STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. NEBRASKA STATE BANK ET AL., APPELLANTS: E. H. LUIKART, RECEIVER, APPELLEE.

FILED FEBRUARY 24, 1933. No. 28606.

1. **District Courts**: EQUITY JURISDICTION. Under the state Constitution, district courts have equity jurisdiction, and it may be exercised without legislative enactment.
2. ———: ———: TRUSTS. In the exercise of its equity jurisdiction, the district court may supervise the administration of trusts.
3. **Banks and Banking**: LIQUIDATION. The property and assets of a banking corporation, organized under the laws of this state, after it has ceased carrying on a banking business, are a trust fund for the payment of its debts. And where liquidation of an insolvent bank is conducted in a court of equity, pursuant to law, the proceeding is a judicial one.
4. **District Courts**: JURISDICTION. In addition to a specific grant of equity jurisdiction to district courts, section 9, art. V of the state Constitution, provides that such courts shall have "such other jurisdiction as the legislature may provide."
5. **Banks and Banking**: LIQUIDATION. Under the Constitution, and statutory provisions enacted pursuant thereto, when, by decree of the district court, a bank is ordered to be liquidated, such decree shall place the assets of said bank in the hands of the appointed receiver, and liquidation shall thereafter be had under order of court in the manner provided by law.
6. ———: ———: INSTRUCTIONS TO RECEIVERS: REVIEW. In the course of such liquidation, an order of the court giving directions or instructions to a receiver in the performance of his trust will not be disturbed on review where no abuse of discretion is shown.
7. **Equity**. In the absence of statutory prohibitions, equitable remedies, when consistent with the fundamental principles of equity, should be so administered and employed as to give complete relief to each complaint, and sufficiently varied to answer every conceivable emergency.
8. **Banks and Banking**. The business of banking involves more than the creation of a private debtor and creditor relation, and embraces the establishment of a public instrumentality for the discharge of a public purpose for the promotion of public good.
9. ———: DEPOSITS. The receipt of money by a bank, where the depositor can withdraw it when and in such sums as he pleases, although creating a debt, is, in a popular sense, the

receipt of money for safe-keeping, which is the essence of the relation.

10. ———: LIQUIDATION. The imperative duty is imposed on courts of equity in administering the affairs of insolvent banks, to minimize as far as possible losses to the public and to the bank's creditors occasioned by its insolvency.

11. ———: ———: EQUITY POWERS. The court may authorize the receiver to borrow money from the Reconstruction Finance Corporation and to pledge the assets of his trust to secure the same, when it is made to appear that such action is for the best interests of the trust estate.

12. ———: ———. Such borrowing and pledging are not in violation of the rights of "claims of depositors, for deposits, not otherwise secured, and claims of holders of exchange."

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

W. D. Funk and *W. A. Meserve,* for appellants.

F. C. Radke and *Barlow Nye, contra.*

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

EBERLY, J.

This is an appeal from an order of the district court for Knox county authorizing the receiver of the Nebraska State Bank of Bloomfield, Nebraska, to borrow money from the Reconstruction Finance Corporation, and for that purpose pledge assets of said bank in the manner and to the extent required by the terms of an act entitled "An Act to provide emergency financing facilities for financial institutions, to aid in financing agriculture, commerce, and industry, and other purposes," adopted by the congress of the United States on January 22, 1932. Reconstruction Finance Corporation Act of January 22, 1932, 47 U. S. St. at Large, ch. 8, p. 5.

The fifth section of this act provides, in part, as follows:

"To aid in financing agriculture, commerce, and industry, * * * the corporation is authorized and empowered to make loans, upon such terms and conditions not inconsistent with this act as it may determine, to any bank,

* * * organized under the laws of any state or of the United States, including loans secured by the assets of any bank that is closed, or in process of liquidation to aid in the reorganization or liquidation of such banks, upon application of the receiver or liquidating agent of such bank and any receiver of any national bank is hereby authorized to contract for such loans and to pledge any assets of the bank for securing the same: Provided, that not more than $200,000,000 shall be used for the relief of banks that are closed or in the process of liquidation.

"All loans made under the foregoing provisions shall be fully and adequately secured. The corporation, under such conditions as it shall prescribe, may take over or provide for the administration and liquidation of any collateral accepted by it as security for such loans. Such loans may be made directly upon promissory notes or by way of discount or rediscount of obligations tendered for the purpose, or otherwise in such form and in such amount and at such interest or discount rates as the corporation may approve. * * *

"Each such loan may be made for a period not exceeding three years, and the corporation may from time to time extend the time of payment of any such loan, through renewal, substitution of new obligations, or otherwise, but the time for such payment shall not be extended beyond five years from the date upon which such loan was made originally."

It appears that the proceedings in the district court were had in a case entitled: State of Nebraska, ex rel. C. A. Sorensen, Attorney General, v. Nebraska State Bank, Bloomfield, Nebraska. In this proceeding there had been an adjudication of insolvency of the Bloomfield State Bank, and the appointment of E. H. Luikart as receiver therefor for the purpose of liquidation thereof had been made. In this cause E. H. Luikart, as receiver, on April 30, 1932, made application for an order authorizing him to borrow money from the Reconstruction Finance Cor-

poration and pledge the assets of this insolvent bank therefor. The sufficiency of this application, as it now appears, is conceded. On May 3, 1932, the court entered an order fixing time and place of hearing of said application, and pursuant to this order notice thereof was duly given by publication and later approved by the district court. Thereafter the Nebraska State Bank, and ten others who were either directors of, stockholders in, depositor creditors, or general creditors of, this bank filed objections. A hearing thereon was had and evidence was introduced, in consideration of which the district court granted the application, from which order the objectors appeal.

The objectors do not now question the truth and sufficiency of facts to sustain the order appealed from, but rely solely on the alleged lack of power of the district court to authorize the proposed loan. It may be said that undisputed evidence in the record fairly establishes that this insolvent institution is located in an agricultural community in northeast Nebraska, and in addition the surrounding farm lands are rich and under ordinary conditions productive; that unusual conditions of the past two years, due to drouth, the presence of the grasshopper plague, current and prevailing prices for farm products, have made it impossible for the farmers and merchants residing in this town and vicinity to meet their financial obligations, and this is also true with special reference to the obligations which make up the assets of this institution; that farm lands in this vicinity are at present practically unsalable; that these conditions extend over eight counties adjoining Knox county, in which this insolvent institution is situated; that it would be to the best interests of the depositors, creditors and stockholders of said bank, and the community of Bloomfield in general, to defer the liquidation of the assets of said bank by extending time to its debtors and retaining the assets until new crops can be produced out of which such indebtedness may be paid; that this course would not only

aid the receiver in the gradual liquidation of the insolvent bank, but would enable him to conserve its assets, and also secure for the bank's depositors the early return of the largest possible portion of their deposited funds, and thus assist and enable them to continue to carry on their usual and ordinary vocations of stock raising, stock feeding, and agriculture; that, therefore, the best interests of all concerned would be promoted by the requested authorization of the receiver to contract with the Reconstruction Finance Corporation for a loan of $50,000. Attached to this application are the forms of the proposed contract and a list of the assets proposed to be pledged.

On argument at the bar of this court, it was conceded that the best interests of the bank, its stockholders, its creditors, as well as the community in which it was situated, would be promoted by the authorization of the loan. However, on behalf of the objectors it was insisted: (1) That the trial court was wholly without power to authorize the receiver of a state bank to borrow money and pledge the assets of the insolvent institution therefor; (2) that under the terms of the Nebraska statutes (Comp. St. 1929, sec. 8-1,102) "the claims of depositors, for deposits, not otherwise secured, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation," and that this statutory lien foreclosed the right of a court of equity, even though possessed of inherent power in a proper case, to direct a disposition of the assets of an insolvent bank in contravention thereof.

In the instant case we are dealing with a receiver judicially appointed. The appointing power came from the Constitution. Const. art. V, sec. 9. "Under the state Constitution, district courts have equity jurisdiction, and it may be exercised without legislative enactment." *Matteson v. Creighton University,* 105 Neb. 219. See *State v. State Bank of Minatare,* 123 Neb. 109.

This court is committed to the view that not only is equity jurisdiction conferred by the terms of the Constitution, but that, as thus conferred, it is beyond the power of the legislature to limit or control; that while the legislature may grant to the district courts such other jurisdiction as it may deem proper, it cannot limit or take from such courts their broad and general jurisdiction which the Constitution has conferred upon them. *Lacey v. Zeigler*, 98 Neb. 380; *State v. State Bank of Minatare*, 123 Neb. 109; *Burnham v. Bennison*, 121 Neb. 291.

One of the well-recognized grounds of equity jurisdiction thus conferred on, and available in, courts in this state, by virtue of this constitutional provision, is supervision of the administration of trusts. *Matteson v. Creighton University*, 105 Neb. 219; *Burnham v. Bennison*, 121 Neb. 291.

"The property and assets of a banking corporation organized under the laws of this state, after it has ceased carrying on a banking business, are a trust fund for the payment of its debts." *State v. Commercial State Bank*, 28 Neb. 677.

"Courts of equity have original power to appoint receivers and to make such orders and decrees with respect to the discharge of their trust as justice and equity may require." *Blades v. Hood*, 203 N. Car. 56.

In addition to the specific grant of equity jurisdiction, section 9, art. V of the Constitution, provides that district courts shall have "such other jurisdiction as the legislature may provide." As will be seen, the legislature of this state has enacted certain provisions relative to procedure in cases of insolvent state banks which are to be read and interpreted in the light of the constitutional provision referred to. It includes a judicial determination of the fact of insolvency (Comp. St. 1929, sec. 8-190), the appointment of a receiver (Comp. St. 1929, sec. 8-192), and further provides: "When, by a decree of court, a bank is ordered liquidated, the decree shall place the

assets of said bank in the hands of the * * * (appointed receiver), *and liquidation shall thereafter be had under order of court in the manner provided by law.*" Comp. St. 1929, sec. 8-193. (Italics ours) The terms of our state bank act contain no specific denial of the right of a receiver to pledge the assets of his trust, unless the provisions already quoted relative to holders of exchange and depositors' first lien may be so construed. Pertinent statutory provisions which section 8-193, Comp. St. 1929, thus above quoted incorporates by reference include the following: Section 20-1081, Comp. St. 1929, provides: "A receiver may be appointed by the * * * district court, or by the judge (thereof) * * * in the following cases: * * * In all cases provided for by special statutes; Fifth. In all other cases where receivers have heretofore been appointed by the usage of courts of equity." Section 20-1087, Comp. St. 1929, provides: "Every order appointing a receiver shall contain special directions in respect to his powers and duties, and upon application of any party to the suit, after due notice thereof, such further directions may be made in that behalf by the court or judge as may in the further progress of the cause become proper." While the legislature has refrained from prescribing any express limitation on the powers of the district courts in dealing with the assets of the trust, it may be said that, by implication, it fairly appears that, though not expressed in specific words of grant, the exercise of such powers for the following purposes was contemplated, viz., (1) for "preserving and protecting property pending litigation," (2) for "continuing the business of the debtor or corporation pending litigation, or when financially embarrassed," (3) for "winding up the affairs of a debtor or corporation, reducing the assets to cash and distributing them." Comp. St. 1929, sec. 20-1092. Also, section 20-1090, Comp St. 1929, provides in part: "All orders appointing receivers, giving them further directions and disposing of the property, may be appealed to the supreme court in the same manner as final orders

and decrees." In the construction of the provisions last quoted, this court is committed to the doctrine: "An order of the court giving directions or instructions to a receiver in the performance of his trust will not be disturbed on review where no abuse of discretion is shown." *State v. Bank of Rushville,* 57 Neb. 608. See, also, *State v. Nebraska Savings & Exchange Bank,* 61 Neb. 496.

In this connection it is to be remembered: "The boast of those who have administered equity jurisprudence, that its remedies may be so employed as to give complete relief to each complainant, would be palpably vainglorious, had they not devised modes of enforcing their decrees, sufficiently stringent to compel obedience and sufficiently varied to answer every conceivable emergency." Freeman, Executions (2d ed.) sec. 8a. Approved in *Sanford v. Anderson,* 69 Neb. 249. See, also, *Matteson v. Creighton University,* 105 Neb. 219.

The subject of this action is the assets of an insolvent state bank in the course of litigation. *Munn v. Illinois,* 94 U. S. 113, *Budd v. New York,* 143 U. S. 517, *Brass v. North Dakota,* 153 U. S. 391, *German Alliance Ins. Co. v. Lewis,* 233 U. S. 389, and *Noble State Bank v. Haskell,* 219 U. S. 104, demonstrate that a business by circumstances, and its nature, may rise from private business to public concern and consequently become subject to public obligations and governmental regulations, as affected with a public interest. Section 8-114, Comp. St. 1929, is a statutory recognition of the fact that this principle is applicable to the business of state banks. It provides: "The business of banking, or the receiving of deposits of money or instruments of credit subject to be repaid upon check, draft, certificate, passbook or order; the discounting, negotiating of promissory notes, drafts, bills of exchange, and other evidences of debts; and the loaning of money upon personal or other security is hereby declared to be a quasi-public business and subject to regulation and control by the state."

Early in our jurisprudence it was determined that the business of banking involved more than the creation of a private debtor and creditor, and embraced the establishment of a public instrument for the discharge of public duties in carrying out a public purpose for the promotion of public good. *McCulloch v. State of Maryland,* 4 Wheat. (U. S.) 316. Even the primary function of a bank of deposit was judicially recognized as being more than a mere creation of a private obligation.

"The receipt of money by a bank where the depositor can withdraw it when and in such sums as he pleases, although creating a debt, is, in a popular sense, the receipt of money for safe-keeping." *Engel v. O'Malley,* 219 U. S. 128.

While intervening insolvency of a bank may terminate its ability to respond to its public and private obligations, it necessarily imposes upon the court administering such corporate assets the imperative duty of so conducting its affairs as to minimize the losses occasioned to the public as well as the private creditors, keeping always in view the course of business contemplated by the parties at the time the engagements defaulted were entered upon. It must be conceded that the money "held for safe-keeping" should be paid at the earliest possible moment, and the prosperity of the local community which the insolvent bank served is seriously affected by any failure in so doing. This is the end sought to be accomplished and the evil sought to be avoided by an equitable receivership. In the absence of express limitations on the powers of the controlling tribunal, methods should be adopted by it to secure the result desired, for both public and private interests are necessarily involved.

It may be true that in the instant case an emergency has arisen, not in the contemplation of the legislature when our banking laws were framed. Nevertheless, as an emergency it is properly the subject of equity jurisdiction. The controlling questions have their origin in an effort of the federal congress to aid closed banks in

the time of financial stringency. Recourse to this aid, in the light of the facts of this record, is the only source from which prompt partial relief upon terms favorable to the interest of all parties may now be secured. Waiving for the moment the question of the statutory first lien of depositors not otherwise secured, and holders of exchange, in view of the terms of our Constitution and the provisions of our statutes, and the nature of the transactions involved, we are unable to perceive any adequate reason for denying to the trial court the powers it assumed to exercise in the instant case. The right of the district court to authorize the receiver of a state bank to borrow money and to pledge assets is never absolute; its necessity must be determined by a court of equity in its administration of justice among those who have a pecuniary interest in the affairs of the bank. The trial court necessarily inquired into and judicially considered all the facts, including those relating to the conditions of the bank, the true interests of the preferred creditors thereof, and the terms imposed by the Reconstruction Finance Corporation for the proposed loan. We find in its decree, approving and authorizing the same, no abuse of its undoubted discretion. *Andrew v. First Trust & Savings Bank,* 244 N. W. (Ia.) 394; *Blades v. Hood,* 203 N. Car. 56; *Bassett v. Merchants Trust Co.,* 115 Conn. 530; *State v. Superior Court,* 169 Wash. 258.

Nor do we find that the terms of the statute creating a first lien on the assets of an insolvent state bank for certain classes of preferred creditors (Comp. St. 1929, sec. 8-1,102) in any manner limit the power of a court of equity to dispose of the property here involved or affect the conclusion stated.

Construing the provision referred to in connection with bank legislation of this state, and the established practice of this court in cases involving like questions, it evidences a legislative intent to grant "claims of depositors, for deposits, not otherwise secured, and claims of holders of

exchange," as against other creditors of the institution, a certain priority of payment out of the assets of commercial banks. Solely for the purpose of securing this statutory right, it is in effect further provided that this right of priority "shall at the time of the closing of a bank be a first lien" on the assets thereof. However, the jurisdiction of a court of equity to be exercised in the selection of the appropriate method to be followed by the receiver in managing and disposing of the property in suit to secure the benefits of the statutory right thus created to and for these preferred creditors, through a proper disposition of the assets involved, is neither in terms nor by necessary implication in any manner qualified, limited or denied. For, in the transaction here authorized, the conclusion is inescapable that, when carried out, the avails of all bank property thus disposed of will have and continue to retain the characteristics of a trust fund, as to which these statutory rights of priority of payment are fully preserved. "Where the form of trust property is legally changed, the trust follows it in its new form with equity's supervisory power of administration unchanged." *Matteson v. Creighton University*, 105 Neb. 219.

It follows that the action of the district court in authorizing and directing the receiver to secure the loan from the Reconstruction Finance Corporation in the amount and upon the terms set forth in the application before that court was unquestionably within its power, and in the instant case the discretion exercised by the trial court was justified by the facts then before it.

The order of the district court appealed from is, therefore, in all respects correct and is

AFFIRMED.

RUSSELL A. LITWILLER, ADMINISTRATOR, APPELLEE, V. LOUIS W. GRAFF ET AL., APPELLANTS.

FILED FEBRUARY 24, 1933. No. 28432.

1. Negligence: SUFFICIENCY OF EVIDENCE. Evidence of negligence that automobile was driven in the center of the highway at excessive speed, without regard for the traffic and use of the road, into an intersection to which the view was not obstructed and collided with another car is sufficient to sustain a verdict.
2. Evidence: MORTALITY TABLES. Mortality tables are admissible in evidence as to probable duration of life, but are not necessary to a determination and are not conclusive. They may be considered with other evidence in the case, and their statement as to the expected duration of life may be varied, strengthened, weakened, or entirely destroyed by other competent evidence, on the question of the life expectancy of the injured party.
3. Appeal: DAMAGES: LIFE EXPECTANCY. In a suit by husband to recover damages for wrongful death of wife, where there is evidence of her life expectancy and he is about the same age and is a witness before the jury, it will be assumed that the jury took into account the age and expectancy of the husband.

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

Chambers & Holland and *Thomas & Vail,* for appellants.

Norval Brothers, contra.

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

DAY, J.

This is an action brought by the plaintiff, as administrator of the estate of his deceased wife, to recover damages arising from her death as a result of an automobile collision. At the time of the accident, the deceased was riding as a passenger in the automobile of a friend which collided with an automobile driven at a country road intersection. The plaintiff brings this action against the owners of both cars. The deceased was riding in a car

driven by the daughter of defendant, Graff, which automobile was a family car. The other car involved in the accident was the property of the defendant, Western Poultry & Egg Company, and driven in its business by their employee, Charles N. Lippold. The jury returned a verdict in favor of the plaintiff against both defendants, upon which a judgment was entered from which both appeal.

At the outset, our attention is challenged to the sufficiency of the evidence to support a verdict. There is evidence in the record that both drivers were driving in the center of the highway; that they were driving at an excessive rate of speed; that both drivers were familiar with the highway and drove it frequently and knew of the intersection and the conditions surrounding it; and that each driver had a clear view approaching the intersection and collided in the center of it. All this constitutes sufficient evidence of negligence on the part of defendants to require submission of the case to the jury. *Waltz v. Elmore,* 95 Neb. 736.

The plaintiff introduced in evidence standard and approved mortality tables to prove the life expectancy of the deceased. In an action for death by wrongful act, such tables are admissible to show the probable duration of the life of deceased. *Moses v. Mathews,* 95 Neb. 672. In the *Moses* case, it was held that such evidence was not necessary to prove probable duration of human life; that it might be received and considered with other evidence bearing upon the question of probable continuance of life. The rule is succinctly stated by an authority as: "The evidence furnished by a table of expectancy is not conclusive, but may be received and considered with other evidence in the case, and its statement as to expected duration of life may be varied, strengthened, weakened, or entirely destroyed by other competent evidence, on the question of the expected continuance of life of the injured party." 8 R. C. L. 864, sec. 136.

We are likewise committed to the doctrine that stand-

ard mortality tables are admissible in evidence to show probable duration of life of the beneficiary or beneficiaries. In *Fisher v. Trester,* 119 Neb. 529, it was held that the life expectancy of the parents, and not that of the injured child, was to be used where the life expectancy of the child exceeds that of the parents. Obviously, the parents could not recover damages for a time greater than the duration of their lives. But *Fisher v. Trester, supra,* is not authority for the proposition urged here, that it was necessary to introduce mortality tables in evidence as to probable duration of life of the beneficiary. In the instant case, the jury were instructed to take into consideration the age of the injured and deceased wife, her health and probable life expectancy, in estimating the damage. Certainly recovery could not be permitted for the benefit of husband upon a time element greater than the probable duration of life of the wife. The right to recover is based upon pecuniary loss to beneficiary. Therefore the expectation of life of deceased is an element of great importance, for, after fixing earning capacity, the question to be determined, in order to fix a gross sum which will represent the life earning capacity, is the number of years it would have been exercised if death had not intervened. 19 R. C. L. 217, sec. 4.

