNTER.
JOHN E. ALMY, EXECUTOR AND TRUSTEE, APPELLEE, V. GERTRUDE AVERY ET AL., APPELLEES: FLOYD CORL ET AL., APPELLANTS.

272 N. W. 318

FILED MARCH 26, 1937. No. 29928.

1. Wills: CONSTRUCTION. The court in construing a will must first ascertain the intent and purpose of testator as disclosed by the language of the will and then give effect thereto if not contrary to law.
2. ———: ———. The testator's intention must be ascertained, if at all, from the language of the will as related to attendant circumstances.
3. ———: EQUITABLE CONVERSION. A provision of a will which directs the sale of real estate for the payment of certain legacies operates as an equitable conversion effective at death of testator.
4. ———: SPECIFIC LEGACIES. A legacy to be paid only from a particular fund is a specific legacy.
5. ———: BEQUESTS: ABATEMENT. Whenever it becomes necessary to pay debts and expenses of administration to resort to the class composed of specific devises and legacies, all in that class will abate proportionately.

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

John J. Ledwith, R. O. Williams and *Herman Ginsburg*, for appellants.

Meier & Meier and *Sam C. Zimmerman, contra.*

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

DAY, J.

The executor of the estate of William B. Hunter, deceased, filed an application for license to sell real estate to pay debts and for a declaratory judgment construing the will. The defendants are the devisee and legatees under the will. The trial court entered a judgment to the effect that there was insufficient personal property to pay the debts of the deceased and that the various bequests were

of equal rank and must suffer abatement *pro rata* to pay the debts and expenses of administration. The defendants Floyd Corl, Dorsey Corl, Jessie Willis, and Madge Walsh are appellants in this court, and Gertrude Avery, a devisee under the will, is an appellee.

It appears that in 1927, when this will was executed, the testator had considerable personal property in addition to the real estate mentioned in the will. It apparently did not occur to him then that his personal property would be exhausted and insufficient to pay his debts. Mr. Hunter died in November, 1932, and his wife died January 17, 1933, both of them being more than 80 years of age. Soon after the execution of the will, Mr. and Mrs. Hunter became invalids. Their long illness and incapacity brought about the exhaustion of his personal property by the time of his death. He also owed debts, some of which were for medical expenses. The testator never contemplated that he would not leave sufficient personal property at his death to pay his debts. This, no doubt, is the reason the testator expressed no intention as to the payment of the debts from any specific property. Certainly, no such intention is expressed in the will either directly or by inference.

Let us consider the will. The first paragraph devised and bequeathed property to his wife, all of which was sold prior to his death so that it is of no interest or help in our inquiry. The second paragraph gave his wife a life estate in all other real estate. Her death succeeded his in less than three months, so that the life estate has long since been extinguished. The fourth paragraph "devised and bequeathed" to Gertrude Avery a Fillmore county farm consisting of 320 acres at such time as she reaches the age of 30. This devise is conceded by the appellants to be specific. This will be referred to in the discussion later.

The sixth paragraph of the will provided for the sale of all other real estate by the executor and trustee and directed the payment from the proceeds of the following bequests: George Corl, Frank Corl, Floyd Corl, Dorsey Corl, and Jessie Willis, $1,000 each; and Madge Walsh,

$6,000. The third and fifth paragraphs relate to the executor and trustee, and his power to sell the real estate not specifically devised for the purpose of paying the bequests made in the sixth paragraph.

With this synopsis of the will in mind, we approach a consideration of the questions presented by the record. The appellants' brief states the issue as follows: "There is but one question involved in this appeal, namely, there being an insufficiency of other assets with which to pay debts and costs of administration, on whom shall be imposed the burden of the payment of the debts and costs of administration?" Is this loss to be borne proportionately by all the legatees and the devisee, or is the loss to be borne solely by the legatees?

Certainly, the court in construing a will must first ascertain the intent and purpose of testator as disclosed by the language of the will and then give effect thereto if not contrary to law. Section 76-109, Comp. St. 1929, requires such construction. See, also, *In re Estate of Mooney,* 131 Neb. 52, 267 N. W. 196; *In re Estate of Combs,* 117 Neb. 257, 220 N. W. 269. But in the case at bar the intention of the testator as to the payment of debts cannot be ascertained from the language of the will.

The testator's intention must be ascertained, if at all, from the language of the will as related to attendant circumstances. *Lesiur v. Sipherd,* 84 Neb. 296, 121 N. W. 104. The circumstances surrounding the execution of the will, the relationship of the devisee and legatees to the testator, and the property of the deceased do not help us here. At the time the will was executed the testator had ample property to pay all his debts and the expenses of administration in addition to the specific devise to Gertrude Avery and the legacies to the several legatees. All the personal property and some of the real estate were exhausted prior to his death. None of these parties was related to the testator. Gertrude Avery had lived in his home as a child but was not legally adopted. The legatees were relatives of his wife. By no possible inference can an intention be ascertained

from the language of the will that the debts and expenses of administration should be paid from one or the other of the two Fillmore county farms. One of them was devised to Gertrude Avery and the other to the executor and trustee, with directions to sell and pay several bequests, including those to appellants. The contention of the appellees has not been overlooked that the testator's intention as to the payment of debts and expenses is expressed in the seventh paragraph of the will. The subject-matter of this section is divided into two unrelated parts, which neither separately nor taken together express any such intention as is contended for here.