Mortality tables are admissible in evidence as to probable duration of life, but are not necessary to a determination and are not conclusive. In the instant case, the jury had the benefit of standard tables of mortality with reference to the deceased wife's expectancy, had not death intervened as a result of the accident. The husband was approximately the same age as his deceased wife. Proper practice would dictate that the life expectancy of the husband should have been proved. But he testified before the jury, and they were able to form some judgment of his expectancy. In a suit by husband to recover damages for wrongful death of wife, where there is evidence of her life expectancy and he is about the same age and is a witness before the jury, it will be assumed that the

jury took into account the age and expectancy of the husband. *Bauer v. Griess,* 105 Neb. 381.

As to the objection that the plaintiff did not prove the life expectancy of the parents of deceased, there is no evidence that either the father or mother suffered any pecuniary loss because of their daughter's death.

The defendant Graff complains of the fact that the attorney for the codefendants Lippold and Western Poultry & Egg Company cross-examined the defendant Graff as to whether or not he carried indemnity insurance and whether he had employed the attorneys representing him. The defendant Graff did not take the witness-stand in his own behalf, but was called by the plaintiff to prove certain facts to establish his case in chief. It was then that the codefendant cross-examined him on the matter of insurance. This action was brought by the plaintiff against two defendants, and in the trial of the case each defendant maintained and contended that he was not guilty of any negligence which was a proximate cause of the accident, but that the accident was caused solely by the negligence of the other. Under this state of the record, the cross-examination of the defendant Graff is within the rule announced by this court. *Nichols v. Owens Motor Co.,* 121 Neb. 105. Likewise, the defendants Lippold and Western Poultry & Egg Company contend that the cross-examination of their client by the attorney for Graff was misconduct. The plaintiff was not responsible for the cross-examination of either defendant by the other and in fact moved to strike the same. Under the peculiar circumstances of this case, and the nature of the contest, it was not prejudicial error.

It is urged that many errors occurred in giving and refusal to give various instructions, but it appears from an examination that the issues of the case were properly, concisely, and adequately covered in the instructions submitted, and that the refusal to give instructions requested by either defendant resulted in no prejudicial error.

The judgment of the district court is

AFFIRMED.

P. F. PETERSEN BAKING COMPANY ET AL., APPELLANTS, V. CHARLES W. BRYAN, GOVERNOR, ET AL., APPELLEES.

FILED MARCH 2, 1933. No. 28356.

1. **Food: POLICE POWER.** The making or selling of bread is a business subject to police regulation.
2. **Constitutional Law: POLICE POWER.** Legislatures, not courts, are primarily the judges of necessities for police regulation and courts can interfere only when such regulation exceeds a reasonable exercise of authority. *Schmidinger v. City of Chicago*, 226 U. S. 578.
3. ———: ———. Mere inconvenience to those conducting a business subject to police regulation does not vitiate the exercise of the power to regulate.
4. ———: FOOD. An act of the legislature fixing standard weights of bread loaves and providing for excess tolerances, but remitting to the secretary of agriculture the fixing by regulation of reasonable tolerances, does not amount to a delegation of legislative power.
5. ———: STATE BOARDS: REGULATIONS. "Where one complains that regulations promulgated under legislative authority by a state board are unreasonable and oppressive, he should seek relief by applying to that board to modify them." *Red "C" Oil Mfg. Co. v. Board of Agriculture of North Carolina*, 222 U. S. 380.
6. ———: FOOD. The act to establish a standard loaf of bread (Laws 1931, ch. 162, Comp. St. Supp. 1931, secs. 89-169 to 89-172) authorizing reasonable excess tolerances to be fixed by the state secretary of agriculture, which tolerances were established at the rate of three ounces to each pound of the respective standard loaves, *held* not violative of the state Constitution or of the Fourteenth Amendment of the Constitution of the United States, in the respects complained of.

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

John C. Grover and *Harold D. Le Mar*, for appellants.

C. A. Sorensen, Attorney General, and *George W. Ayres, contra.*

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

GOSS, C. J.

Plaintiffs sued for an injunction to prevent the enforcement of "An act to establish a standard loaf of bread" and making a violation a misdemeanor. Laws 1931, ch. 162, Comp. St. Supp. 1931, secs. 89-169 to 89-172. From a decree rendering a judgment for defendants, plaintiffs appeal. Under the Code of Civil Procedure the appeal is for trial *de novo*. Comp. St. 1929, sec. 20-1925.

Section 1 of the act charged the department of agriculture with the duty of enforcement and authorized it to promulgate necessary rules and regulations. Sections 2 and 3 follow:

"Sec. 2. Every loaf of bread made for sale in the state of Nebraska shall be of the following weights avoirdupois: One-half pound, one pound, one and one-half pounds, and also in exact multiples of one pound and of no other weights. Whenever twin or multiple loaves are baked, the weights herein specified shall apply to each unit of the twin or multiple loaf, provided that a twin one and one-half pound loaf may be made and sold, but units of said loaf must not be sold separately: Provided that none of the provisions of this act shall apply to fancy breads.

"Sec. 3. The secretary of agriculture shall prescribe reasonable tolerances or variations in excess, but not under the weights mentioned in the preceding section, within which all loaves shall be baked, and also the time for which said weights shall be maintained."

The secretary of the department of agriculture duly promulgated rules and regulations. He prescribed that tolerances should not exceed one and one-half ounces for half-pound loaves, three ounces for pound loaves, four and one-half ounces for one and one-half pound loaves, six ounces for two pound loaves and the same relative tolerance for loaves of larger size. The rules provided that bread for sale in Nebraska should maintain its required minimum weight for not less than twelve hours under

normal conditions, but that the baker should not be held responsible for the maintenance of the minimum weight after delivery to a retail dealer or consumer or to a transportation agency in Nebraska for delivery to a retail dealer or consumer; and provided that weights shall be determined by averaging the weight of not less than five loaves, if available, of a given lot of bread of the same grade, size and baking.

The act in question repealed an existing law passed in 1921 and amended in 1927. The 1921 law was the subject of litigation in 1922. It was sustained in the district court and the judgment of this court affirmed the validity of the act. *Burns Baking Co. v. McKelvie,* 108 Neb. 674. On error proceedings the United States supreme court, two members dissenting, reversed the judgment of this court on the ground that the tolerance was unreasonable and arbitrary and therefore repugnant to the Fourteenth Amendment. *Burns Baking Co. v. Bryan,* 264 U. S. 504. That court found from the evidence that it was "impossible to manufacture good bread in the regular way without frequently exceeding the prescribed tolerance and incurring the burden of penalties prescribed by the statute." The act of 1921 (Laws 1921, ch. 2), there considered, provided for a tolerance at the rate of two ounces per pound, to be maintained at least twenty-four hours after baking, averaged by weighing not less than twenty-five loaves of any one unit. The act of 1931, attacked here, by its authorized regulations, increased the tolerance to three ounces per pound, to be maintained not less than twelve hours under normal conditions, averaged by weighing not less than five loaves. But the regulation relieved the baker from maintaining the weights after delivery.

We deem it unnecessary to review in detail the testimony of the numerous witnesses for both parties as to the practicability of compliance with the tolerance as now fixed. It is sufficient to state our conclusions of fact in respect thereto. Actual tests of regular run of bread

baked by the plaintiffs and purchased from them indicate that the tolerance is ample. The evidence shows that bakers having plants in many states comply with quite similar provisions in laws and ordinances in some of these states and from choice pursue the same methods as to weights in the other states where they do business but where such laws and regulations do not exist. We find that the great preponderance of the evidence shows that plaintiffs, and others similarly situated for whom they sue, may readily comply with the weight and tolerance provisions of the present act.

Plaintiffs argue that the title is not broad enough to prohibit weights of bread of certain types now baked. The evidence applicable to this point refers especially to a twenty-ounce loaf. We are of the opinion that an act to establish a standard loaf of bread and to prohibit violations is broad enough to prohibit other than standard sizes as fixed by the act. While it might inconvenience the bakers to shorten or lengthen the twenty-ounce loaf, so as to make one of legal weight, or to adjust their appliances so as to make prescribed sizes, these are matters generally for consideration by the legislature and not by the court. The making and selling of bread is a business subject to police regulation. Courts can interfere only when regulations arbitrarily exceed a reasonable exercise of authority. Mere inconvenience to those conducting a business subject to police regulation does not vitiate the exercise of the power. *Schmidinger v. City of Chicago,* 226 U. S. 578; *Burns Baking Co. v. McKelvie,* 108 Neb. 674.

It is claimed that the act unlawfully delegates legislative authority in violation of section 1, art. II of the Constitution of Nebraska. Such delegation to an administrative body as took place here is a part of the settled legislative policy of this state. Section 71-2302, Comp. St. 1929, places sanitation and quarantine under the department of public welfare, authorizes it to adopt and publish reasonable rules and regulations and provides a

penalty for violation of such rules and regulations. Section 75-201 gives the state railway commission power to regulate rates and service of railroads and all other intrastate common carriers and, under section 75-218, a violation of any order is a misdemeanor subject to penalty. Other instances might be cited.

The legislature of North Carolina put oil inspection under the commissioner of agriculture of that state. It authorized the board of agriculture to make rules and regulations for inspection and to adopt such standards of safety not in conflict with the act as it might deem necessary to provide the people of the state with satisfactory illuminating oil. Section 8 of the act (Public Laws N. Car. 1909, ch. 554) made a violation a misdemeanor. The supreme court of the United States held that remitting to the proper state board the establishment of rules and regulations to determine what oils measure up to such standards did not amount to a delegation of legislative powers. *Red "C" Oil Mfg. Co. v. Board of Agriculture of North Carolina,* 222 U. S. 380, and cases cited on page 394. There the North Carolina board of agriculture was granted wider authority than the Nebraska secretary of agriculture was given in the present instance. Neither was granted nor exercised purely legislative powers. In each instance the authority was administrative in its nature. Its use by the administrative department was essential to the complete and wise exercise of the powers of the legislative department of the state government. It resulted in constitutional cooperation between the legislative and executive branches.

Plaintiffs assert that the act is indefinite and uncertain and alleges several specifications. If these have not been met by what we have already said in deciding that the act fixed the standards and the regulations merely forwarded them, we think what was further decided in *Red "C" Oil Mfg. Co. v. Board of Agriculture of North Carolina, supra,* disposes of them: "Where one complains that regulations promulgated under legislative authority by a state board are unreasonable and oppressive, he

should seek relief by applying to that board to modify them."

In their main brief the plaintiffs say: "No contention is made that the legislature is unable to fix minimum weights so long as minimum weights specified are reasonable, and that the law as passed is designed to prevent deception and fraud upon the public by means of short weights." A secondary purpose is to prevent unfair competition by dishonest bakers resulting in injury to the consuming public. Plaintiffs urge that the act is unreasonable and arbitrary because it prohibits a maximum weight in each size of standard loaf. The very provision against permitting excess of more than three ounces to the pound prevents short weight frauds. Neither the act itself nor the regulation prescribed by the secretary of agriculture requires wrapping, labelling or branding of loaves. Bakers may make as a pound loaf one perfectly legal but weighing 19 ounces and sell it as a substitute for the present twenty-ounce loaf which some of the plaintiffs greatly favor. It may or may not deceive the consumer accustomed to a twenty-ounce loaf. Whether it deceive him or not, no action will lie because the loaf is within the tolerance provided by the act. But, if the baker make a loaf weighing 19½ ounces, a purchasing consumer may be actually and legally defrauded by believing it is one of the former twenty-ounce loaves. Or an undiscriminating purchaser may even be deceived into thinking it a pound and a half loaf. Thus, in a very practical way, it is demonstrated that the state attempts to prevent short weights by prohibiting excess tolerance or variation. That is the plain intent of the law.

We cannot cover in detail other particulars urged by appellants. We do not find them available to secure a reversal of the judgment of the district court. We are of the opinion that the act and regulations complained of are not violative of the state Constitution nor of the Fourteenth Amendment of the Constitution of the United States. The judgment of the district court is

AFFIRMED.

IDA WILSON, APPELLEE, V. NATIONAL LIFE & ACCIDENT INSURANCE COMPANY, APPELLANT.

FILED MARCH 2, 1933. No. 28433.

Insurance: INJURY TO INSURED: LIABILITY. Where an insured was injured during the life of a policy and she continued her premium payments thereon for some months thereafter, during which time she received disability benefits from the insurer, the subsequent nonpayment of premiums does not relieve the insurer of liability, since such liability became fixed at the time of the accident and was not contingent on future payments of premiums.

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

King & Haggart, for appellant.

O'Sullivan & Southard and *A. J. Whalen, contra.*

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

DEAN, J.

On or about December 5, 1921, a combined policy of life, sickness and accident insurance was issued to Ida Wilson, the plaintiff, by the National Life & Accident Insurance Company, defendant herein. The plaintiff, on or about May 4, 1930, sustained injuries in an automobile accident and, pursuant to the terms of the policy, she was paid benefits by the defendant company for 140 days, or until October 26, 1930. The plaintiff ceased her premium payments on November 3, 1930, and the defendant company contends that the policy thereupon lapsed and that the liability of the company ceased. The plaintiff thereupon began this action to recover disability benefits for 140 days during 1931. Trial to a jury was waived and the court found for the plaintiff and against the defendant company in the sum of $120, with lawful interest from date, together with an allowance of $50 as attorney's fees.

The defendant company contends that no liability for benefits during 1931 accrued prior to May 4, 1931, and that the policy had lapsed for nonpayment of premiums.

Neither party offered any evidence, but it was stipulated that the premiums were paid up to November 3, 1930; that the plaintiff was disabled on or about May 4, 1930, as a result of an automobile accident, and that her disability continued at the time of the trial; that no premiums were paid by the plaintiff subsequent to November 3, 1930; that due notice was given the defendant company of plaintiff's disability during the year 1931; and that the proofs of loss were waived by the company.

The policy provides that it shall not lapse for nonpayment of premiums until such premiums are four weeks in arrears, but further provision is made that the insured shall not be entitled to sick or accident benefits when premium payments are two weeks or more in arrears, and that the subsequent payment of such arrears shall not entitle the insured to benefits for sickness or disability "beginning or occurring during the period of such arrears." And the policy also provides that the payment of benefits during any twelve consecutive months shall be limited to 140 days.

Does the failure of the plaintiff to pay premiums on the policy in suit after the disability began bar a recovery of benefits? We are constrained to hold that the provision in the policy that an insured shall not be entitled to sick or accident benefits when premium payments are two weeks or more in arrears applies to disability occurring after the insured is in arrears and not to the facts in the present case. Likewise, the provision that the subsequent payment of arrears shall not entitle the insured to benefits for sickness or disability "beginning or occurring during the period of such arrears" does not apply herein, as the disability began before the period of arrears, and it appears to us that the word "occurring" must be construed as meaning happening during the period of arrears and without reference to a disability that was continuing, as

in the present case. On this point it has been held: "Under a policy of life insurance which also contained a total disability clause, lapse of the policy by nonpayment of the premium did not operate as a release of the company from any liability on a total disability claim which had arisen prior to such lapse." *Illinois Bankers Life Ass'n v. Byassee,* 169 Ark. 230. In *Railway Mail Ass'n v. Dent,* 213 Fed. 981, it is stated: "The cause of action against the association arose when the accident occurred, and was not subject to impairment by subsequent default of the insured in the conditions of continued membership." In *Seyk v. Millers Nat. Ins. Co.,* 74 Wis. 67, it was held that the nonpayment of an assessment falling due after a loss did not defeat an action upon the policy, even though the amount of the loss was not actually due to the insured when the assessment became payable. The *Seyk* case was cited by us in *Johnston v. Phelps County Farmers Mutual Ins. Co.,* 63 Neb. 21, where, in the body of the opinion at page 25, we stated: "After loss, the relation between insurer and insured becomes one of debtor and creditor, not subject to this forfeiture clause in the policy; and, in consequence, no forfeiture arises from nonpayment of an assessment falling due after loss." In *Kentucky Life & Accident Ins. Co. v. Kaufman,* 102 Ky. 6, the court held that the 30 days allowed for the payment of assessments were not merely days of grace, but that the meaning of the provision was that the contract of insurance remained in force for 30 days from the date of notice, and the insured having died within the time without having paid his assessment, the policy was not forfeited. And the court also held in the *Kaufman* case that, "the policy being in force at the time of the insured's death, the contract was thereby terminated, and the liability of the company fixed, and the relation of debtor and creditor created between the company and the beneficiary." In *Burkheiser v. Mutual Accident Ass'n,* 61 Fed. 816, where a member of a mutual benefit association died within 90 days after an accident that caused

his death, the court held that the fact that before his death he ceased to be a member, because of default in paying an assessment falling due after the accident, did not relieve the association from liability, since its liability became fixed at the time of the accident.

The defendant company contends that liability for accidental death benefits may very properly be said to accrue at the time of the accident, and that nonpayment of premiums during the specified period between the date of accident and date of death would not prevent a recovery, but it is argued that "liability for health and accident benefits does not accrue until proof of continuing disability is made." It is also contended that, under the provisions of the policy in suit, no liability for sickness or accident disability would accrue for the year 1931, until a certificate of continuing disability was furnished on and before May 4, 1931. On this point, however, as above noted, it was stipulated between the parties that due notice was given the defendant company of the plaintiff's disability during 1931, and that "proofs of loss were waived by the defendant company."

The general rule appears to be that default in the payment of assessments falling due after an accident does not relieve the insurer from liability. We conclude that, where the plaintiff was injured during the life of the policy and she continued her premium payments thereon for some months thereafter, during which time she received disability benefits from the insurer, the subsequent nonpayment of premiums does not relieve the insurer of liability, since such liability became fixed at the time of the accident and was not contingent on future payments of premiums.

The judgment is affirmed, with directions that $50 be allowed plaintiff's attorneys for services in this court.

AFFIRMED.

EFFIE D. WEAD ET AL., APPELLEES, V. CITY OF OMAHA, APPELLANT.
EDWARD PHELAN ET AL., APPELLEES, V. CITY OF OMAHA, APPELLANT.

FILED MARCH 2, 1933. No. 28411.

Municipal Corporations: STREET IMPROVEMENTS: ASSESSMENTS: COLLATERAL ATTACK. Where a property owner has notice that his property is to be assessed for benefits by reason of a public improvement, and the law affords him an opportunity to appear and protest, and, if aggrieved by the action of the authorities, to appeal to the courts, but neglects to avail himself of such provisions, he may not thereafter, in a collateral proceeding, attack the validity of such assessment, except for fraud, actual or constructive, a fundamental defect, or an entire want of jurisdiction.

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

Fred A. Wright, Thomas J. O'Brien, Harry B. Fleharty and *Bernard J. Boyle,* for appellant.

William H. Herdman, contra.

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

GOOD, J.

Plaintiffs sued to have adjudged void, and to enjoin the defendants from collecting, certain special assessments, levied by the city of Omaha by special levy ordinance No. 5337 to cover, in part, the cost of lands appropriated by the defendant city for opening and extending St. Mary's avenue from Twenty-seventh street to a point on Leavenworth street between Thirty-first street and Thirty-first avenue. Decrees were entered for plaintiffs as prayed, and defendant has appealed.

Plaintiffs allege that their several parcels and tracts of land derived no special benefits from such public improvement; that the levy of said special assessments was grossly unjust, fraudulent, arbitrary and the taking of

plaintiffs' properties without due process of law, in contravention of the provisions of both state and federal Constitutions.

Prior to the public improvement in question, St. Mary's avenue extended westerly from Seventeenth and Howard streets to Twenty-seventh street in said city. The avenue was extended in 1925; the ordinance levying the special assessments was passed July 21, 1925. These actions were begun, respectively, April 9 and 10, 1931.

It is conceded that the city authorities in every respect followed the letter of the statute in making the public improvement and in making the levy of special assessments. Plaintiffs contend that, their respective properties not having derived any benefits, the action of the city authorities in making any levy against their properties was arbitrary and fraudulent. No other fraudulent act than this is claimed by plaintiffs. Defendant contends that whether the plaintiffs' properties were specially benefited by the improvement and the extent of benefits were questions of fact, and were to be determined by the city council sitting as a board of equalization; that, in determining these facts, the council acted judicially, and that, since plaintiffs were afforded a remedy by appeal to the district court from the action of the city council, they may not now resort to a court of equity in a collateral proceeding to attack the validity of the assessments.

The law provides for notice to the persons whose lands are alleged to have been benefited by the improvement and for a hearing before the board of equalization. Plaintiffs had the notice and were afforded an opportunity to make objections to the city council and, if aggrieved by its action, to appeal to the district court. They filed no objection or protest and did not appeal from the action of the city council in making the levy of special assessments.

Plaintiffs concede that, unless the special assessments are void, they cannot be attacked collaterally, but they argue that, since the record in this case shows that

plaintiffs' properties derived no special benefits from the improvement, therefore the action of the city council, sitting as a board of equalization, in the enactment of the ordinance levying assessments was arbitrary, fraudulent and void.

Sections 14-302 and 14-528, Comp. St. 1929, authorize, respectively, the creation of improvement districts and the assessment of special taxes for the improvement of streets and alleys. Section 14-536, Comp. St. 1929, is, in part, as follows: "All special assessments to cover the cost of any public improvements herein authorized shall be levied and assessed on all lots, parts of lots, lands and real estate specially benefited by such improvement, or within the district created for the purpose of making such improvement, to the extent of the benefits to such lots, parts of lots, lands and real estate by reason of such improvements, such benefits to be determined by the council sitting as a board of equalization." Section 14-538, Comp. St. 1929, provides for the council to sit as a board of equalization, fixes the time of its meetings, and further provides as follows: "At such session the said board shall hear and determine all such complaints, and shall equalize and correct such assessment, and after all corrections have been made the council may levy such special assessments by ordinance at a regular meeting thereafter. The ordinance levying a special assessment shall be final and binding as the final order or judgment of a court of general jurisdiction. After the passage of such ordinance no court shall entertain any action for relief against such special assessment, except upon appeal from such final order, which remedy shall be deemed exclusive." Section 14-539 provides that any person who has filed a written complaint before said board shall have the right to appeal to the district court for the county within which such city is located, and if the court find such assessment to be valid it shall render a decree for the amount of the assessment, interest and costs, and declare the same a lien upon the lots of land so assessed, and if the court

find that the tax is invalid it shall order a relevy of such assessment, or render such decree as may be just and equitable. That in such case the city council, sitting as a board of equalization, acts judicially is not only so declared by statute but has been held by this court in numerous cases.

It is a general rule that the decisions of a special tribunal, having jurisdiction over the subject-matter and the parties, is conclusive, unless reversed or modified in the manner provided by law. See *Portsmouth Savings Bank v. City of Omaha,* 67 Neb. 50; *Omaha & N. P. R. Co. v. Sarpy County,* 82 Neb. 140; *Burkley v. City of Omaha,* 102 Neb. 308; *Weilage v. City of Crete,* 110 Neb. 544; *Frohnen v. Sanitary Sewer District,* 115 Neb. 84; *Bamrick v. Village of Minatare,* 118 Neb. 644.

In 5 McQuillin, Municipal Corporations (2d ed.) sec. 2277, it is said: "The general rule is that, where a municipality has power to make the local improvement and acquires jurisdiction by the proper preliminary steps, objections to an assessment, not of a fundamental character, are deemed to be waived if not presented at the time and in the manner prescribed by law. * * * And, speaking broadly, failure of a property owner to appear before the proper tribunal and object to an assessment, or to appeal therefrom, within the time provided by law, will estop him from contesting the validity of the assessment or restraining the collection thereof on the mere ground of irregularities. * * * Where the law provides a tribunal to pass upon all objections to special assessments and correct inequalities therein, and if the property owners feel themselves aggrieved appeals to the court are given them, such procedure is generally held exclusive, and the decision of the tribunal unless appealed from is also generally held conclusive on the property owners assessed, except in case of fraud, or fundamental defects, or an entire want of jurisdiction." And in the same volume, at section 2270, it is said: "Assessments may be attacked by landowners required to pay, in whole or

in part for the improvement, only when they have been injuriously affected by the proceeding, where complaint is seasonably made, or within the time prescribed, but not afterwards, and provided they are not estopped by reason of their prior conduct from urging the invalidity. The right of a property owner to question the validity of his assessment on the ground that his property is not benefited or that the assessment is in excess of the benefit for which his property is assessed must be exercised in the assessment proceedings before the assessment is finally confirmed, and the determination of the local authorities is final in the absence of fraud or manifest violation of law. All defects, errors, irregularities, and inequalities in the making of special assessments or in proceedings prior thereto, not raised by proper objection before the improvement authorities or on appeal, are waived, and cannot be questioned in a collateral proceeding."

To the rule thus announced there are some apparent exceptions. For instance, where the record discloses that the physical facts are such that the property was not and could not have been specially benefited, or could not have been benefited to any extent approaching the assessment, such facts have been in some cases held to show that the levy of assessment was arbitrary and constructively fraudulent, and therefore void, and might be attacked collaterally.

The case of *Standard Pipe Line Co. v. Miller County Highway & Bridge District*, 277 U. S. 160, illustrates the exception to the rule. In that case a road district constructed a highway and assessed against the pipe line traversing the district special benefits therefor to the extent of $5,000 a mile. The pipe line had originally cost less than $9,000 a mile. The collection of the assessment was enjoined in an action in equity. In that case the facts demonstrated that the assessment levied was so unjust and arbitrary as to be constructively, if not intentionally, fraudulent. The rule in such cases is stated

in Hamilton, Law of Special Assessments, sec. 760, wherein it is said: "Where an assessment for street improvements is arbitrary and fraudulent, and therefore void, the appeal provided by the charter is not the only remedy. The person aggrieved may have his remedy in equity, or a common-law action for damages. Equity will enjoin the collection of a void local assessment, and taxpayers are not relegated to an appeal from an assessment."

And it is stated in 25 R. C. L. 141, sec. 58, in this language: "When it is plainly and palpably manifest from the physical condition of the property involved, its locality, environment, character of the work or improvement, assessment, and from the very nature of things, that an assessment is not adapted to the purpose, and is an exaction from the property owner of a contribution which he should not be obliged to make in that capacity, the courts will interfere to prevent a consummation of the injustice. So in those cases where the power to determine local improvements and levy assessments is delegated to a common council, while the presumption is that the council has done its duty, this presumption may be overcome by facts showing that the rule prescribed for the apportionment or the assessment made under it is so grossly and palpably unjust and oppressive as to give demonstration that the proper authority had never determined the case on the principle of taxation." In such cases the assessment may be attacked collaterally.

Plaintiffs also cite and rely upon a number of cases which, in effect, hold that special assessments may only be levied on property specially benefited and only to the extent of such special benefits, and that special assessments in excess of special benefits conferred amount to the taking of private property without just compensation. This is a well-recognized rule; but, if the question as to whether the property has been benefited and the extent of such benefits has been litigated by a tribunal having jurisdiction of the person and the subject-matter, the assessment may not be attacked in a collateral proceeding,

except for fraud, either actual or constructive.

In the instant case plaintiffs introduced the evidence of a single witness. He testified that in his opinion the respective properties of the plaintiffs were of no greater value immediately after the improvement than before, and that no special benefits were derived from the improvement. He also testified as to the locations of the various properties with reference to the improvement. Some of them were practically half a mile from the improvement, and others were a less distance. He further testified that ingress and egress to and from the respective properties were afforded by other streets and avenues.

From the physical facts disclosed by the record, we are unable to say that the properties of plaintiffs received no benefits from the improvement, or that the assessments levied were so excessive as to indicate an arbitrary or fraudulent action by the city council, sitting as a board of equalization. The city introduced no evidence. We are therefore confronted with this proposition: Is the court required to hold that the action of the council in levying the assessment was arbitrary and fraudulent because, in the opinion of the only witness called, the properties derived no special benefits from the extension of St. Mary's avenue? We think not. It is a matter of common knowledge that the values of property and the extent of benefits conferred by local improvements are largely matters of opinion, and that these opinions vary widely. We think we are justified in holding the action arbitrary and fraudulent only where the physical facts disclosed are such that the court can say, beyond question, that the action of the taxing authorities was arbitrary and therefore constructively fraudulent.

We are of the opinion that plaintiffs were afforded an adequate remedy in the assessment proceedings, and that, having failed to avail themselves of the right which the statute gives of a direct appeal to the courts in that proceeding, they are now precluded, under the facts disclosed, from attacking the assessments in a collateral proceeding.

The decrees of the district court in these cases are reversed, and the actions dismissed.

REVERSED AND DISMISSED.

STATE AUTOMOBILE INSURANCE ASSOCIATION, APPELLEE, V. EARNEST S. PICKETT, APPELLANT.

FILED MARCH 2, 1933. No. 28641.

Master and Servant: WORKMEN'S COMPENSATION ACT: INDEPENDENT CONTRACTOR. As applied to the facts in the instant case, a person has the status of an "independent contractor" where he contracts to drive alone an automobile from one state to another for a certain agreed lump sum, not to be measured or affected by the time and labor devoted to the project, and where the terms of the agreement are such that neither party of his own volition may terminate the same, and where he is not subject to control as to the details, means, or methods followed, or route selected, in the performance of the job, but is responsible for final results.

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

George B. Dent, Jr., for appellant.

Chambers & Holland and *C. R. Mattson, contra.*

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

EBERLY, J.

This is an action by Earnest S. Pickett, hereinafter referred to as claimant, to recover compensation under the workmen's compensation act of Nebraska for injuries sustained by him while driving an automobile for the State Automobile Insurance Association, hereinafter designated as the association, from El Paso, Texas, to North Platte, Nebraska. At the conclusion of claimant's evidence, the district court sustained a motion of the association for a judgment in its behalf, finding generally for the association, and finding specially that claimant, at

the time of the accident which caused his injuries, was not an employee of the association, but was then an "independent contractor," and as such not within the provisions of the workmen's compensation act of Nebraska, and thereupon dismissed the proceeding. Claimant appeals.

There is no conflicting evidence in the case; claimant's proof alone appearing in the bill of exceptions. The undisputed facts disclose that an automobile, which had been insured by the association against theft, had been stolen in Nebraska, and had been recovered by the state authorities of Texas in the city of El Paso in that state. The association was desirous of having it returned to North Platte, Nebraska. An oral agreement, for the purpose of accomplishing this plan, was entered into by T. A. Wilson, representing the association, and the claimant. The testimony on this subject was: "Q. What conversation did you have with Mr. Wilson? A. Mr. Beck introduced me to him, and he said, 'Here is a man for you,' and Mr. Wilson told me about the car having been stolen and give me all the credentials, and told me to go down and get it. Q. Where did he tell you the car was? A. At El Paso, Texas. Q. What did he tell you relative to paying you for making this trip down there? A. He told me he would give me $10 and all my expenses. * * * Q. Was there anything said there as to what your expenses should include? A. Railroad fare, room, board and lodging and the expense of driving the car back; also he explained if there was anything the matter with the car to get it fixed so I could drive it back." This of course included supplying a certain spare tire for equipping the same. Pickett was advanced expense money before commencing his trip to Texas, and was furnished a schedule of railway trains via Denver, Colorado, to El Paso, Texas. He proceeded to that place, took possession of the stolen car, and had the necessary repairs made. The return route to be followed was not covered by the terms of the oral agreement, nor indicated

by any instructions of the association. Pickett was, however, not to drive after 6 p. m., as the association was desirous of taking no chances of increased risk due to night driving. On the return trip, while passing over a road which had been chosen by the claimant, in the general vicinity of Carlsbad, New Mexico, the left front tire "blew out" causing the automobile to tip over. This accident resulted in damages to the car and certain physical injuries to the claimant. This transaction constitutes the basis of this litigation. Thereafter the necessary repairs to the automobile were made, and certain services of a physician were had by claimant. The repaired automobile driven by claimant arrived at North Platte in due time, and was delivered to the agent of the association, and claimant's injuries were further treated. A settlement was later had between the association and claimant, in which claimant received the $10 as his compensation agreed upon and also the amount to defray all the expenses of the trip, which included meals, transportation, hotel lodgings, and repairs to the car. It did not include expenses incurred by claimant for services of physicians, necessitated as a result of the accident that occurred near Carlsbad, New Mexico, nor did it include compensation because of the injuries sustained by him.

The right to relief under the workmen's compensation act, in this case, depends on whether claimant is to be regarded as an employee or as an independent contractor. On this subject this court is committed to the doctrine: "There is no hard and fast rule by which to decide whether one is an employee or an independent contractor, but that relation must be determined from all the facts in each particular case." *Cole v. Minnick,* 123 Neb. 871; *Showers v. Lund,* 123 Neb. 56.

Such facts we have already epitomized. The car was to be brought from El Paso to North Platte. The *termini* of the proposed journey were unalterably established by the terms of the contract. The price or compensation was a fixed sum for the performance of the job. It

was not in any manner dependent on or measured by the time required to complete it, or by the amount of labor performed by claimant. Neither was the right to terminate the contract reserved on behalf of or vested in either of the parties thereto. On the return trip the choice of highways, the time of commencing each day's travel, and all details of the journey were, under the contract, for the determination of claimant. We think the terms of the oral agreement and the circumstances above enumerated are sufficient to sustain the finding of the trial court that claimant, when injured, was an independent contractor and not an employee. We deem that as applied to the facts of this case the controlling rule is that one who contracts with another to do a specified piece of work for him, as distinguished from work in general, to be paid for by a lump sum rather than by compensation measured by time devoted to the work, without being subject to control of the employer as to details of means and methods to be followed, but only as to the result of the work, under the terms of an agreement which neither party may of his own volition terminate, has the status of an independent contractor. *Bodwell v. Webster,* 98 Neb. 664; *Showers v. Lund,* 123 Neb. 56; *Perham v. American Roofing Co.,* 193 Mich. 221; *See v. Leidecker,* 152 Ky. 724; *Taute v. J. I. Case Threshing Machine Co.,* 25 N. Dak. 102; *Matter of McNally v. Diamond Mills Paper Co.,* 223 N. Y. 83.

This conclusion is not affected by the fact that in the instant case the employer may have designated the time when the work should be started, stipulated and given warning on the subject of speed limits, and as to driving after dark, and provided that a certain route in going from North Platte to El Paso was to be followed. *Omaha Bridge & Terminal R. Co. v. Hargadine,* 5 Neb. (Unof.) 418; *Gall v. Detroit Journal Co.,* 191 Mich. 405; *St. Louis & S. F. R. Co. v. Madden,* 77 Kan. 80.

It follows that the determination of the district court is correct, and it is

AFFIRMED.

WILLIAM BENTON V. STATE OF NEBRASKA.

FILED MARCH 2, 1933. No. 28349.

1. **Automobiles**: MANSLAUGHTER: CONTRIBUTORY NEGLIGENCE. In a prosecution for manslaughter based upon the unlawful operation of a motor vehicle, where the defendant is negligent, contributory negligence of deceased is no defense.
2. ———: COLLISION: GROSS NEGLIGENCE. One who drives motor vehicle into rear of another car which he knew was in front of him on the highway is grossly negligent, where ordinary care on his part would have avoided a collision.
3. ———: MANSLAUGHTER: ILLEGAL DRIVING. Testimony that, while defendant was driving closely behind a car, still another car approached from the opposite direction with glaring headlights, when considered with other testimony of physical facts surrounding the accident, such as skid marks on the highway indicating distance required to stop and the position of the cars in the ditch after the collision, in which defendant hit the rear of the car he was following, is sufficient evidence to sustain a finding that defendant was negligently operating his car upon the highway at the time of the accident in violation of law, at a rate of speed greater than was reasonable or proper, having regard for the use of the road.
4. ———: ———: ———. When one drives an automobile in violation of law pertaining to the operation of such vehicles on the public highway and in so doing, as a result of the violation of law, causes death to another, he is guilty of manslaughter.
5. ———: ———: INTOXICATION. One driving an automobile while intoxicated is engaged in the commission of an unlawful act, sufficient to support a conviction for manslaughter.
6. ———: ———: ———. Evidence that defendant had been drinking intoxicating liquor prior to accident and was intoxicated immediately thereafter is sufficient to sustain a finding by the jury that he was intoxicated at the time of the accident.
7. ———: ———: REVOCATION OF LICENSE. Statute providing for licensing of automobile drivers being a regulation in the interest of public safety, the fact that a driver's license had been revoked by judgment of a court, and he is operating a motor vehicle notwithstanding, is evidence of negligence.
8. **Evidence** which directly tends to disprove material testimony of witness is admissible.

9. **Criminal Law: ARGUMENT: OBJECTION.** Objection to misconduct of prosecutor in argument to jury must be made at the time and a record must be made then. It is too late to object for first time on the motion for new trial upon a showing by affidavit of defendant's attorney.

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

Morrow & Morrow, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

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

DAY, J.

The plaintiff in error was convicted of manslaughter in that he negligently drove an automobile, while intoxicated, into the rear of a car on the highway, killing Zeigler, a passenger therein. Our general statute applicable is:

"Whoever shall unlawfully kill another without malice * * * while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter." Comp. St. 1929, sec. 28-403. The unlawful acts charged against plaintiff in error are: (a) At time of accident he was operating a motor vehicle upon the public highway, while intoxicated, in contravention of statute, Comp. St. 1929, sec. 39-1106; and (b) he was operating a motor vehicle upon the highway at a rate of speed greater than was reasonable and proper, having due regard for the traffic and use of the road. Comp. St. 1929, sec. 39-1102.

The evidence is sufficient to support a finding by the jury that the defendant was driving his car, at the time of the accident, at a greater speed than was reasonable and proper, having regard for traffic and use of said highway. The defendant and his companion at the time testified that they had been following for some distance about 30 yards behind the car in which the deceased

was riding; that they met a car coming in the opposite direction with bright lights, which momentarily blinded them, immediately after which they observed the car so close in front that they were unable to stop and collided with it, resulting in the tragedy. They also testified that the front car had no tail light and stopped on the road without warning. Where a defendant is negligent, the contributory negligence of the driver of the car in which deceased was riding, even if it were imputable to the deceased, is no defense in a criminal prosecution. *Thiede v. State,* 106 Neb. 48; *Schultz v. State,* 89 Neb. 34; *State v. Gray,* 180 N. Car. 697; 29 C. J. 1154.

The defendant was driving his car negligently at the time of the accident. He drove his car into the car ahead of him with such force that it was knocked off the road into the ditch. In *Roth v. Blomquist,* 117 Neb. 444, we held that, as a general rule, it is negligence for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within an area lighted by his lamps. There are certain exceptions to this general rule, or situations to which it does not apply—an unbarricaded, unknown, open, unlighted ditch across a highway which cannot be seen and cannot be anticipated (*Tutsch v. Omaha Structural Steel Works,* 110 Neb. 585); a negligently maintained highway which has unknown ditches or ruts which cannot be seen until close (*Cromwell v. Fillmore County,* 122 Neb. 114); corner of a platform with a narrow edge extending from a drag line over a street-car track and not easily observable (*Day v. Metropolitan Utilities District,* 115 Neb. 711); and an obstruction in the road similar in color to the highway (*Frickel v. Lancaster County,* 115 Neb. 506).

There is evidence in the case at bar that the defendant was temporarily blinded by the glaring lights of a car approaching him from the opposite direction. Does this create a situation within the recognized exception to the rule in this state which exonerates the defendant from

negligence? Let us repeat the facts pertinent to this issue. The defendant knew the car in which deceased was riding was about 30 yards in front of him, therefore the fact that the tail light was unlighted was immaterial. The glaring headlights from another car could not deprive him of this knowledge. To drive into a car which he knew was on the road under such conditions was grossly negligent. The car in front and the car approaching from the opposite direction with glaring headlights and his own car created a situation which justified a jury in finding that the defendant was operating his car upon the highway at the time of the accident at a rate of speed greater than is reasonable or proper, having regard for the traffic and use of the road, and was in the commission of an unlawful act. There was also evidence of physical facts after accident, viz., skid marks on the road, and the fact that the car hit by defendant was hurled off the road into the nearby ditch. Such a finding is sufficient to support a conviction for manslaughter. *Schultz v. State,* 89 Neb. 34; *Crawford v. State,* 116 Neb. 125.

The defendant is also charged with the commission of another unlawful act at the time of the fatal accident in that he was operating a motor vehicle upon the highway while intoxicated. If true, it constitutes an unlawful act sufficient to sustain the verdict of conviction for manslaughter.

When one drives an automobile in violation of law pertaining to the operation of such vehicles on the public highway and in so doing, as a result of the violation of law, causes death to another is guilty of manslaughter. This rule applies to one driving while intoxicated. *State v. Kline,* 168 Minn. 263; *State v. Goldstone,* 144 Minn. 405; *Cannon v. State,* 91 Fla. 214; *McDaniel v. State,* 105 Tex. Cr. Rep. 468; *State v. Sandvig,* 141 Wash. 542; *State v. Budge,* 126 Me. 223, 53 A. L. R. 241; *People v. Collins,* 195 Cal. 325; *People v. Townsend,* 214 Mich. 267.

The reading of the record in this case forces us to the

conclusion that defendant's intoxication was one of the proximate causes of the accident and the resultant death of the unfortunate Mr. Zeigler. The evidence is amply sufficient to support a finding that the defendant was intoxicated. He and his companion testified that they had drunk some illicit beer shortly before the accident. Although they denied that it was sufficient to cause intoxication, other witnesses testified that defendant at the time and immediately after the accident was intoxicated.

The record of the county court was introduced in evidence for the purpose of proving that the defendant's license to drive had been revoked. The court in its instructions told the jury that such was the purpose of admitting the record. Thus limited, it does not amount to proof of another crime wholly independent of that for which the defendant was on trial. The licensure of drivers, under section 60-401, Comp. St. 1929, is in the interest of public safety, and when one drives in violation of this statute, it is evidence of negligence which may be considered by the jury. In *Conroy v. Mather,* 217 Mass. 91, it was held that it may be evidence of negligence in showing that the driver was incompetent to operate the vehicle, although the authorities generally permit a recovery by one who is injured whose motor vehicle is not licensed on the theory that the license does not contribute to the accident. However, since the purpose of this statute is to protect the public from negligent and incompetent drivers, the fact that the defendant was driving after having had his driver's license revoked may properly be considered as tending to prove his negligence. While it is clear that the failure to have a driver's license would not be such violation of law as would supply the place of criminal intent necessary to constitute manslaughter, yet in a case where the license has been revoked by judgment of a court and the driver is operating a motor vehicle notwithstanding, it is evidence of negligence proper to be considered by the jury with all the other evidence in the case.