What is the nature of the devise and the various bequests? At the outset, we are relieved of a determination of the nature of the devise of the one farm in Fillmore county to Gertrude Avery. The appellants admit that it is a specific devise. All that remains is to determine the nature of the bequests and the operation of law upon the facts.

The will for construction here devised the one tract of Fillmore county land to the executor and trustee with directions to sell and from the proceeds pay certain bequests. A provision of a will which directs the sale of real estate for the payment of certain legacies operates as an equitable conversion effective at the death of the testator. *Coyne v. Davis*, 98 Neb. 763, 154 N. W. 547; *In re Estate of Kulp*, 122 Neb. 157, 239 N. W. 636; *Chick v. Ives*, 2 Neb. (Unof.) 879, 90 N. W. 751; *Will of Schilling*, 205 Wis. 259, 237 N. W. 122, 75 A. L. R. 184; *In re Estate of Mount*, 189 Ia. 279, 178 N. W. 391.

The fifth paragraph of the will directs that the real estate from which the legacies were to be paid should be sold, while the next paragraph (the sixth) provides that from the proceeds of the sale the legacies shall be paid. This paragraph reads: "Sixth. I further will and direct that from the proceeds of such sale of real estate my said executor and trustee shall pay to each of the following persons the sum of One Thousand ($1,000) dollars to

wit: George Corl, Frank Corl, Floyd Corl, and Dorsey Corl, nephews of testator's wife, and to Jessie Willis, daughter of Mary J. Willis, which said sum of One Thousand ($1,000) dollars to each of said persons I hereby give and bequeath to each; also to pay to Madge Walsh the sum of Six Thousand ($6,000) dollars, the said sum of Six Thousand ($6,000) dollars I hereby give and bequeath to said Madge Walsh."

A legacy to be paid only from a particular fund is a specific legacy. *In re Estate of Bush*, 89 Neb. 334, 131 N. W. 602; *In re Estate of Carpenter*, 166 Ia. 48, 147 N. W. 175. A recognized authority states the rule as follows: "A bequest of the proceeds, or a certain sum out of the proceeds, of a sale of specified property is ordinarily specific." 69 C. J. 929. One of the cases cited to support the statement of the rule is *Matter of Hall*, 144 Misc. Rep. 264, 258 N. Y. Supp. 460, in which it was said: "The proceeds of sale of specified property which is to be sold is just as specific a legacy as if the property itself had been given." See the other cases cited and note that none expresses a contrary view. The discussion upon this question is not extended because the appellee contends only that the will expresses the intention of the testator as to the source from which the debts and expenses should be paid. With this contention, we are unable to agree. The legacies under the will to be paid the legatees from the proceeds of the sale of certain real estate are specific. Likewise, the devise of the other Fillmore county farm is specific. These two farms were practically the only property of the testator when he died. The problem is which property shall be charged with the payment of the debts and expenses of administration.

The testator had control over the order of abatement by expressing his wishes in his will, either by express terms or by inference. But, in the absence of such an expression, this court cannot place itself in his position and divine what the testator would have done under the circumstances of a depleted estate. The rule applicable has been succinctly stated in the following language: "Generally speaking, and

in the absence of an expression of a contrary intent, where the assets of an estate are insufficient to pay all obligations and legacies, there will be an abatement in the following order: (1) Residuary estate, (2) other general legacies *pro rata,* (3) specific bequests or devises." 69 C. J. 981.

Another well-known authority states: "Whenever it becomes necessary to resort to the class composed of the specific legacies and devises, all the legacies and devises in that class will abate *pro rata.* Specific legacies and devises stand upon the same footing, are subject to the same liability, are abated together under the same circumstances, and contribute ratably for the payment of debts and charges." 3 Pomeroy, Equity Jurisprudence (4th ed.) 2642.

As applied to this present case, it appears that the testator devised and bequeathed a certain specific devise and certain specific legacies. This intention is clearly apparent from the will. The debts and the expenses of administration must be paid. The other assets of the estate have been exhausted, and resort must be made to an abatement of the devise and legacies to pay the debts and expenses of administration. Whenever it becomes necessary to pay debts and expenses of administration to resort to the class composed of specific devises and legacies, all in that class will abate proportionately. The doctrine of abatement determines the priority of classes. It also determines that all legacies of the same class shall be reduced equitably (proportionately) whenever a deficiency of assets occurs. In this way the testator's will still benefits each in the relative proportion intended.

The judgment of the trial court is reversed and that of this court substituted.

REVERSED.