The defendant and his witnesses by their testimony covered their entire activities for the evening. Testimony of a witness was introduced in rebuttal that shortly before the fatal accident the defendant had a minor accident, which he denied, with another car, after which he did not stop. Evidence which directly tends to disprove facts to which defendant has testified is admissible. *Heyen v. State,* 114 Neb. 783.

The defendant testified as to his age. The state cross-examined him in respect thereto by confronting him with his application for a driver's license, which tended to prove that he was a different age. This was proper cross-examination, and while of doubtful materiality to the issues was not prejudicial to defendant. But it was a matter concerning which defendant testified on direct examination.

A more serious question is presented by the argument of the prosecution to the jury in relation thereto. The attorney for the state argued to the jury that the false statement in the application was perjury. Of course it was not, since the defendant at the time was entitled to a license in any event and the discrepancy was not material to the matter involved. *Shevalier v. State,* 85 Neb. 366. This question was presented to the trial court by affidavit at the motion for new trial. From said affidavit it appears that the attorney for defendant objected to this line of argument; that there was a more or less unseemly argument between attorneys as to whether this constitutes perjury; that the court insisted that the argument cease and that the trial proceed. This argument should have been stopped by the trial court, as it seems to have been. No proper request for a specific instruction on this matter was made by defendant. *Martin v. State,* 67 Neb. 36. We are not persuaded that the defendant suffered any prejudice as a result of this alleged misconduct.

Furthermore, the error is not properly presented to this court. Objection to alleged misconduct of prosecutor

must be made at the time, and it is too late to make objection for the first time in motion for new trial. *Goldsberry v. State,* 92 Neb. 211; *State v. Geary,* 184 Minn. 387. It is the duty of counsel to make a record of the prejudicial remarks at the time and to properly request a specific instruction upon the question.

The judgment of the district court is

AFFIRMED.

ALBERT E. LEBS, ADMINISTRATOR, APPELLANT, V. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, APPELLEE.

FILED MARCH 2, 1933. No. 28431.

1. Instructions should submit to jury only issues of fact supported by evidence.
2. Insurance: SUICIDE: EVIDENCE. Testimony of witness, who could not read, that contents of a lost note left by deceased read, "He can't stand it any longer, tell his brother too. Good bye," *held* insufficient to support finding that deceased committed suicide.
3. Evidence: PRESUMPTION. Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference.
4. Appeal: ERRONEOUS INSTRUCTIONS. Where a verdict is the only one which the evidence is sufficient to support, erroneous instructions *held* not prejudicial.
5. ———: DIRECTION OF VERDICT. Where the evidence is insufficient to support a verdict for plaintiff, the court should sustain defendant's motion to direct a verdict.

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

Rait & Kuppinger, for appellant.

Cleary, Horan & Skutt, contra.

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

DAY, J.

This is an action to recover for accidental death under

the provisions of an accident policy. It is alleged by the plaintiff that the insured died on or about the 16th day of July, 1928, as a result of an "accidental gunshot wound and by accidentally wandering and falling into the Missouri river." The answer of the insurance company denies these allegations. The plaintiff appeals from a judgment entered upon a verdict in favor of the defendant.

The plaintiff complains that the court erred in giving certain instructions relating to the alleged shooting, in which the jury were told that a brawl or altercation between an insane father and his son would have some bearing upon the question as to whether or not the shooting, if any, was accidental. This instruction is erroneous for the reason that it submitted the question to the jury as to whether or not there was a brawl or altercation between the insured and his insane father, when there is no evidence in the record upon this question. The sole evidence as to what occurred is testimony of a witness to the effect that deceased said immediately after visiting the father's home that his father shot him. The learned trial judge was in error in submitting this question to the jury. The instructions of the court should direct the jury's attention only to issues of fact supported by evidence. *Trute v. Holden,* 118 Neb. 449; *Stiefler v. Miller,* 120 Neb. 6.

Complaint is made to the giving of another instruction to the effect that, if the insured committed suicide, his death was not accidental within the terms of the policy. This instruction is criticized on the theory that the defense of suicide is an affirmative defense. The appellant relies upon *Michalek v. Modern Brotherhood of America,* 179 Ia. 33, which holds (161 N. W. 125): "In an action upon a certificate of life insurance, defense of suicide, an expressly excepted risk, is an affirmative defense, the burden of establishing which by proof of facts excluding every reasonable hypothesis of natural death is upon the insurer." However, in an action on an accident policy

to recover for accidental death, the burden is upon the plaintiff to establish such death. Evidence of suicide would tend to disprove accidental death. The only evidence from which a possible inference of suicide might be drawn was introduced by the plaintiff. The woman with whom the deceased boarded testified that he left a note which she had lost, and that it said: "He can't stand it any longer, tell his brother too. Good bye. That is all." In passing, it is significant that this witness could not read, and it is not disclosed how she acquired knowledge of the contents of the alleged message. The evidence in this record is not sufficient to support a finding upon this issue of fact, and, for that reason, the instruction should not have been given.

Do the instructions erroneously given require reversal of the judgment in this case? The burden of proof was upon the plaintiff in this case to establish that the insured was dead and that his death was the result of an accident. *Dodder v. Aetna Life Ins. Co.*, 104 Neb. 70. A brief summary of the evidence relating to the alleged accident would be helpful. A nephew testified that he went to the house, where the insured boarded, on the day after his disappearance; that he examined some tracks, and went over to the place where the father of the insured lived, nearby; that he examined the house, but could not find any bullets in the house; that he examined the driveway that ran by the house to the river. He also said: "I found tracks leading up part way in the driveway. It seemed as though they went so far and went back again, just to the end of the driveway, between the driveway and the street, I found a spot of blood there. * * * The grass looked as though somebody had fallen on it or been laying on it; it was down, see?" He testified also that the blood spot was six to eight inches in size; that he tried to follow the tracks, but could not go any farther on account of the grass in the road; that the tracks resembled the insured's tracks because of a peculiar worn spot in the sole; that he went back to the

house where insured lived and picked up the tracks and found there was the same worn spot there; that he traced them down over the dike; that he could not trace them any farther on account of the grass; that he went on down toward the river trying to pick up the tracks again; that he found tracks, but could not identify them; and that the father of the deceased had a gun.

The woman with whom the insured boarded testified that the insured went over to his father's house and she heard shooting; that the insured came home and "told me he got shot; his father shoot him;" that he was over to his father's house about 30 minutes, after which he left for a few minutes to see his brother who lived at a short distance. This witness also testified that deceased came home and went to bed with his clothes on, where he remained for the rest of the day; that she thought he was feverish; that he got up about 9 o'clock in the evening and went out of the house and came back in again later, and that she never saw him again, and that she got up about 1 o'clock and found he was not there; that at about 3 o'clock she looked around the yard and searched along the river with her dog, but could not find him; that she saw neither a wound nor blood on his clothes; and that no doctor was called. The testimony of these witnesses is relied upon by plaintiff to support the allegations of the petition that the plaintiff was accidentally shot and that he died as a result of said accident.

This evidence is not sufficient to establish that the insured died as the result of an accidental injury. In the first place, it must have been proved that the insured was injured accidentally. Assuming that he was shot, a fact upon which the evidence is not satisfactory, it must be presumed that it was accidental. Upon this presumption must be developed the presumption that he is dead and under the terms of the policy died within 13 weeks, and that the injury was the cause of his death. The testimony of the witness who cared for him the day of

the alleged shooting saw no blood on his clothing and saw no bullet wound. She testified that he was up and walked about during the day and walked out of the house 12 or 15 hours after the shooting. The next presumption necessary to be indulged in to permit a recovery is that the insured was delirious as a result of an accidental wound and while in such condition walked into the nearby river and was washed away. There is neither evidence to establish that the insured is dead nor evidence from which an inference of death may be drawn. The right to recover in this case rests upon the presumption that insured is dead; that he be presumed to have died within 13 weeks of the time he is presumed to have been accidentally shot. It is a well-established rule that presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference. *Poweshiek County v. Merchants Nat. Bank*, 209 Ia. 467. This evidence is not sufficient to support a verdict in favor of the plaintiff, and the verdict returned by the jury for the defendant was the only one permissible under the law and the evidence. It is the well-established rule that, where the verdict of the jury is the only one which the evidence will support, erroneous instructions are not prejudicial. *Ramold v. Clayton*, 77 Neb. 178; *Dodder v. Aetna Life Ins. Co.*, 104 Neb. 70. The record presents a case in which the evidence is not sufficient to support a verdict of the jury, and the trial court should have sustained the motion of the defendant for a directed verdict, after the evidence had been submitted. *Swett v. Antelope County Farmers Mutual Ins. Co.*, 91 Neb. 561; *Coulter v. Cummings*, 93 Neb. 646.

Since the verdict of the jury was the only one which could have been returned which would have been supported by the evidence, the plaintiff was not prejudiced by the giving of instructions which found no support in the evidence.

The judgment of the trial court is

AFFIRMED.

FEDERAL LAND BANK OF OMAHA, APPELLEE, V. JEANIE ARTHUR ET AL., APPELLANTS.

FILED MARCH 2, 1933. No. 28358.

1. **Mortgages: FORECLOSURE: COMPUTATION OF INTEREST.** In a mortgage foreclosure, error in computing interest on the debt is not ground for setting aside a sale under the foreclosure decree, where a stay has been taken, and where such error is not prejudicial.
2. ———: ———: ———. In such proceeding, a petition to set aside the decree after the term at which it was rendered, under section 20-2001, Comp. St. 1929, cannot be maintained, after a sale under the decree, because of error in computation of interest or other error, where the parties, after they knew or had ample opportunity to learn of such error, took a stay of order of sale under such decree, and such error is not prejudicial.

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

Merrow & Murphy and *J. C. Sprecher*, for appellants.

E. F. Dougherty, J. M. Gurnett and *Harvey M. Johnsen, contra.*

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

RAPER, District Judge.

This action was begun on February 12, 1930, by plaintiff and appellee to foreclose a mortgage given by Jeanie Arthur, on premises later sold to George Anderson, both being made defendants, and are appellants. Maggie Brown, defendant, filed cross-petition to foreclose second mortgage. Plaintiff sets up its note and mortgage, and alleges that Jeanie Arthur purchased capital stock to the amount of 130 shares in the Surety National Farm Loan Association (being 5 per cent. of the loan) through which plaintiff's loan was made, and that said association in turn purchased a like amount of capital stock in plaintiff corporation, and plaintiff issued said 130 shares of its

stock to said association, but retained said stock as collateral to said loan. Plaintiff alleges default in conditions of its mortgage, and prays foreclosure for amount due thereon and for taxes paid for the year 1928, and that it be directed and authorized to retire at par value ($650), the said 130 shares of its stock and credit same, and that the Surety National Farm Loan Association (which association is also made defendant) be directed to retire and cancel its said 130 shares of stock.

Maggie Brown claims a lien second to plaintiff's, on a note and mortgage for $2,559.22, and interest, and also sets up a second note for $385.08 signed by Jeanie Arthur, dated February 23, 1927 (same date as mortgage) but the mortgage does not secure this $385.08 note.

Service was had on Anderson and wife by publication, answer day being July 14, 1930, and on that day George Anderson answered by general denial. No further appearance by any party was made until November 1, 1930, when Surety National Farm Loan Association filed cross-petition and petition in intervention, alleging that the property had been purchased at tax sale by plaintiff in the year 1925, and tax sale certificate issued therefor, which plaintiff, soon after, assigned to the association, and that said association thereafter in the years 1926 and 1927 paid the taxes on said land, and prays for foreclosure of its tax lien, but subject to plaintiff's mortgage lien. No process was issued on this cross-petition. On November 5, 1930, in the district court, there was entered and filed a decree of foreclosure giving plaintiff a first lien for the sum of $12,671.21, with interest at 8 per cent. from January 20, 1930, directing the Surety National Farm Loan Association to withhold retirement of the $650 capital stock until there is a sale of the property, and if enough be realized from the sale to pay plaintiff's lien, the stock retirement fund will be available to be paid to said association, but if enough is not realized from the sale to pay plaintiff's lien the stock retirement fund is directed to be applied to the deficiency to the

extent that it is necessary. Maggie Brown was given a second lien in the sum of $3,676.42 with 10 per cent. interest, which apparently includes the note of $385, which no doubt was an inadvertance. The decree does not grant the association's claim for its tax foreclosure.

On November 10, 1930, Jeanie Arthur and George Anderson filed request for stay. At the expiration of the stay, an order of sale was issued under which the sheriff on September 14, 1931, sold the land to plaintiff for a sum less than sufficient to satisfy plaintiff's decree and costs. Anderson and Mrs. Arthur on September 18, 1931, filed objections to confirmation, alleging the land sold for an inadequate price; that the decree provided for excessive interest; that plaintiff had no right to purchase the taxes for 1925, and assign the certificate and thus give the association the right to claim interest at a larger per cent.; that Maggie Brown's decree included the note not secured by the mortgage, and her decree allows greater interest than the pleadings warranted; that the decree was not submitted to their attorneys prior to its entry.

It will be noted that the decree was duly filed on November 5, 1930, and five days thereafter these appellants asked for a stay, which was granted. There was ample opportunity for the appellants to read or learn of the decree before they filed their stay, and this stay waives all errors in the decree which might have been corrected if promptly called to the attention of the court. The objections to the errors in the decree were not made until after the sale, and no valid reason given for the delay. Appellants, no doubt realizing their weakness in such claim, on November 24, 1931, filed petition to set aside the decree, alleging in substance the same reasons that were claimed in their objections to the confirmation of the sale.

The court on November 20, 1931, entered an order, after hearing objections to the confirmation, granting objectors 30 days in which to raise the reported sale price, and if not raised by that time, the sale to be con-

firmed. During that period a person offered $15,000, but the offer contained some reservations as to title and conditions that the court or sheriff had no authority to comply with, and the court refused the offer.

The district court on January 2, 1932, overruled the objections and confirmed the sale, and on same day sustained a demurrer to appellants' petition to set aside the decree and dismissed same. George Anderson and Jeanie Arthur appealed from those orders. As to the question of the value of the land, the court heard the evidence and the evidence is sufficient to sustain its finding that the land sold for a reasonable price. There were some irregularities in computing the interest amounting only to a small sum, and in granting lien of Maggie Brown's second note, but in view of the fact that the premises did not bring sufficient to pay plaintiff's lien and costs these irregularities are not prejudicial to the sale. It may be that the court, if deficiency judgments be asked for, can correct the computations as to Jeanie Arthur. *Hoagland v. Way,* 35 Neb. 387. No deficiency is prayed against appellant Anderson, and no final judgment was in fact entered against Jeanie Arthur on Maggie Brown's $385 note. The appellants cite *Hoagland v. Way, supra,* as authority for right to set aside judgment at a subsequent term, after filing stay. The facts in that case clearly distinguish it from the case at bar.

Where the parties knew or could by reasonable diligence have known the facts upon which such petition is based, before taking a stay or before the adjournment of the term at which a decree was rendered, and their rights have not been prejudiced, they are not entitled to vacate the decree at a subsequent term, under section 20-2001, Comp. St. 1929.

The procedure in the case is set out above more fully than might ordinarily be expedient, but it shows that the appellants had ample opportunity to present their claims, and the court, after full hearing, was warranted in confirming the sale, and in dismissing their petition.

There being no prejudicial error disclosed, the orders appealed from are affirmed.

AFFIRMED.

DAVID W. DAY, PLAINTIFF, V. HENRY J. WALKER, SECRETARY, ET AL., DEFENDANTS.

FILED MARCH 4, 1933. No. 28747.

1. Statutes: ENACTMENT: VOTE. Publicity of voting by members of the legislature was the object sought to be attained by the constitutional provision that "All votes in either house (of the legislature) shall be *viva voce*." The electric roll call device, now installed in each house of the legislature, attains that object.
2. Evidence: STATUTES: ENACTMENT: LEGISLATIVE JOURNALS. The journals of the respective houses of the legislature are the best evidence as to whether an act has been properly passed by the legislature. The entries contained in the journals are conclusive as to the facts therein disclosed.
3. Statutes: ENACTMENT: VOTE. In voting, the legislature may, in its discretion, adopt or use any system which gives publicity to the member's vote, and provides for his yea or nay to be properly entered upon the journals of the respective houses of the legislature.

Original action to enjoin enforcement of the provisions of sections 71-2020 and 71-2023, Compiled Statutes of Nebraska 1929; the purpose of the action being to determine the constitutionality of the use of an electric voting device in the passage of laws. *Judgment for plaintiff.*

Paul F. Good, Attorney General, and *Daniel Stubbs,* for plaintiff.

Clarence G. Miles, for defendants.

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

GOOD, J.

This is an original action in this court in which plaintiff seeks to enjoin defendants, as officers and agents of

the state, from enforcing the provisions of sections 71-2020 and 71-2023, Comp. St. 1929, on the ground that said sections have been repealed by the 1933 session of the legislature.

Defendants contend that the repealing act is invalid, because, on final passage of that act in each house of the legislature, the vote of the members was not taken *viva voce,* as required by the Constitution, and that said original sections remain in force. Defendants concede that said original sections have been amended and repealed if house roll 56 of the 1933 session of the legislature was legally passed.

It is alleged in the petition and admitted by defendants' demurrer thereto that there has been installed in each of the legislative halls an instrument and device known as the electric roll call system. This system provides for a board above and back of the presiding officer's position. On this board appear the names of all members of that particular branch of the legislature and opposite the name of each are three columns which are designated "Yea," "Nay" and "Not voting." Upon the roll call each member presses an electric button at his desk which instantly records on the board his vote, yea or nay, and if he does not vote he is marked in the third column as not voting. The names of the members and how the vote is cast are plainly visible to all persons in that legislative hall, so that every person present may be, unless blind, fully advised as to how each member voted on the roll call.

It is admitted that the electric roll call system would be a great convenience, would conserve the time of the members of the legislature, and would make a considerable saving to the taxpayers. But defendants urge, notwithstanding the desirability of having the system installed and using it, it may not be done under the present constitutional provisions.

Section 11, art. III of the Constitution, provides in part: "All votes in either house shall be *viva voce.* The doors of each house, and of the committee of the whole

shall be open, unless when the business shall be such as ought to be kept secret." Section 13 of the same article provides in part: "No bill shall be passed by the legislature unless by the assent of a majority of all members elected to each house of the legislature, and the question upon final passage shall be taken immediately upon its last reading and the yeas and nays shall be entered upon the journal."

Plaintiff contends that the primary object of the framers of the Constitution in providing a *viva voce* vote on all questions was to give publicity to their acts, in contradistinction to a secret vote or ballot; so that the people, and particularly the constituents of each member, might know precisely how he voted and have a record thereof; and contends that every purpose of the framers of the Constitution is fulfilled in the use of the electric roll call device.

Defendants contend, on the other hand, that the provision of the Constitution is imperative and cannot be varied from, and at the same time they admit that if any member is mute, or is unable to use his voice, he is not thereby deprived of his right to vote upon the measure. It appears to us that this is an admission that the provision relative to *viva voce* voting is not imperative. While not likely, it is possible that a considerable number of members of one or the other house of the legislature might be so afflicted as to destroy, for the time being, their vocal powers. Certainly, these members would not be deprived of the right to vote because, at the time, they were voiceless.

The question presented amounts to this: Shall an act of the legislature be declared invalid because, in its passage, the legislature has not followed the strict letter of the Constitution, but has complied with every requisite according to the spirit thereof?

In 15 Cyc. 345, it is said: "The subject of *viva voce* voting is not now of much importance, although some traces of it are still to be found in minor elections such

as those for school officers. An interesting question has been presented as to the rights of deaf and dumb persons, where the law requires that votes shall be personally and publicly given *viva voce,* and it would seem to be the better opinion that they have the right to vote if they possess the qualifications of voters."

The Constitution of Kentucky formerly provided that votes shall be publicly and personally given *viva voce.* In a contested election for member of congress, the house of representatives of the United States held that the votes of deaf and dumb persons should be received, as clearly within the spirit of the Constitution. Bouvier's Law Dictionary defines *viva voce* voting as opposed to ballot.

In *Spickerman v. Goddard,* 182 Ind. 523, and particularly at page 526, it is said: "Voting by ballot involves secrecy while *viva voce* voting insures publicity. The word 'ballot' was used as a symbol of secrecy while *viva voce* was used as the symbol of publicity. There was nothing sacred in the contrivance of a strip of paper with names or questions printed thereon, which the framers sought, to preserve by the use of the word 'ballot;' nor was there any imperative necessity for the use of the voice of the legislator which moved the convention to decree its perpetual exercise in legislative elections. The constitutional limitation is not violated by dispensing with the use of the paper contrivance in the one case, or the legislator's natural voice in the other, if, in the former the people may choose in secret, and in the latter the legislator must make a public expression of his choice." In the opinion it is further pointed out that the Constitution "requires the opinions of this court to be given 'in writing.' At the time of the convention, the opinions were delivered in the handwriting of the judges, with pen or quill as the mechanical device used. The object of course was not to preserve the mere handwriting of the judges, but to provide a permanent record of the court's reasons for its mandates. An opinion as then written could be filed as a permanent record, and

consequently the word 'writing' was used to symbolize the purpose of requiring a permanent record. In recent years the court's opinions have been printed on typewriting machines, and thereby the inconvenience resulting from poor handwriting has been eliminated, and no one has been so narrowly technical as to claim the Constitution has been violated by the innovation." To the same effect is *Williams v. Stein*, 38 Ind. 89.

Another question somewhat akin is the use of voting machines at general and municipal elections. In most of the states the constitutional provision is that the voting shall be by ballot. Yet in many states voting machines, which entirely dispense with the ballot, have been held not to be in violation of the constitutional provision, on the theory that, where the voting machine provided a means whereby the voter could exercise his choice as to candidates or measures, and could cast his vote so that his choice of men or measures was secret, it was a sufficient compliance. Among the cases so holding is *Elwell v. Comstock*, 99 Minn. 261. In the opinion in that case it is said: "Constitutions are not made for existing conditions only, nor in the view that the state of society will not advance or improve, but for future emergencies and conditions, and their terms and provisions are constantly expanded and enlarged by construction to meet the advancing and improving affairs of men."

In *Henshaw v. Foster*, 9 Pick. (Mass.) 312, speaking of a constitutional provision, it is said: "We are to suppose that those who were delegated to the great business of distributing the powers which emanated from the sovereignty of the people, and to the establishment of rules for the perpetual security of the rights of person and property, had the wisdom to adapt their language to future as well as existing emergencies; so that words competent to the then existing state of the community, and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consist-

ently with the general object of the authors and the true principles of the compact, they can be extended to other relations and circumstances which an improved state of society may produce."

In speaking on the same subject, the supreme court of Montana, in *State v. Keating*, 53 Mont. 371, holds: "In interpreting a constitutional provision, the language used therein must be taken as having been designed to meet the needs of a progressive society, and should not be strictly confined to its meaning as understood at the time the instrument was adopted."

There are many other cases from other courts which hold that the adoption of voting machines for voting, where the Constitution provides that the voting shall be by ballot, is not in violation of such constitutional provision. In those cases it was pointed out that the object of the provision was to secure to the voter absolute freedom in the selection of men and measures to be voted for, and at the same time permit him to cast his vote so that no one except himself would know how he voted. The voting machine permitted that. The question we have before us is the direct reverse. The object and purpose of the constitutional provision was to give publicity and required each member of the legislature, voting on the passage of a bill, to vote publicly and have his vote recorded on the journal. It was publicity that was aimed at. The electric roll call device provides that publicity.

On the final passage of a bill by the legislature, the Constitution requires yeas and nays to be recorded on the journals of each house, but does not require the journals to show that the members voted *viva voce*. We think this omission is significant. Had the framers of the Constitution considered *viva voce* voting of vital importance, they would have required the journals to show that fact. We are impelled to the view that the use of the electric roll call device on the passage of house roll 56 did not render the act invalid.

There is another reason why we are precluded from holding that house roll 56 was not legally passed by the legislature. It has long been the rule in this court, and we think in most courts, that, in determining whether an act has been properly passed by the legislature, the journals of the respective legislative houses are the best evidence, and whatever the journals show may not be impeached, but must be accepted. *State v. Abbott,* 59 Neb. 106; *State v. Junkin,* 79 Neb. 532. The court takes judicial notice of the contents of the journals of the houses of the legislature. *Elmen v. State Board of Equalization & Assessment,* 120 Neb. 141; *State v. Frank,* 61 Neb. 679.

The journals in this instance show that house roll 56 was duly passed. The yeas and nays were recorded on the journals of the house and senate. This is a record that complies with the constitutional requirement, and shows that the bill was properly passed. We may not go behind that record. Whether the requisite number of representatives and the requisite number of senators voted for a bill on its final passage is absolutely determined by the house and senate journals. The record itself, in this case, presupposes that the bill was regularly passed. But, aside from this, the question of whether they should resort to the electric roll call system, or the old-style *viva voce* voting, is a question entirely within the discretion of the legislative bodies. So long as the system used gives publicity to the member's vote, and his yea or nay vote is properly recorded on the journal, no other requirement in that respect is necessary.

We therefore conclude that house roll 56 was validly enacted and that sections 71-2020 and 71-2023, Comp. St. 1929, have been amended and repealed, and may no longer be enforced.

Plaintiff is entitled to the relief demanded.

JUDGMENT ACCORDINGLY.

ROSE, J., dissenting.

The question presented is the power of the legislature,

in absence of a constitutional amendment, to depart from the provision of the Constitution relating to the passage of legislative bills and declaring that "All votes in either house shall be *viva voce,*" and enact a law by means of voting machines.

No law can be enacted except by majority votes cast in the specific manner prescribed by the Constitution, which declares:

"No bill shall be passed by the legislature unless by the assent of a majority of all members elected to each house of the legislature, and the question upon final passage shall be taken immediately upon its last reading and the yeas and nays shall be entered upon the journal." Const. art. III, sec. 13.

Upon final passage of a bill there is only one lawful way of ascertaining the "assent" of the majority and that is by yeas and nays *viva voce.* The framers of the Constitution and the people who adopted it did not permit the legislature to select its own method of voting on the final passage of a bill, but provided a specific mode having a definite meaning for that purpose. The Latin phrase, *viva voce,* as used in the Constitution, means "With the living voice" or "By word of mouth." In addition, it has been defined in a standard law dictionary as follows:

"As descriptive of a species of voting, it signifies voting by speech or outcry, as distinguished from voting by a written or printed ballot." Black's Law Dictionary, 1211.

It has had this definite meaning in legislative halls, in city councils, in meetings of voluntary associations, and in other bodies, and in common speech since long before the Constitution was adopted. It was so accepted and obeyed by all departments of government until the present legislature attempted to adopt a bill by casting votes on its final passage with mechanical devices. The new method substitutes mechanisms for vocal utterances, a departure from the Constitution which makes the human voice a necessary element of a lawful vote on the final passage of a bill. Following the provision that "All

votes in either house shall be *viva voce,*" the supreme law commands:

"The doors of each house, and of the committee of the whole shall be open, unless when the business shall be such as ought to be kept secret." Const. art. III, sec. 11.

In voting for or against a bill on its final passage, a legislator must be prompted by such a conviction or sense of duty as enables him to use his voice in a legislative hall with open doors. The oath of each member of both houses contains a solemn vow to support the constitutional method of voting by use of the human voice. Throughout the entire history of legislation in Nebraska this exclusive method was never questioned until the use of the voting machine was proposed.

When the people in creating a system of government depart from the ordinary business of framing and adopting a written Constitution to prescribe a definite mode for the exercise of legislative power in a particular instance, the method adopted is deemed to be of vast importance and cannot be exercised in any other manner. The mode adopted is a limitation on power. A provision of that kind is mandatory and the courts tread upon very dangerous ground when they venture to say that the requirement is merely directory and that power may be exercised in a different manner. In substance these are views of an outstanding text-writer who reviewed the authorities and discussed the subject at length. Cooley, Constitutional Limitations (7th ed.) 114. The constitutional method openly places lawmaking obligations on each legislator and requires him to share with others full responsibility by word of mouth. This purpose has been announced over and over again by the courts of the country. Nebraska law formerly conformed to these views. Constitutional provisions are mandatory, unless by express provision or necessary implication a different intention is manifest. *Barkley v. Pool,* 102 Neb. 799. There is no provision or implication to the contrary. My research leads me to conclude there is no judicial prece-

dent at variance with these views, except in a few instances, where courts bowed to expediency or convenience and departed from the law.

The Constitution does not automatically develop with changed conditions and new inventions at such a pace and with such power as to sweep down its mandatory provisions without even an attempt at lawful amendment. Mechanism should not be recognized as the master of the Constitution. The general course of precedent is to the effect that laws prescribing the manner in which members of legislative bodies shall vote on proposed legislation is mandatory and that public acts not so adopted are void. *Cutler v. Town of Russellville,* 40 Ark. 105; *Tracey v. People,* 6 Colo. 151; *Rich v. City of Chicago,* 59 Ill. 286; *Spangler v. Jacoby,* 14 Ill. 297; *City of Logansport v. Dykeman,* 116 Ind. 15; *Town of Olin v. Meyers,* 55 Ia. 209; *Morrison v. City of Lawrence,* 98 Mass. 219; *Coffin v. City of Portland,* 43 Fed. 411; *Sullivan v. Pausch,* 5 Ohio Cir. Ct. Rep. 196.

It is perfectly clear to my mind that the meaning of the requirement for voting *viva voce* is definite and certain and not open to construction, but the result would be the same, if a resort to interpretation could be justified. Interpretation of a phrase in a foreign language is controlled by the meaning of the original text, rather than by translation into English words having a broader import. *Engen v. Union State Bank,* 121 Neb. 257; *Todok v. Union State Bank,* 281 U. S. 449. As applied to voting, the Latin words, *"viva voce,"* are technical in an exclusive sense—"With the living voice" or "By word of mouth." Technical words in a law are considered in a technical sense. *Franklin v. Kelley,* 2 Neb. 79.

Literal compliance with voting *viva voce* on the final passage of a bill will not deprive a voiceless statesman of a right to make known his legislative will. Neither the record nor the current history of legislation furnishes an example of a legislator without a voice, but, if one should be found, there will be other legislators to lend

a voice for the purpose of a vote. In such an improbable event the right to vote will be determined by interpretation of the constitutional provision prescribing qualifications for members of the legislature. *Letcher v. Moore,* Cl. & H. Cont. El. Cas. 715.

When this cause was argued at the bar, I assumed it was submitted as a test case for a declaratory judgment of the court on facts pleaded by plaintiff and admitted by defendants. An admitted fact of the record is that house roll 56 was not passed by votes *viva voce.* I now learn that the court has rejected the admitted facts pleaded and has determined the issue by judicial notice of legislative journals. By attempting to pass house roll 56 without complying with the mandatory constitutional provision that "All votes in either house shall be *viva voce,*" an admitted fact, the legislature went beyond a limitation of power fixed by the Constitution and attempted to deprive the state of part of its revenue. I deny the right or power of the legislature to disregard a mandatory provision of the Constitution, to thus deprive the state of lawful revenue, to make legislative journals which do not show compliance with the exclusive constitutional method of individual voting *viva voce* on the final roll call and in this manner to prevent the court from redressing wrongs. In the present instance, however, the legislative journals themselves disclose a method of voting at variance with the Constitution, thus leaving the court free to pass on the question presented in the light of the admitted facts pleaded. The constitutional law of Nebraska is:

"All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." Const. art. I, sec. 13.

This provision applies to the state as well as to individuals, and is a delusion and a snare, if the legislature can exceed its powers, strip the state of revenue or a citizen of his property in violation of the Constitution

and close the door to judicial scrutiny and redress. The law is that the humblest citizen, when his constitutional rights are invaded by the legislature, stands before the court on an equality with government in all its power. The state and its officers have the same standing. I am reminded of the prophetic vision of Abraham Lincoln who said:

"Let every man remember that to violate the law is to trample on the blood of his father, and to tear the charter of his own and his children's liberty. Let reverence for the laws be breathed by every American mother to the lisping babe that prattles on her lap. Let it be taught in the schools, in seminaries, in colleges. Let it be preached from the pulpit, proclaimed in the legislative halls, and enforced in courts of justice, and, in short, let it become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay of all sexes and tongues and colors and conditions sacrifice unceasingly upon its altar."

It was the same Lincoln who afterwards, when President, kept his mind clear and his face steady during the revolutionary storms in his distracted country and declared in his first inaugural address:

"I shall take care, as the Constitution especially enjoins upon me, that the laws of the Union be faithfully executed in all states."

There is need of the same spirit in all departments of government. The declaratory judgment should uphold individual *viva voce* voting and condemn house roll 56 as void.

ANNA NELDEBERG ET AL., APPELLEES, V. CITY OF OMAHA, APPELLANT.

FILED MARCH 10, 1933. No. 28415.

Record and evidence examined. *Held*, that the verdict was sustained by the evidence and that no errors prejudicial to appellant were committed.

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

Fred A. Wright, Harry B. Fleharty, Thomas J. O'Brien and *Bernard J. Boyle,* for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

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

PER CURIAM.

The city of Omaha appeals from a judgment awarding damages for about 45 acres condemned for an aerial landing field appropriated as an addition to the Omaha Municipal Airport in East Omaha. The appraisers' report, approved by the city council, awarded the plaintiff $17,310. On appeal the jury awarded $32,500 and judgment was for that amount.

Both parties state that the only issue raised by the pleadings is the market value at the time of the appropriation on April 14, 1931. The city claims the verdict was excessive. There was great divergence in the testimony of the witnesses for the respective sides as to value. It was peculiarly the province of the jury to decide, in the light of all the evidence, which witnesses they would follow on this subject.

The court instructed the jury in substance that the fair market value of real estate is that cash consideration which one desiring to purchase would be willing to pay to the owner who is willing but not compelled to sell. The appellant does not complain of the instruction, which certainly was not unfavorable to it. 38 C. J. 1260-1266. But the appellant assigns error because the court refused to give the only instruction requested by defendant, to the effect that, where a large tract of land is subdivided into lots for the purpose of placing it on the market, the price for which one lot would sell, multiplied by the number of lots, is no criterion of the value of the large tract, because the length of time necessary to dispose of the

lots and the expense of selling them must be taken into consideration. Appellant states that this requested instruction accurately reflected the testimony of J. A. Nickerson, a witness for plaintiffs. This witness qualified as a practical expert in real estate matters, particularly in East Omaha. His company had sold about 2,000 acres there. He had handled a great many sales there for individual owners. His company had subdivided land, not as owners, but for clients, and had sold these lots and had sold larger tracts, on a commission basis. He had sold a tract of two acres adjoining the airport for $750 an acre. He testified, without objection, that the Neldeberg tract was worth $750 an acre as a tract and that he would not subdivide it. In fixing the value of the tract he said he not only took into consideration the sales he had made but everything else—"what the land could be adapted for, its present use for garden land, factory sites, for airplane use, and other uses that that land could be used for; it isn't restricted to one, two or three uses." The evidence showed it was used by Mr. Neldeberg for a farm and dairy of 104 cows, employing five men most of the time, sometimes six. Thus it will be seen that the requested instruction did not accurately reflect the testimony of Mr. Nickerson. We think the appellant was not prejudiced by the refusal of the court to give the instruction requested by it.

The appellant assigns error because the court overruled its motion to strike "all of the answers of the witness (Nickerson) as to the value of the surrounding real estate, for the reason that it is not a proper test of the value of real estate. * * * The selling price is not a proper element to determine the value of land." Even on appellant's apparent theory that the selling price of other lands in the vicinity may not be considered, yet the motion is too general when it asks to strike all the answers of the witness relating to values of surrounding land. It is necessary to refer only to the instance of the two acres which the witness testified he had sold for

$750 an acre. The court did not err in overruling the motion.

There are other minor specifications of error which we do not find to have prejudiced the defendant. The judgment of the district court is

AFFIRMED.

GRAND ISLAND FINANCE COMPANY, APPELLANT, V. DENNIS C. FOWLER, APPELLEE.

FILED MARCH 10, 1933. No. 28453.

1. **Usury.** A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan.
2. ———. "Where original purchase of automobile on credit was valid, it is immaterial in defense of usury to suit on note for car that finance company solicited contracts from automobile dealers and furnished schedules for that purpose." *Commercial Credit Co. v. Tarwater*, 215 Ala. 123.
3. ———. "Purchase of note at discount beyond legal rate of interest does not constitute transaction 'usurious.'" *Commercial Credit Co. v. Tarwater*, 215 Ala. 123.
4. **Contracts:** CONSTRUCTION. In passing on the validity of a contract, the court, in addition to other factors, may consider it in the aspect in which the parties understood, treated and partially performed it as valid.
5. **Replevin:** DEFENSES: USURY. In replevin for an automobile for the purpose of foreclosing a chattel mortgage thereon, evidence *held* insufficient to prove the defense that the transaction was a usurious loan instead of a sale.

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

Beeler, Crosby & Baskins, Francis P. Matthews and *William P. Kelley*, for appellant.

George N. Gibbs and *William E. Shuman, contra.*

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

ROSE, J.

This is an action of replevin for a Plymouth sedan automobile. Under the writ, the Grand Island Finance Company, plaintiff, recovered possession from Dennis C. Fowler, defendant, claiming a special ownership through a chattel mortgage. W. B. Hayes, a dealer in automobiles, sold the sedan to defendant, accepted a used car in part payment, took from him for the remainder a 376-dollar note secured by a chattel mortgage on the car sold, payable to himself in 16 monthly instalments for $23.50 each, and assigned the paper to plaintiff. Defendant paid $94 on his debt, but later failed to pay an instalment when due, leaving unpaid $282. After the default, plaintiff, as authorized by the note and mortgage, elected to declare the unpaid debt due and seized the mortgaged chattel by replevin for the purpose of foreclosure.

The action was defended on the grounds that Hayes was the agent of plaintiff in the transactions resulting in the execution of the note and mortgage; that the real payee in those instruments was plaintiff instead of Hayes, its agent, the forms being devices to evade usury; that the sum of the transactions was a loan; that the cash sale price of the Plymouth sedan was $550; that Hayes, acting for plaintiff, accepted in part payment a used car for $250 and exacted for the balance of $300 a note and mortgage for $376, which included unlawful interest at a rate exceeding 30 per cent. per annum; that the note and the mortgage were void under the forfeiture clause in the statute limiting the maximum rate of interest to 10 per cent. per annum, providing for issuance of licenses to members of a class of money-lenders and authorizing them to charge, in addition to such interest, a brokerage fee not exceeding one-tenth of the money actually lent—Comp. St. 1929, secs. 45-112 to 45-123; that by reason of the usury and the statutory penalty there-

for plaintiff did not have a lien on the Plymouth sedan or the right of possession thereof.

A jury was waived and the cause tried to the district court. There was a judgment against plaintiff, directing it to return the property or, if unable to do so, to pay defendant the adjudged value of $425 with legal interest from December 14, 1931, the date of the replevin, costs and damages of one cent for unlawful detention. Plaintiff appealed.

The parties seem to agree that the question to be determined is the nature of the business transacted—whether they entered into a contract of sale on credit for deferred payments or a contract for a loan to pay part of the cash purchase price, but they differ radically on the facts and the law that determine the issue.

Plaintiff's expressed understanding of the transactions is that Hayes, a regular dealer in automobiles, sold the car in litigation to defendant on part credit, taking a note and a mortgage which permitted deferred payments in monthly instalments, and sold the paper for value to plaintiff, a corporation engaged in financing purchasers of automobiles on credit; that the cash price was less than the credit price, the former being $550 and the latter $626; that the transaction was fair, lawful and free from usury; that these issues were conclusively established in favor of plaintiff and that there is no competent evidence to the contrary; that defendant did not prove a defense to the action of replevin.

In defending the judgment for the return of the automobile taken from defendant by replevin, he was forced into the position that he entered into an unlawful contract with plaintiff to borrow from it $300 and to pay interest at a rate exceeding 30 per cent. per annum and thus acquired a 550-dollar Plymouth sedan for a used car valued at $250 and $94 in deferred payments, and that the forfeiture of plaintiff's note and mortgage on account of usury was supported by the evidence and the law.

If defendant and Hayes, each acting for himself honestly and in good faith, entered into an agreement for the sale and purchase of the Plymouth sedan for the consideration of a 250-dollar Whippet car and a note secured by a chattel mortgage for $376, the balance of the purchase price, there was no defense to the action of replevin, because it is too plain for argument that a dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in price may exceed lawful interest for a loan. If the transaction was a loan for usury, as asserted by defendant, instead of a sale on time, the contracting parties entered into an unlawful agreement. Viewed in that light both participated in the lawlessness. On the face of the note and the chattel mortgage securing it, the transaction was legal and the contract enforceable. The burden was on defendant to prove that the chattel mortgage under which he procured the Plymouth sedan from Hayes was usurious.

Defendant himself adduced evidence that the Grand Island Finance Company, plaintiff, since its organization, has been engaged principally in financing purchasers of automobiles on time—buying their instalment notes. Hayes was a dealer in automobiles. Plaintiff was not licensed under the law permitting a class of money-lenders to charge a broker's fee in addition to interest at the rate of 10 per cent. per annum. Plaintiff solicited business from Hayes and furnished him a printed schedule of rates used in discounting paper, and also forms for notes, chattel mortgages and other documents, but this was not material to defense of usury, if the original sale was valid. *Commercial Credit Co. v. Tarwater,* 215 Ala. 123. Testimony of defendant as a witness in his own behalf may be summarized in part as follows: He initiated the negotiations by going to Hayes' place of business to trade a used Whippet car on another car and to get time for payment of the boot or the balance of the purchase price. The cash price for the Plymouth sedan was $550 and

defendant was told it would be more, if not paid in full at the time. He knew he would have to pay more for finance charges, including insurance, if he bought the car on time; talked with Hayes about the extent of finance charges; did not borrow money from Hayes; knew if he got credit he would have to pay more than the cash price; agreed on $250 as exchange price of Whippet car; understood he could not get the Plymouth car unless he paid $300 in cash or more on time; stood by while Hayes telephoned to plaintiff for terms on which it would finance the unpaid purchase price by taking Hayes' assignment of a chattel mortgage as security; knew the deal was closed when he learned the amount of the finance charges and signed the papers. Defendant did testify, however, that a price on time was not mentioned, but he knew that he could not make the deal without financial aid for the unpaid purchase price; that Hayes did not lend money on automobiles; that Hayes procured for him from plaintiff credit for $76 in addition to $300. Defendant made a financial statement to obtain this credit on the security of the chattel mortgage. Defendant signed and delivered to Hayes the chattel mortgage which designated defendant as purchaser and Hayes as payee and specificially provided for the payment of $376 to Hayes as the balance of the purchase price. By means of this written contract, showing that the balance of the purchase price on time was $376, defendant procured the car and used it for months. The note and chattel mortgage were formally assigned to plaintiff and the discount exceeded lawful interest based on a loan, but did not make the transaction usurious. *Commercial Credit Co. v. Tarwater*, 215 Ala. 123. The proper inference from all the writings, the payment of monthly instalments and other evidence is that all three interested parties at first understood the sum of the transactions to be a sale on credit for the unpaid purchase price and proceeded to carry out its terms. In passing on the validity of a contract, the court, in addition to other factors, may consider it in the aspect

in which the parties understood, treated and partially performed it as valid. There is nothing in the record to show that the difference of $76 between the cash price and the price on time was unfair or fraudulent or extortionate in view of the hazards of used automobiles as security for debts. The evidence, when considered in its entirety, does not support findings that plaintiff was the real payee in the note and chattel mortgage or that Hayes was the agent of plaintiff or that the transaction was a usurious loan. Transactions like the one in controversy have been held valid sales on time and not usurious loans. *Manufacturers Finance Trust v. Stone,* 251 Ill. App. 414; *General Motors Acceptance Corporation v. Weinrich,* 218 Mo. App. 68; *In re Bibbey,* 9 Fed. (2d) 944; *Commercial Credit Co. v. Tarwater,* 215 Ala. 123; *Standard Motors Finance Co. v. Mitchell Auto Co.,* 173 Ark. 875.

The judgment below is reversed, with directions to the district court to enter a judgment in favor of plaintiff and against defendant.

REVERSED.

GOOD, J., dissenting.

I have no criticism to make of the principles of law, as announced in the syllabus of the majority opinion. Some important facts are overlooked which, in my opinion, when fairly considered, require an affirmance of the judgment of the district court, instead of its reversal.

This is a law action, in which the parties waived a jury and tried the cause to the court. Under such circumstances, the finding of the trial court has the same force and effect as the verdict of a jury. *McCarter v. Cover,* 122 Neb. 691, same case in 122 Neb. 833; *Bliss v. Peters Nat. Bank,* 122 Neb. 76; *Cook v. Moats,* 121 Neb. 769; *National Cash Register Co. v. Chipman,* 122 Neb. 866; *Nebraska Nat. Bank v. Parsons,* 115 Neb. 770. We have further held that in an action at law, tried to the court without a jury, where there is sufficient evidence in support thereof, the finding of the court has the

same effect as the verdict of a jury and will not be disturbed on appeal, unless clearly wrong. *Ayres v. Atlas Ins. Co.*, 123 Neb. 285; *Farmers Cooperative Mercantile Co. v. Shultz*, 113 Neb. 801; *Prime v. Squier*, 113 Neb. 507; *Peterson v. State*, 113 Neb. 546; *Young v. Johnson & Blind*, 113 Neb. 149.

The real controversy in this action was whether the promissory note, the basis of plaintiff's action, was tainted with usury. The record reflects the following facts:

Defendant purchased from Hayes, an automobile dealer, an automobile for $550, trading in a used car for $250, and for the difference gave his promissory note for $376, payable in 16 instalments of $23.50 each. The first instalment was due in 6 days, the last instalment in 15 months and 6 days. The average time the instalments ran was 7.7 months. In other words, plaintiff, for the use of $300 for the term of 7.7 months, was paying $76, or at a rate of more than 39 per cent. per annum. Hayes was not able to finance transactions of this sort, and did not sell automobiles on time, except in form. He was the agent of the plaintiff, or at least had an arrangement with the plaintiff whereby he kept a supply of its blank mortgages, notes and forms, and made loans under such circumstances, making notes payable to himself, and immediately indorsing them to the plaintiff. In the instant case, before the deal was completed, Hayes, in the presence of defendant, called up plaintiff, to know precisely the amount for which the note would have to be drawn and the rate at which paid in instalments, and secured the information, which resulted in the giving of the note for $376. This note was made payable to Hayes, was immediately indorsed and transferred to the plaintiff. The evidence also shows that Hayes received from the plaintiff a commission out of the loan thus made, and was, therefore, the agent of plaintiff.

Section 45-105, Comp. St. 1929, with reference to usury, provides: "The acts and dealings of an agent in loaning money shall bind the principal, and in all cases where

there is illegal interest by the transaction of the agent, the principal will be held thereby as if he had done the same in person." And further provides: "Where the same person acts as agent for the borrower who obtains the money from the lender, he shall be deemed to be the agent of the loaner also." The statute made Hayes the agent of the plaintiff. The law denounces as usury any rate in excess of 10 per cent. per annum, with certain exceptions, but the plaintiff is not within the excepted class. In my view, the transaction was a flagrant violation of the usury statute. It ought not to be upheld.

In the case of *State v. Central Purchasing Co.*, 118 Neb. 383, paraphrasing the language there used, it is said (p. 389): "The courts in such a case as this are not bound by forms but will look beyond form to the real substance. Looking through the scheme of the plaintiff to acquire and retain an unlawful and usurious rate of interest for the use of its money, and discerning the real substance of its transactions, we are of the opinion that its transactions pictured in the evidence were not *bona fide* purchases of rights of action from its customers, but rather were loans of plaintiff to its customers. As such they were strongly infected with usury, were unlawful, and were contrary to the public policy of the state."

The contract rate was unlawful and unconscionable. The judgment of the district court is right, and it should be affirmed.

GRAND ISLAND FINANCE COMPANY, APPELLANT, V. RAYMOND G. RIDGEWAY, APPELLEE.

FILED MARCH 10, 1933. No. 28454.

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

Beeler, Crosby & Baskins, Francis P. Matthews and *William P. Kelley,* for appellant.

George N. Gibbs and *William E. Shuman, contra.*

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

ROSE, J.

This is an action of replevin for an automobile for the purpose of foreclosing a chattel mortgage thereon. The district court sustained the defense of usury, canceled the chattel mortgage and forfeited the principal debt and interest. Plaintiff appealed.

The case was tried with *Grand Island Finance Co. v. Fowler, ante,* p. 514, and for reasons stated in the opinion therein the judgment below is reversed, with directions to the district court to enter a judgment in favor of plaintiff and against defendant.

REVERSED.

GOOD, J., dissenting.

I dissent from the holding in this case for the reasons given in my dissent in *Grand Island Finance Co. v. Fowler, ante* p. 514.

GRAND ISLAND FINANCE COMPANY, APPELLANT, V. SIDNEY B. BESACK, APPELLEE.

FILED MARCH 10, 1933. No. 28455.

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

Beeler, Crosby & Baskins, Francis P. Matthews and *William P. Kelley,* for appellant.

George N. Gibbs and *William E. Shuman, contra.*

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

ROSE, J.

This is an action of replevin for an automobile for the purpose of foreclosing a chattel mortgage thereon.

The district court sustained the defense of usury, canceled the chattel mortgage and forfeited the principal debt and interest. Plaintiff appealed.

The case was tried with *Grand Island Finance Co. v. Fowler, ante,* p. 514, and for reasons stated in the opinion therein the judgment below is reversed, with directions to the district court to enter a judgment in favor of plaintiff and against defendant.

REVERSED.

GOOD, J., dissenting.

I dissent from the holding in this case for the reasons given in my dissent in *Grand Island Finance Co. v. Fowler, ante* p. 514.

NELS L. NELSEN, APPELLEE, V. LEOPOLD DOLL ET AL., APPELLANTS.

FILED MARCH 10, 1933. No. 28475.

1. Mortgages: FORECLOSURE: SALE: CONFIRMATION. "Mere inadequacy of price in a sale under foreclosure will not justify a court in refusing a confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud." *Lemere v. White,* 122 Neb. 676.
2. ———: ———: ———: REVIEW. An order of the court confirming the sale of land under foreclosure proceedings will not be disturbed where it has not been affirmatively shown that a subsequent sale would realize a greater price for the land.

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

R. H. Olmsted, for appellants.

William McDonnell, contra.

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

DEAN, J.

This is an appeal from an order of the district court

for Douglas county confirming the sale of 15 acres of land in Nels L. Nelsen, the plaintiff herein.

It is disclosed that a mortgage on the above tract was given to the plaintiff by the defendants as security for a certain note. The defendants defaulted in payments and failed to pay the taxes on the land over a period of five or six years and, on or about March 25, 1931, a decree of foreclosure was obtained against them by the plaintiff. The court found that $2,932.48 was due the plaintiff pursuant to the terms of the note and the land was thereupon ordered sold to satisfy such judgment. The defendants were given a nine months' stay, but the land was subsequently sold to plaintiff, the highest bidder, for $3,100, and the sale was confirmed by the court.

The plaintiff's affidavit and that of a witness in his behalf, who was familiar with real estate, tend to establish the fact that, in the present state of market values, another sale of the land would not realize to exceed $4,000. The land is located about three-quarters of a mile from the city of Omaha and is intercepted by a creek which deducts approximately two acres from the total fifteen acres.

In behalf of the defendants, affidavits were offered tending to prove that the land was worth more than the amount of the plaintiff's bid and that such bid does not represent the fair market value thereof. Defendant Doll averred in his affidavit that he had a prospective purchaser, but the name of such purchaser was not divulged, nor does it appear certain that the sale would be consummated. And in view of the fact that taxes in an amount exceeding $1,000 are now due on the land, it is doubtful whether a purchaser could be obtained who would pay more than the amount of the bid. The plaintiff stated in his affidavit that the taxes exceed the income derived from the land.

It is contended that the court erred in that he did not set out in his findings that the land was sold for its

fair value. It is apparent from the order confirming the sale, however, wherein it is stated that the court fully and carefully examined the proceedings and was satisfied that the sale was legal and in all respects conformed to the law, that the court concluded the property was sold for its fair value. Complaint is also made in that the court confirmed the sale without having first passed on the defendants' motion to set the sale aside. It is evident that the court would have set aside its order confirming the sale had he decided to sustain the defendants' motion and we fail to see that the defendants were prejudiced in the manner indicated.

We have held: "Mere inadequacy of price in a sale under foreclosure will not justify a court in refusing a confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud." *Lemere v. White,* 122 Neb. 676. See, also, *Metropolitan Life Ins. Co. v. Heany,* 122 Neb. 747, and *Federal Land Bank v. Radke,* 122 Neb. 834. An order of the court confirming the sale of land under foreclosure proceedings will not be disturbed where it has not been affirmatively shown that a subsequent sale would realize a greater price for the land. The defendants had ample time in which to sell the land to a purchaser of their own choosing but failed to do so. The judgment is

AFFIRMED.

LOUISE SGROI, APPELLEE, V. YELLOW CAB & BAGGAGE COMPANY, INC., APPELLANT.

FILED MARCH 10, 1933. No. 28429.

1. Negligence: CONTRIBUTORY NEGLIGENCE: QUESTIONS FOR JURY. The existence of negligence and contributory negligence in an action for personal injuries is, ordinarily, a question of fact, and where the evidence in relation thereto is such that minds may reasonably reach different conclusions as to their existence, such question should be submitted to the jury.
2. Appeal: INSTRUCTIONS: DAMAGES. An instruction on measure

of recovery, under statutory comparative negligence rule, which tells the jury: "Plaintiff's damage must be reduced in the proportion that her contributory negligence bears to the whole amount of damages sustained," is erroneous.

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

Kennedy, Holland & DeLacy, for appellant.

Howell, Tunison & Joyner and *J. R. Lones, contra.*

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

GOOD, J.

This is an action to recover damages for personal injuries, in which plaintiff recovered a judgment. Defendant has appealed.

Plaintiff was a passenger on a street car traveling north on Sixteenth street in the city of Omaha. The street car stopped when it reached Howard street, and plaintiff alighted from the front end of the street car and started to walk east to the sidewalk. While so doing, she was injured in a collision with one of defendant's taxicabs going north and passing the street car on the east side thereof. At the place where plaintiff alighted there was a safety zone for the protection of persons alighting from or waiting to enter street cars stopping at that point.

Plaintiff charged defendant with negligence in operating the taxicab without having it under control; in disregarding the rights and safety of persons upon the street at said place; in failure to give any signal or other warning of its approach at the time and place of the collision, and in that the taxicab was suddenly and negligently driven at a speed in excess of 12 miles an hour and at a speed which was greater than reasonable and proper, having regard for the traffic and use of the street and prevailing conditions. In its answer defendant admitted

that there was a collision in which plaintiff received some injuries, but charged that plaintiff walked into the side of the taxicab, and that she was guilty of contributory negligence.

At the close of plaintiff's testimony and again at the close of all the evidence, defendant moved for a directed verdict, which the court denied. Defendant contends that the evidence fails to establish actionable negligence on the part of defendant, and that, in any event, it establishes that plaintiff was guilty of more than slight negligence in comparison, and for those reasons its motion should have been sustained.

Where, from the evidence before the jury, different minds might reasonably draw different conclusions as to defendant's liability, it would be error to direct a verdict for defendant. *Suiter v. Park Nat. Bank,* 35 Neb. 372; *Thomson v. Shelton,* 49 Neb. 644; *Ogden v. Sovereign Camp, W. O. W.,* 78 Neb. 806; *Oleson v. Oleson,* 90 Neb. 738; *Morrissey v. Wharton,* 98 Neb. 544; *Sindelar v. Hord Grain Co.,* 116 Neb. 776.

We have read all the evidence and, from a consideration thereof, have reached the conclusion that the evidence is such as to bring it within the announced rule. The court properly refused to direct a verdict for defendant.

Defendant complains that the court erred in submitting to the jury the question of the speed of the taxicab. The only direct evidence as to the rate of speed at which the taxicab was being driven was to the effect that it was not more than ten miles an hour. On the other hand, there was evidence that the driver of the taxicab applied his brakes and locked the rear wheels of the taxicab. There was evidence tending to show that the marks of the locked wheels on dry, level pavement were from six to ten feet long. This is sufficient to warrant an inference of a greater speed than that testified to by defendant's witnesses. We think it was sufficient to permit that question to be submitted to the jury.

Complaint is made of the giving and refusing of a number of instructions. We have examined both those given and those refused, and find no just ground for criticism except in instruction No. 11, given by the court. In this instruction the trial court attempted to give the rule as to the measure of recovery in cases where the comparative negligence rule would be applicable; that is, in cases where the contributory negligence of plaintiff was slight and the negligence of defendant gross in comparison. The instruction contains the following language: "If you find that the negligence of plaintiff was slight, and defendant's negligence gross in comparison therewith, the plaintiff may still recover, but in such case plaintiff's damages must be reduced in the proportion that her contributory negligence bears to the whole amount of damages sustained."

The statute (Comp. St. 1929, sec. 20-1151) provides that in actions to recover damages for personal injuries, where plaintiff and defendant have both been negligent, plaintiff may still recover if his contributory negligence was slight and the negligence of defendant was gross in comparison, and further provides that "the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff."

It is clear that the comparison was to be made between the negligence of the two parties, and if plaintiff was entitled to recover, then her recovery should be reduced in the proportion that her negligence contributed to the injury. If defendant's negligence was four times as great as plaintiff's negligence, the proportion would be four to one. The combined negligence of the two causes the total damage sustained. It is plain in such case that plaintiff's own negligence caused one-fifth of her injury and defendant's negligence four-fifths, and that plaintiff would be entitled to a judgment for only four-fifths of the total amount of damage sustained as the result of the combined negligence of the two.

The instruction failed to properly inform the jury as to the extent plaintiff could recover under the comparative negligence statute. Without the proper rule to guide them in this respect, the jury were left to speculate. The instruction was clearly erroneous, but the erroneous part thereof related only to the measure of recovery. No complaint is made that the verdict is excessive, if plaintiff was entitled to recover. Under such circumstances, the giving of this instruction was harmless error and not ground for reversal.

No prejudicial error has been found. Judgment

AFFIRMED.

GEORGE LUNSFORD V. STATE OF NEBRASKA.

FILED MARCH 10, 1933. No. 28643.

Forgery. The offense of forgery is not established by evidence that defendant signed the name of another to a bank check with intent to utter it, unless it affirmatively appears that such signing was without the authority of the person whose name was so used.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Reversed.*

John Wiltse and *James E. Leyda,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *George W. Ayres, contra.*

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

GOOD, J.

Plaintiff in error, hereinafter called defendant, brings to this court for review the record of his conviction of the crime of forgery. The principal assignment of error relied upon for reversal is that the evidence is insufficient to sustain the conviction.

The information charged the forging of a check for $3.50. Defendant was designated as payee in the check, and the name of his father was appended thereto as maker. Defendant admits that he signed his father's name to the check and uttered it, but contends that he had his father's authority so to do. Defendant so testified. The state called defendant's father as a witness to prove lack of authority on the part of defendant. The father testified that his son had authority to sign the check; that he knew of the check, the amount thereof, to whom it was made payable, and that he caused payment of the check to be stopped because it was given for intoxicating liquor. It appears from the evidence that on several other occasions the son had signed his father's name to checks which had been paid either by the bank on which drawn, or by the father.

To sustain a conviction of forgery, it is not sufficient to show that the person charged wrote another's name, but it must appear affirmatively that it was done without the authority of the person whose name was signed to the instrument.

In *Taylor v. State,* 114 Neb. 257, it was held: "Where, upon trial for forgery, it is shown that the accused indorsed the name of another on a bank check which was cashed by the prosecuting witness, before a conviction can be had of the crime of forgery, it devolves upon the state to prove that the indorsement was made without the authority of the person whose name was used."

We conclude that the evidence is wholly insufficient to show that the defendant signed his father's name to the check in question without the latter's authority.

The judgment of conviction is therefore reversed and the cause remanded.

REVERSED.

FREDRICKSON MILLING COMPANY, APPELLANT, V. WILLIAM H. FASER, APPELLEE.

FILED MARCH 10, 1933. No. 28659.

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

Kennedy, Holland & De Lacy and *Edward J. Svoboda,* for appellant.

Stiner & Boslaugh and *Edmund P. Nuss, contra.*

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

DAY, J.

This is a compensation case. The only question presented in this case is as to the method by which the wage shall be determined for the purpose of fixing the amount of compensation. The employee claims that the contract of employment was that he was to receive 40 cents an hour, ten hours a day, and six days a week, whether he worked all of that time or not, which would make his weekly wage $24 a week. On the other hand, the employer claims that there was no such contract, and that the weekly wage should be determined on the basis of the average earned for the time he actually worked, which average weekly wage during his employment was $15.55 a week. The trial court found that the contract of employment was for $24 a week and an award was made based upon this weekly wage. The compensation commissioner and the trial court found for the defendant, and plaintiff, employer, appeals.

If the contract is found to be as alleged by the employee, the finding of the district court is correct, but if, on the other hand, the contract of employment is as alleged by the employer, then the award is excessive. The plaintiff attempts to establish the contract of employment by his own testimony, his brother's, and that of the witness Knapp. The defendant testifies to the conversa-

tion at the time he was hired by the foreman for the milling company. According to him, the conversation in substance was during the discussion about the rate of pay, that he said he would pay him 40 cents an hour for ten hours a day and he was to work six days a week, and that the conclusion he drew from this statement was that he was to receive $24 a week, whether he worked all the time or not. At times the mill did not operate on account of either a lack of orders or on account of weather conditions. The plaintiff identified checks which were given to him from time to time in payment for the number of hours for which they were given. The plaintiff testifies that these checks did not come regularly, but an examination of the exhibits shows that the plaintiff was paid almost every week which he worked and that each check was given for a definite and specified number of hours. The plaintiff claims that these checks were given on account. It would seem, however, that the checks were given for a certain number of specified hours for which he had worked and were accepted without complaint by him. This is stronger evidence of the nature of the contract of employment than the testimony of the plaintiff as to his recollection of the terms of the contract. Furthermore, the testimony of the plaintiff is not in conflict with the theory that the plaintiff was to be paid for the hours which he put in, since at the time the parties hoped that conditions would be such that they would be able to work every day.

The brother of the employee claimed to be present at the conversation which the employee had with the foreman of the milling company. He testified that it was his recollection that the compensation that his brother was to receive was 40 cents an hour, ten hours a day, and six days a week. After the employee had been injured and was claiming compensation, the insurance carrier sent him a check for compensation, and this brother, who testified to the contract, wrote a letter to the insurance carrier, for defendant, stating that the check was insuffi-

cient and stating that the employee in this case was entitled to have his weekly wage figured at $14.61 a week and that the compensation check should be for $9.74. He sets out facts concerning employment to sustain his claim. He states in the letter that he wrote it with the authority of his brother. Whether he did or not, it tends to contradict his testimony to the effect that the contract was for $24 a week. The witness Knapp testified that the foreman for the milling company offered Faser 40 cents an hour regularly for ten hours a day and six days a week.

The president of the milling company wrote a letter to the compensation commissioner, the material part of which is as follows: "The rate per hour was 40 cents and Mr. Faser was subject to call at any time during the week or Sundays, and would average a ten hour a day and six days a week, as our business is such that our customers call for feed very irregular and must make shipments on time." This statement of the company's official is not sufficient to establish that the contract of employment was for wages of $24. The foreman for the milling company was not a witness.

We are constrained to find upon the question of fact as to the contract of employment that it was to pay the employee 40 cents an hour for the time for which he worked in the operation of the alfalfa mill, which was operated out in the open on trackage property and subject to weather conditions, for the actual number of hours that he worked, and that, upon this basis, the weekly wage of the employee was $15.55 a week for the purpose of figuring compensation, and not $24. Upon this finding of fact, the award by the district court was excessive and should be reduced accordingly. The award should be for 126 weeks of temporary total disability at the rate of $10.37 a week, and thereafter for 80 per cent. permanent disability for 174 weeks at the rate of $8.30 a week, and thereafter at the rate of $5.60 a week for life. Credit should be given plaintiff for amount paid on compensa-

tion. The judgment of the district court is reversed and the cause remanded, with directions to enter a decree conformable to this opinion.

REVERSED.

EARL K. BURTIS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MARCH 10, 1933. No. 28410.

1. Carriers: DELAYED SHIPMENTS: LIABILITY. A railroad company is not an insurer of the arrival of its trains on schedule time in the transportation of live stock; but, when there is material delay in the delivery of stock, the company must, to exonerate itself from liability, show that the delay arose from some cause other than its own negligence.
2. ———: ———: ———. A common carrier is not liable for loss or depreciation in value of live stock due to the time consumed in the transportation thereof, if the stock is transported within the time provided by its regular schedules.

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

Jesse L. Root, Byron Clark, J. W. Weingarten and *A. G. Abbott,* for appellant.

B. J. Cunningham and *Paul B. Newell, contra.*

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

PAINE, J.

This is an action to recover $1,039.47, alleged damages on account of negligent delay in transportation of cattle from Spokane, Washington, to Grand Island, Nebraska, which delay required the steers to be held over until the next regular sale, one week later. A judgment for $433 was entered upon the verdict which the jury returned.

The plaintiff, a resident of Kearney, had been engaged in the live stock business for 35 years, handling some-

thing like 50 carloads a year, and was in Spokane to purchase feeder steers to sell on the Grand Island live stock market. He made inquiry of the agent of the Northern Pacific about the time required for shipment. He told the agent that he wanted to be on the Grand Island market on Monday, July 1, 1929, and that Monday of each week was the only day the market was held, and the agent examined the schedules and told him that the shipment would take five days' time, but that five and a half days would be the outside. Thereupon, the plaintiff went out and bought 47 steers on the market. They were loaded and shipped at 11 o'clock, Tuesday, June 25, 1929, the plaintiff going with the shipment.

The defendant attempts to show in its brief that there was only one scheduled through freight train daily from Spokane eastward to Billings over the Northern Pacific, and but one scheduled through freight train from Billings over the Burlington to Grand Island, and that, transporting this shipment of stock only upon said scheduled through freight train, and allowing for the required stops for feed, water, and a rest of five hours, this shipment would have reached Grand Island at 12:30 p. m., July 1, 1929, and not at 11 p. m., Sunday, June 30, as the plaintiff testifies the initial agent promised, for which promise, if made, the carrier can in no wise be held under the law. However, it is shown by the evidence of the plaintiff that, if the steers had arrived at the regularly scheduled time of 12:30 p. m., July 1, they could have been sold on the market that day, for the sale was continued until late that afternoon. The shipment actually arrived in Grand Island that night at 10:35 p. m., even though, after being held in Helena for some 26 hours, it was shipped out on an extra train at 9:10 a. m., June 27, instead of being held until the regular through freight leaving Helena according to schedule, at 6:15 p. m.

All of the facts of the delays in this shipment at various points were properly submitted to the jury, together with all of the defenses therefor, and the jury,

under proper instructions, found that there was a negligent delay in the shipment.

1. It may be admitted that the petition lacks much of charging, in definite and concise language, certain detailed facts going to make up the negligence in the delay of this shipment, but charges the same generally, and the plaintiff introduced considerable evidence in reference thereto, which evidence the defendant attempted to meet, and this question of negligent delay was submitted to the jury by the trial court in its instructions. The gist of the action is the alleged negligence of the carrier in failing to forward said steers and deliver them according to their published schedules.

The trial court, in instruction No. 7, told the jury: "A railroad company is not an insurer of the arrival of its trains on schedule time in the transportation of live stock; but, when there is a material delay in the delivery of stock, the company must, to exonerate itself from liability, show that the delay arose from some cause other than its own negligence." This is clearly in line with the case of *Jeffries v. Chicago, B. & Q. R. Co.*, 88 Neb. 268, in which it was held that a delay of 24 hours at a station is an unnecessary delay, unless it is explained and excused by something which the law recognizes as sufficient, and it is further held in this case that a common carrier of live stock cannot, by contract with the shipper, relieve itself from liability for injury or loss resulting from its own negligence. See *Denman v. Chicago, B. & Q. R. Co.*, 52 Neb. 140; *Union P. R. Co. v. Nelson*, 76 Neb. 72.

In *McElwain v. Union P. R. Co.*, 101 Neb. 484, 1 A. L. R. 533, this court held: "Where there is proof that an unreasonable time was consumed in transporting the shipment, the burden is on the carrier to prove that the delay was not caused by its negligence, though the owner of the live stock accompanied the shipment." See *Panhandle & S. F. R. Co. v. Bell*, 189 S. W. (Tex. Civ. App.) 1097.

In *Cohn v. Chicago & N. W. R. Co.*, 100 Neb. 7, it was

held: "To entitle the plaintiff to recover for negligent delay in transporting an interstate shipment of live stock, it is necessary to introduce some competent evidence tending to show the length of time ordinarilv required to transport the shipment from the place where it was received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose."

2. A common carrier is not liable for loss or depreciation in value of live stock due to the time consumed in the transportation thereof, if the stock is transported within the time provided by its regular schedules. *Payne v. Chicago, M. & St. P. R. Co.*, 99 Neb. 699; *Rose v. Chicago & N. W. R. Co.*, 111 Neb. 783.

It is insisted that the pleadings do not adequately cover the issues presented in the briefs and evidence. This court has held: "Where the record on appeal to this court clearly shows that the case was tried and determined in the court below upon a certain theory, it will ordinarily be considered and decided in this court upon the same theory, even though such theory may be somewhat at variance with the pleadings." *Hunt v. Chicago, B. & Q. R. Co.*, 95 Neb. 746.

The verdict returned by the jury is attacked by the defendant carrier as not sustained by the evidence. There appears to be no conflict in the evidence upon the feed bill of $113 for feed during the week while the steers were being held for the next sale, and O. I. Blain, office manager of the live stock company, testified that the weight of the 47 steers was 37,300 pounds, and that the market was 75 cents less per hundred pounds on July 8 than it was on July 1 on this class of stockers, which makes a difference of $279.75. This leaves a difference of $40.25, which the defendant carrier insists is not supported by the evidence. The mistake appears to have occurred from an error of the jury in computing too much interest. It appears that in the petition the plaintiff asked interest at 7 per cent. from the date of the filing

of the petition, to wit, February 19, 1931, while in instruction No. 16 the trial court instructed the jury, in case they found for the plaintiff, to allow him interest at 7 per cent. from the date of the filing of his claim with the defendant carrier, which was upon August 8, 1929. This conflict in computing the interest is an error which can be corrected by the trial judge, and, finding no other error therein, the judgment of the district court is affirmed, except as to the item of interest, and the same is remanded to the district court to enter a judgment for the correct amount, including interest.

AFFIRMED AS MODIFIED.

LINCOLN NATIONAL BANK & TRUST COMPANY, APPELLANT, V. SCHOOL DISTRICT NO. 79, BOYD COUNTY, APPELLEE.

FILED MARCH 16, 1933. No. 28409.

1. Assignments. Assignee of chose in action ordinarily acquires no greater rights than those of assignor.
2. Schools and School Districts: WARRANTS. School district warrants are not negotiable and purchaser takes them subject to all defenses available to original payee or subsequent holders.
3. Banks and Banking: DEPOSIT OF SCHOOL FUNDS: TRUSTS. Bank receiving deposit of funds of school district treasurer, who is also active managing officer of the bank, holds such funds as trustee.
4. ———: ———: NOTICE. Knowledge of active managing officer of the bank will be imputed to the bank, where, as in this case, said officer handled the transaction for the bank, although he acquired the information as treasurer of the school district.
5. ———: ———: RIGHT OF SET-OFF. Where a bank purchases warrants of a school district through its managing officer, who, as treasurer of school district, wrongfully registers them for payment, instead of paying them from funds of the district deposited in the bank in the name of the treasurer, the school district is entitled to offset its claim against the bank.

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

Good, Good & Kirkpatrick and *W. A. Selleck*, for appellant.

J. A. Donohoe, W. L. Brennan and *Fred S. Berry, contra.*

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

PER CURIAM.

This is an action brought by the Lincoln National Bank & Trust Company against School District No. 79, of Boyd county, to recover on certain registered warrants issued by the school district and held by the trust company. The district issued these warrants in payment of operating expenses. The warrants were genuine and regular on their face when the trust company purchased them from the Ponca Valley State Bank, of Monowi, Nebraska. R. A. Studley was the treasurer of the district and was the active managing officer of the Monowi bank at the time these warrants were issued, registered, and sold. Studley, as treasurer of the school district, deposited its money in his bank in a special account. The warrants involved in this controversy were paid upon presentation by the bank, but were not charged to the Studley treasurer account. When a number of them accumulated in the bank, Studley, as treasurer of the district, registered them and then, as managing officer of the bank, sold them to the trust company. Studley, as managing officer of the bank, wrongfully transferred the money from his account as district treasurer to other accounts. Studley was not faithful to his trust either as managing officer of the bank or as treasurer of the school district, and the present litigation results because of his wrong-doing. This is a mild portrayal of his manipulation of the accounts in the bank by Studley, but is sufficient for the purposes of this opinion. The district alleged two defenses, payment and set-off. The trial court, jury being waived, found in favor of the defendant district. There is some uncertainty although little dispute as to the facts. The trust company, as the assignee of

the bank, occupies the same position as the bank would if the assignment had not been made. School warrants are not negotiable instruments, and the rights of the plaintiff in this case are to be determined in the same manner as the rights of the bank, had the transfer not been made. *School District v. Stough,* 4 Neb. 357; *State v. Cook,* 43 Neb. 318; *Nebraska State Bank v. School District,* 122 Neb. 483. In *State v. Melcher,* 87 Neb. 359, we said: "School district warrants do not possess the qualities of negotiable paper, and the purchaser thereof takes them subject to all equities existing against the original holder." In *Henefin v. Live Stock Nat. Bank,* 116 Neb. 331, the rule is stated in another way, as follows: "Ordinarily, an assignee of a chose in action acquires no greater right than was possessed by his assignor, but simply stands in the shoes of the latter." It represents the universal rule. See annotation, 36 A. L. R. 949.

The question involved in this case is simplified by considering the situation which would exist, if the warrants had not been transferred, between the bank and the school district. There is no difference in the situation of the bank and the trust company, since the trust company bought the warrants at face value and in the regular course of business from the bank. There is no defense to the warrants in the hands of the trust company except such as could be urged against the bank. The bank acquired these warrants by payment from bank funds and did not charge them to the account of Studley as treasurer of the district. Could the bank recover from the district upon these warrants? The answer is obviously in the negative. A school district cannot become a depositor in a bank. Comp. St. 1929, secs. 79-405, 79-2008. A bank receiving a deposit by treasurer of a school district becomes trustee for the district. *State v. Midland State Bank,* 52 Neb. 1. And very recently we have held: "A bank receiving a deposit of funds of a school district, in the hands of its treasurer, who is also president and

managing officer of such bank, holds such funds as trustee for the district." *Nebraska State Bank v. School District,* 122 Neb. 483. The bank as the holder of these warrants, upon cashing them, knew that the deposit of Studley as treasurer of the district was money of the district which the bank held in trust. Substituting the name of Studley as treasurer in the language of the above cited case: "While it is a well-recognized rule that knowledge of an officer of a bank acquired while acting beyond the scope of his authority will not be imputed to the bank, we feel that under the circumstances in this case the knowledge of the treasurer, Studley, who was president and managing officer of the bank, should be imputed to it. *Brownell v. Ruwe,* 117 Neb. 407; *State v. American State Bank,* 108 Neb. 92; *Emerado Farmers Elevator Co. v. Farmers Bank,* 20 N. Dak. 270." The entire management and control of the bank's transactions, so far as the matters involved in this litigation are concerned, were in his hands. The bank received the deposit with the knowledge that it was funds of the district. Studley's act in registering the warrants as treasurer of the district and selling them as managing officer of the bank was to secure money for the bank. At the time the warrants were issued and wrongfully registered and sold, the bank had in its possession as a trust fund a sum aggregating the total amount of these warrants. It is immaterial that the total amount of all outstanding warrants was slightly in excess of the total amount of the district's money in the possession of the bank. Even though the outstanding registered warrants may have had a priority over the warrants in this controversy, the prior warrants were not paid, and in an action by the bank upon these warrants against the district, the bank would have been compelled to offset the amount of its deposit.

The other officers of the district did not know that these warrants had been registered, but intended and supposed that they had been paid by the treasurer from the

funds of the district. The payment of these warrants, whereby the bank claimed to secure possession and ownership of them, was of no benefit to the district. We are of the opinion that this case is controlled by the opinion in *Nebraska State Bank v. School District, supra.* The appellant distinguishes that case from the case at bar for the reason that the warrants in that case were irregular on their face so that they were not entitled to registration by the treasurer. In our view of the case, that is not a controlling distinction, because the right of the plaintiff to recover depends entirely upon the right of the bank to recover, and certainly, under the facts in this case, the bank could not recover. It is also argued that the sale of these warrants was not for the benefit of the bank, for that Studley, the managing agent of the bank, had embezzled the funds of the school district and had appropriated them to his own use. Even though the record indicates that Studley as managing officer of the bank and as treasurer of the school district had embezzled and appropriated money of the bank to his own use, it is also the fact that the bank sold these warrants and received the money therefor. Studley, it is true, negotiated the sale, but he did so as managing officer of the bank, and the funds derived from the sale went to the bank account and became funds of the bank. The fact that Studley embezzled funds of the bank did not change the right of the bank to recover against the school district.

The judgment of the district court is

AFFIRMED.

W. R. CARTER, GUARDIAN, APPELLANT, V. A. L. CARRELL: ALEX MUIRHEAD, APPELLEE.

FILED MARCH 16, 1933. No. 28424.

1. **Pleading**: DEMURRER. A general demurrer to a petition admits the truth of all facts well pleaded therein.

2. **Courts:** COUNTY COURT: JURISDICTION. "The county court possesses exclusive original jurisdiction in probate matters, and questions relating to the settlement of estates must be adjudicated there in the first instance." *Boales v. Ferguson*, 55 Neb. 565.
3. **Pleading.** Facts well pleaded in the answer *held* to sustain the overruling of a demurrer thereto.

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

R. O. Canaday and *F. E. Williams*, for appellant.

Mitchell & Gantz, contra.

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

GOSS, C. J.

Plaintiffs sued A. L. Carrell and Alex Muirhead as individuals. The petition set up an unpaid note for $1,000, dated December 14, 1927, due September 1, 1928, made by A. L. Carrell in favor of "Alex Muirhead, Adminst. of Hoppock Estate or order," and alleged that for value before due the said Muirhead indorsed the note on the back thereof to the plaintiffs, as follows: "Pay to Charles D. Hoppock, Eugene Hoppock, Roy Hoppock, William Hoppock, Robert Hoppock, Marjorie Hoppock, Minors, and W. R. Carter, their Guardian. (Signed) Alex Muirhead, Administrator." The petition duly prayed for judgment against each defendant.

Defendant Carrell defaulted. Judgment was rendered against him and he did not appeal. Alex Muirhead answered, admitting the execution and indorsement of the note to plaintiffs, but denying that for value received he indorsed the note. He further pleaded that on May 19, 1924, he was appointed as administrator of the estate of Mattie Hoppock and that he qualified and continued to act as such until July 28, 1928. He set forth the facts, showing that the note in suit was executed by A. L. Carrell for the benefit of the estate and as evidence of a debt due said estate for rental of lands belonging to the estate;

that on June 4, 1928, he filed his final report, and on June 28, 1928, the county court entered a decree of distribution, allowing the account and finding that said note was all the personal property in the possession of said administrator, that it belonged to said minors, who were the sole heirs of Mattie Hoppock, and assigning said note to said minors, share and share alike; that pursuant to said decree, in his capacity as administrator, he indorsed the note to the minors and to their guardian, W. R. Carter, and that the guardian accepted and received the note from defendant as administrator; that the receipt therefor in writing, signed by said guardian, in the name of said minors by himself as such guardian, is attached to the answer and made a part thereof; that the guardian and said minors well knew this defendant did not own the note, had no personal interest therein, and indorsed it solely in his capacity as such administrator; that by reason of the facts alleged the plaintiffs are estopped; that the defendant accounted for all property that came into his hands as administrator, that he was duly discharged as such and that he and his bondsmen were released by the county court from all liability on his bond.

To this answer the plaintiffs demurred on the ground that it did not state facts sufficient to constitute a defense. The demurrer was overruled. Plaintiffs elected to stand on the demurrer and the action was dismissed. Plaintiffs appealed. The only question is whether the indorsement of the note bound the defendant Alex Muirhead personally.

A general demurrer to a petition admits the truth of all facts well pleaded therein.

Under the Constitution, the county court has original jurisdiction in all matters of probate and settlement of estates of deceased persons. Const. art. V, sec. 16. "The county court has exclusive original jurisdiction in matters of probate and in the settlement and distribution of the estates of deceased persons." *State v. O'Connor*, 102 Neb. 187. See *Boales v. Ferguson*, 55 Neb. 565. In the latter

case it was held: "The county court possesses exclusive original jurisdiction in probate matters, and questions relating to the settlement of estates must be adjudicated there in the first instance."

The petition declared on a note made in form in favor of defendant as administrator and indorsed by him in form as administrator. The answer pleaded that the defendant, as administrator, took the note in the course of his administratorship as evidence of a debt due the estate; the county court found that the note belonged to the minors and decreed that it be assigned to them; by reason of said decree defendant indorsed and delivered the note to the minors and to their guardian and they accepted it and receipted in writing in full of the distributive shares due the minors in said estate, both the guardian and the minors knowing that defendant did not own the note, had no interest in it, and indorsed the note to them only in his capacity as administrator. These are facts, not conclusions, and the demurrer admitted them. If plaintiffs were dissatisfied with the decree it was their duty to attack it directly. Having admitted the facts well pleaded by defendant, they are bound by them. We are of the opinion that the facts admitted show that defendant indorsed the note in his official capacity, as administrator, rather than personally, and that no personal liability was created thereby. This conclusion is compelled by the legally admitted facts. It answers in the negative the plea that the title following defendant's name in the indorsement was merely a description of his person. And it renders unnecessary any consideration and analysis of the cases involving decision of the very interesting question, when the meaning of the words has not been agreed upon, whether the words connected with an indorser's name are merely *descriptio personæ*.

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

AFFIRMED.

INTERSTATE AIRLINES, INC., APPELLANT, V. THOMAS F. ARNOLD, APPELLEE.

FILED MARCH 16, 1933. No. 28426.

Appeal. The jury, as triers of fact, are the sole judges of the credibility of the witnesses and the effect to be given their testimony, and it is error for the trial court, at the close of all of the evidence, to withdraw the case from the jury and dismiss the action where disputed questions of fact are involved from which different minds might well draw different conclusions.

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

Byron W. Hunter and *Gaines, McGilton, McLaughlin & Gaines,* for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

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

DEAN, J.

This is an appeal from the district court for Douglas county wherein the Interstate Airlines, Inc., plaintiff herein, seeks to recover $1,700 for damages to a Pitcairn aeroplane owned by it and alleged to have been caused by a Stinson aeroplane jointly owned by Thomas F. Arnold and Norman P. Cahow, the defendants. It is alleged that, on the night of January 29, 1931, the plaintiff's aeroplane was parked on the north side of the Rapid Airlines' hangar in Omaha, and the Stinson aeroplane was parked on the south side thereof, and that defendant Cahow attempted to start the motor of the Stinson aeroplane but did not have it under control, and the aeroplane crossed the hangar apron and crashed into the plaintiff's aeroplane, thereby damaging it. It is also alleged that Cahow thereby violated certain department of commerce regulations in that no starting blocks had been placed under the wheels of the aeroplane, and that it was not

in charge of a licensed mechanic or pilot, and that the aeroplane was not equipped for night flying.

Defendant Cahow filed no pleadings, nor did he make any appearance at the trial. At the close of all of the evidence, the court sustained Arnold's motion and dismissed the plaintiff's action against him. The plaintiff has appealed.

The plaintiff contends that the evidence is sufficient to prove the existence of a partnership between the defendants at the time of the accident, and that they are therefore jointly liable, and that the court erred in withdrawing the case from the jury and dismissing the action as against Arnold.

Defendant Arnold denied that he was the owner or in any way responsible for the operation of the Stinson aeroplane at the time of the accident and he denied that Cahow was his agent or partner. He alleged that a conditional sales contract was entered into between them and Lawrence Enzminger, on or about December 11, 1930, whereby the defendants agreed to purchase the Stinson aeroplane from Enzminger, and it is alleged also that the agreement provided that the purchasers should have the right to the use of the aeroplane, but that it was in all instances to be operated by a pilot approved by Enzminger, and that it was agreed and understood therein that the purchasers intended to form a corporation, and to assign their interest in the conditional sales contract to such corporation. And it is alleged that, on or about January 19, 1931, or about ten days before the accident, the contract between Enzminger and the defendants was assigned to the X U Airways, Inc. Arnold denied that he and Cahow had a conversation in respect of purchasing an aeroplane as partners, but he testified that a corporation was to be formed for the handling of the aeroplane, in which he and his wife were to have 50 per cent. of the stock, their son 15 per cent. and Cahow and his wife 35 per cent. of the stock. On March 18, 1931, Arnold, in a written communication signed by him as president

of the X U Airways, Inc., notified the Rapid Airlines, Inc., that the Stinson aeroplane was not to be removed from the hangar by Cahow with any pilot and under any circumstances without the consent of Arnold or his son.

As stated above, Cahow did not appear at the trial, but his deposition discloses that he holds a student's permit to obtain instruction in piloting an aeroplane; that he and Arnold had been acquainted for three years; and that he had assisted Arnold in the sale of cattle owned by the latter. Cahow testified that he desired to purchase an aeroplane for himself, but that, upon the suggestion of Arnold, a larger aeroplane was purchased by both of them in partnership, to be used in transporting farmers to and from sales of cattle and to be used in conveying passengers for hire. Cahow also testified that Arnold paid a certain sum on the purchase price and that it was understood that Cahow would pay an agreed sum at a later date, the money to be derived from passenger flights and from commissions obtained in the sale of cattle.

It appears that both Cahow and Arnold used the aeroplane when a licensed pilot was along, and that a regular account was maintained at the hangar for gas and other incidental expenses and that such account was carried in the name of both defendants. Cahow testified that arrangements for the storage of the aeroplane were made, and that it was understood at the hangar that he was to be manager of the aeroplane in Arnold's absence, and that, at the time of the accident, the government license plate was in the name of both defendants and that no one else had any ownership or interest in the aeroplane.

The pilot who was engaged to fly the Stinson aeroplane testified that arrangements for his services were made by both of the defendants, and that he was instructed by Arnold that Cahow was to be in charge of the aeroplane and that it was to be removed from the hangar only under Cahow's orders. It further appears that, on the night of the accident, two fare-paying passengers had engaged the aeroplane to be transported to Denver, but

the pilot testified that he refused to fly the aeroplane at Cahow's request for the reason that it was not equipped for night flying, and therefore the services of another pilot had been procured for the flight.

Defendant Arnold denied having signed any instrument with Cahow as a partner, and he testified that all of the necessary papers transferring the aeroplane to the X U Airways, Inc., were executed January 19, 1931, before the accident occurred. But he identified his signature on the bottom of a photostatic copy of the transfer of the aeroplane from the defendants to the X U Airways, Inc. This instrument is designated exhibit No. 11, and was excluded from the record under the court's ruling. It is certified therein that the defendants as owners of the aeroplane described "have this date, for value received, sold said aircraft" to the X U Airways, Inc., of Omaha, Nebraska. The instrument is signed by both of the defendants, by "Thomas F. Arnold, Partner," and bears the date of February 19, 1931. We think the court erred in excluding the above exhibit, and that the plaintiff was entitled to have the jury pass on the question as to whether the facts herein are sufficient to warrant a finding that the defendants were partners at the time of the accident and therefore jointly liable for the damage to plaintiff's aeroplane.

The jury, as triers of fact, are the sole judges of the credibility of the witnesses and the effect to be given their testimony, and it was error for the trial court, at the close of all of the evidence, to withdraw the case from the jury and dismiss the action where, as in the present case, disputed questions of fact are involved from which different minds might well draw different conclusions. *Thomson v. Shelton,* 49 Neb. 644; *Kimble v. Roeder,* 115 Neb. 589. It has been well said: "A trial court is not justified in withdrawing a case from a jury and directing a verdict, if there is competent evidence from which the alleged facts may be reasonably inferred." *Oleson v. Oleson,* 90 Neb. 738.

Other assignments of alleged error are pointed out, but, in view of our conclusion, we do not find it necessary to discuss them.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views expressed herein.

REVERSED.

FRANK L. PAUP, APPELLEE, V. AMERICAN TELEPHONE & TELEGRAPH COMPANY, APPELLANT.

FILED MARCH 16, 1933. No. 28365.

1. **Torts.** A tort-feasor is answerable for all the consequences that, in the natural course of events, flow from his unlawful or negligent acts, although those results are brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or were the natural consequences of his original wrongful act.
2. **Appeal.** As to assignments of error relating to insufficiency of pleading, and challenged instructions of the trial court, the controlling principle, in view of the record presented, is: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Comp. St. 1929, sec. 20-853.
3. **Evidence** examined, and *held* sufficient to support the verdict and judgment.

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

Brome, Thomas & McGuire and *G. H. Seig,* for appellant.

Fred N. Hellner and *Richard Mackey, contra.*

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

EBERLY, J.

This is an action at law to recover damages, growing out of an accident, to an automobile owned by plaintiff. A trial to a jury resulted in a verdict and judgment against the defendant, American Telephone & Telegraph Company, and for plaintiff, in the sum of $600, and a verdict in favor of defendant Short. From the order overruling its motion for a new trial, the telephone company appeals.

It appears that plaintiff, an automobile dealer, was driving a new Nash automobile, just delivered to him by the distributors at Omaha, eastward from that city to his place of business at Denison, Iowa. En route he arrived at the Douglas street bridge between Omaha, Nebraska, and Council Bluffs, Iowa, about 8 o'clock a. m. on January 9, 1931. It was a foggy, misty morning. His automobile lights were burning, and he was traveling about fifteen miles an hour. Shortly before plaintiff arrived at the bridge, a Ford car, belonging to the defendant telephone company, with three employees therein, parked upon the north side of the bridge, headed west. Two of these employees then crossed to the south side of the bridge with certain tools and materials for the purpose of making repairs on the property of the telephone company, and while they were thus engaged a Dodge car, not involved in the accident, ran into the rear of the telephone car in such a manner as to become engaged thereto. Thereupon the foreman of the telephone company crew ordered Mr. Montgomery, a fellow employee, to go to the east tollhouse at the east entrance to the bridge and instruct the toll attendant to stop westbound traffic. What this employee did thereafter is a matter of disputed evidence. Testimony of plaintiff, if believed, establishes that, in carrying out this order, after delivering his message to the east tollhouse attendant, and on his return to the telephone company car, the employee, Montgomery, ran toward plaintiff's automobile, as it was being driven eastward over the bridge, and flagged it

to a complete stop. At this time the truck of defendant Short was traveling about 75 feet in the rear of plaintiff's car. The truck driver observed the plaintiff's car stopping, and that there was ample room to pass to the left of plaintiff's car. The intervening cars prevented the truck driver from seeing Montgomery or observing his stop signals. He turned to the left, slowed down, and started to go around the car of plaintiff. When he arrived on a line even with the back footboard of that car, a man, subsequently identified as Montgomery, dashed from in front of the Paup automobile to a position directly in front of this approaching truck, signaling for it to stop. The intervening distance between the approaching truck and the running man, when the latter was first discovered, was such that the truck could not be stopped in time to save Montgomery from serious injury. As the driver of the truck testified: "It was up to me either to hit the man or hit the car." In the emergency presented, to save the man, he turned his truck quickly to the right and collided with plaintiff's Nash car, and thereby the damages in suit were caused.

The defendant telephone company insists that the evidence is insufficient to sustain the verdict, and in argument at the bar emphasized the opposing testimony of its own witnesses. But it is plain that the trial jury accepted the version of the accident as given by plaintiff's witnesses. On this basis their determination is binding upon this tribunal. In the light of the verdict, we accept the view that the jury were justified in determining that defendant Short, driving his truck at a lawful rate of speed, undertook in a proper manner to pass plaintiff's car ahead. When he turned to the left and was coming up abreast of it, Montgomery dashed into view and negligently assumed a dangerous position, and to save this man it was necessary for the truck driver to turn his truck promptly to the right. In doing this he crashed into the plaintiff's car. He was suddenly called to act in an emergency. He was not negligent, and if it be

conceded that he acted unwisely, it was error *in extremis*. It follows that the negligence of the telephone company's servant furnishes the sole and proximate cause. *Wyatt v. Chesapeake & P. T. Co.*, 158 Va. 470, 82 A. L. R. 386; *Lammers v. Carstensen*, 109 Neb. 475.

In the early case of *Scott v. Shepherd*, 2 W. Bl. (Eng.) 893, it appears that a "lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, etc. That one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and then threw it across the said market-house, when it fell upon another standing there of one Ryal, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market-house, and, in so throwing it, struck the plaintiff then in the said market-house in the face therewith, and the combustible matter then bursting, put out one of the plaintiff's eyes." Shepherd was held liable for the injury thus inflicted. The reason is: Here was but a single wrong, the original act of throwing the dangerous missile; and though the plaintiff would not have been harmed by it but for the subsequent acts of others in throwing it in his direction, yet, as these were instinctive and innocent, it is the same as if a cracker had been flung in his direction which had bounded and rebounded, again and again, before it struck the plaintiff's eye, and the injury was therefore a natural and proximate result of the original act.

Since this so-called squib case, the principle is well established that: "A tort-feasor is answerable for all the consequences that, in the natural course of events, flow from his unlawful acts, although those results are brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or were the natural consequences of his original act." 1 Cooley, Torts (4th ed.) 114.

The following cases illustrate the application of the language just quoted: *Pierce v. Conners,* 20 Colo. 178; *Phillips v. Dewald,* 79 Ga. 732; *Western & A. R. Co. v. Bailey,* 105 Ga. 100; *Alabama G. S. R. Co. v. Chapman,* 80 Ala. 615; *Marchand v. Gulf C. & S. F. R. Co.,* 20 Tex. Civ. App. 1; *Hammill v. Pennsylvania R. Co.,* 56 N. J. Law, 370; *Jackson v. Galveston, H. & S. A. R. Co.,* 90 Tex. 372; *Village of Carterville v. Cook,* 129 Ill. 152.

In *Hilligas v. Kuns,* 86 Neb. 68, this court expressly approved and substantially adopted the statement of the principle above quoted, which is controlling in the instant case. It follows that the evidence before us is ample to sustain a recovery.

As to the challenge to the sufficiency of the petition, the first paragraph or division thereof, after alleging the time and place of the accident, continues: "That while proceeding in a careful and prudent manner eastward the agent, servant and employee of the defendant, American Telephone & Telegraph Company, one Montgomery, suddenly without any warning, reason or cause jumped in front of the automobile of your plaintiff and ordered your plaintiff to stop, which was immediately done, instantaneously and concurrently, and as a result of said negligent acts the truck driven by Samuel L. Short and owned by the defendant William B. Short ran into the rear of your plaintiff's car, which at that moment was standing, which concurrent negligence of the defendants and each of them was the proximate cause of plaintiff's damage, as hereinafter set out." The language thus quoted embraces and covers the ultimate facts of the transaction, as already recited in this opinion. These constitute the facts from which the inference of actionable negligence in this case arises. The second paragraph or division of this petition which furnishes the sole basis of defendant's challenge to the sufficiency of this pleading may be considered as merely stating the conclusions of the pleader, and whatever force and effect be accorded them, they cannot function to circumscribe or limit the

legal effect of the ultimate facts pleaded in the first paragraph.

At best, petitions must be construed as entireties, giving full force and effect to all language therein contained. We are committed to the rule: "A petition, taken as a whole, which states facts showing the plaintiff is entitled to some relief, is not fatally defective merely because it may require some disentanglement, when it is impugned for the first time by a demurrer *ore tenus.*" *Donovan v. Chitwood,* 116 Neb. 683.

The defendant telephone company complains of instruction No. 1 given by the trial court on its own motion. In this connection it is to be remembered that the real issue of fact upon which this case must be determined is to be found in the positive evidence of plaintiff's witnesses that Montgomery, the telephone company's employee, ran toward plaintiff's automobile as it was being driven eastward over the bridge and flagged it to a complete stop; then, as the following truck turned out to the left and started around the Paup car, Montgomery dashed in front of the oncoming truck and, from a position of danger, likewise signaled it to stop, thus, due to his own position of danger, causing it to swerve sharply to the right and collide with plaintiff's automobile. Opposed to this is the equally positive testimony of Montgomery, and other witnesses for the defendant telephone company, categorically denying the evidence of plaintiff's witnesses as to the telephone company's employees in any manner participating in the accident. The testimony on behalf of the telephone company, it is true, does not negative the occurrence of the accident by a collision between plaintiff's automobile and Short's truck, substantially as alleged, but is directed to establishing as a fact that Montgomery did not flag either the truck or the damaged automobile, was not present when the accident occurred, knew nothing about it, and in no manner participated therein or contributed thereto.

We have already quoted certain allegations of the "first

paragraph of plaintiff's petition." This defendant's answer expressly admits the allegations contained in the first four lines of paragraph 1 of plaintiff's petition, and also sections 1, 2, and 3 of paragraph 3 thereof. It denies generally all allegations not expressly admitted therein. But the original petition of plaintiff is not before us, and neither does the transcript show its paging and paragraphing with reference to the lines composing the same. In this situation, by the instruction of which defendant complains, the district court instructed the jury that "The defendant telegraph company for answer admits the allegations in the plaintiff's petition, but denies that its servants or any of them was guilty of any act of negligence causing or contributing to the bumping of plaintiff's car and the damage to the same." Obviously it does not affirmatively appear that defendant was prejudiced by the instruction given. Comp. St. 1929, sec. 20-853.

The evidence in the record as to extent of damage is ample to support the verdict.

The record here presented failing to affirmatively disclose that a substantial or prejudicial error was committed by the trial court, its judgment is

AFFIRMED.

IN RE ESTATE OF GEORGE C. CACHELIN.
GRANT LOTHROP, APPELLANT, V. MADELINE DE WITT, APPELLEE.

FILED MARCH 16, 1933. No. 28413.

1. **Executors and Administrators: APPOINTMENT.** Even though the applicant for appointment as executor be of legal age, sound mind and memory, and untainted by conviction for a crime which renders the convicted person infamous, yet if, in addition thereto, from evidence relating to the character and relation of the interested parties, the nature and extent of the testator's estate, and the circumstances surrounding the

same, the court, in the exercise of a sound judicial discretion, determines that such applicant is "incapable or unsuitable to discharge the trust," the application will be denied.

2. Evidence examined, and *held* to sustain the judgment of the district court.

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

Grant Lothrop and *Norman Lothrop*, for appellant.

Patrick & Smith, contra.

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

EBERLY, J.

Grant Lothrop, a resident of Stanton county, Nebraska, on December 26, 1930, filed a petition in the county court for Douglas county, Nebraska, setting forth the death of George C. Cachelin, "late of Omaha, in the county of Douglas, state of Nebraska," on November 20, 1930, "leaving a last will and testament * * * now on file in this court;" also setting forth that Madeline De Witt, of Omaha, Nebraska, a daughter, and three grand-children of deceased were the only heirs at law of deceased and the sole persons interested in said estate. This petition prayed for the admission of the will to probate, and the appointment of Grant Lothrop as executor. The validity of the will was not challenged, but Madeline De Witt filed objections to the appointment of Grant Lothrop as executor. On hearing, the county court admitted the will to probate, but sustained the objections of Madeline De Witt and appointed her as administratrix with will annexed of her father's estate. From this order Grant Lothrop appealed to the district court for Douglas county where, after trial *de novo*, a judgment was entered denying his appointment. From this order Grant Lothrop prosecutes this appeal.

It may be said that appellant, as an attorney at law, drafted the Cachelin will which appears in the instant

case. It was executed by Cachelin in the presence of Mr. Lothrop and the latter's wife, who attested the same as the sole witnesses thereto. So far as the record discloses, Lothrop has no interest in the estate of the deceased, nor is he a beneficiary under the terms of the will, save and except as such interest or benefits may be created by the following words of this testamentary instrument: "Lastly, I constitute and appoint Grant Lothrop of Blair, Nebraska, to be executor of this my last will and testament," etc. It appears that Grant Lothrop has removed to Stanton county where he now resides. None of the property of said estate is situated in Stanton county, but at the time of the death of said deceased such property was wholly confined to Douglas and Washington counties. In addition to these facts, the appellee challenged Lothrop's appointment on the ground that he, "without cause, is antagonistic and hostile" to her, and that the provisions of the will relating to his appointment as executor were secured by the exercise of undue influence by appellant over the testator at the time of the making of the will.

Appellant, in pleading and in evidence, denied the allegations of the appellee. He insists that the provisions of section 30-302, Comp. St. 1929, are controlling. These are in the following language: "When a will shall have been duly proved and allowed, the county court shall issue letters testamentary thereon to the person named executor therein, if he is legally competent, and he shall accept the trust and give bond as required by law." In the interpretation of this statute, appellant adopts the language of the supreme court of Illinois, as applied to the words "legally competent," to the following effect: "It is the duty of a court of probate to grant letters testamentary to the executor named in the will if he or she is 'legally competent' and accepts the trust. These words mean that the person named as executor must be of legal age, sound mind and memory, and untainted by conviction for a crime which renders the convicted person infamous." *Clark v. Patterson,* 114 Ill. App. 312.

Appellant further insists that he responds to the terms of the definition thus quoted, is named in the will as executor, and the court therefore may not refuse to appoint him.

We are unable to agree with appellant's contention. The words "legally competent" as employed in our decedent act are not in terms defined by the lawmakers. They must be construed in the light of context, and must be held to cover, include, and embrace all qualifications which other provisions of the statutes require executors to possess in performance of their statutory duties. Thus, section 30-309, Comp. St. 1929, provides: "If an executor shall reside out of this state, or shall neglect, after due notice given by the judge of probate, to render his account and settle the estate according to law, or to perform any decree of the court, or shall abscond, or become insane, or otherwise incapable or unsuitable to discharge the trust, the county court may remove such executor." Obviously, the fact that an executor may be *"otherwise incapable or unsuitable to discharge the trust,"* when so determined by the probate court in the exercise of a sound judicial discretion, renders his prompt removal mandatory. The law does not contemplate vain procedure. It is not reasonable to suppose that it requires that one set of qualifications render mandatory the appointment of an applicant as executor, and as soon as the appointment is made the lack of additional qualifications then required will render mandatory an immediate removal. Obviously the words "legally competent" include all qualifications necessary not only to secure the job but to hold it. Therefore, even though it affirmatively appears, at the time of the original application to the probate court for the appointment as executor of one named in a will admitted to probate, that such petitioner was then "of legal age, sound mind and memory, and untainted by conviction for a crime which renders the convicted person infamous," yet if, in addition thereto, from the evidence relating to the character

and relations of the interested parties, the nature and extent of the testator's estate, and the circumstances surrounding the same, the court, in the exercise of a sound judicial discretion, determines that such applicant for appointment is "incapable or unsuitable to discharge the trust," such appointment should not be made. The denial of the petition for the same in this case is therefore fully justified. The present case is not here for trial *de novo*. The judgment of the district court is before us surrounded with the presumption of correctness. It would serve no good purpose to set out the testimony contained in the bill of exceptions. Viewed as a law case, error does not appear.

It follows that the judgment of the district court is correct, and it is

AFFIRMED.

WILLIAM DUNN, APPELLEE, V. CHRIS SNELL, APPELLANT.

FILED MARCH 16, 1933. No. 28474.

1. **Brokers**: CONTRACT: STATUTE OF FRAUDS. Real estate broker's contract of employment to make an exchange of land is not governed by statute requiring broker's contract for sale of land to be in writing. Comp. St. 1929, sec. 36-108.
2. ———: COMPENSATION. A principal cannot defeat a broker's right to compensation for procuring customer for an exchange of real estate by revoking his authority pending negotiations with the customer.
3. ———: AGENCY: REVOCATION. Though an agency to sell real estate may be revoked at any time before the sale, such revocation must be in good faith, and will not obtain to appropriate the broker's services without compensation.

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

Joseph E. Strawn and *Hugh A. Myers*, for appellant.

Lawrence F. Welch and *John A. McKenzie, contra.*

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

DAY, J.

This is an action brought by a real estate broker to recover compensation for services. He obtained a judgment in the trial court, from which the defendant appeals.

The contract employing the plaintiff was oral, and since the employment was to assist in making an exchange of properties, recovery is not barred by section 36-108, Comp. St. 1929; *Sallack v. Freeman,* 106 Neb. 299; *Gill v. Eagleton,* 108 Neb. 179; *Nelson v. Nelson,* 95 Neb. 523.

The plaintiff produced a customer, negotiated a trade, and the defendant signed a contract of exchange, containing a time limitation for acceptance. The plaintiff's customer did not accept the proposition. In the meantime, the defendant had an interview with the customer. The defendant displayed unusual diligence in getting back his exchange contract, making several trips to plaintiff's office. A short time thereafter he made the exchange, without the help of the broker, with the customer produced by him, upon the identical terms of the former contract. The final papers were prepared by another real estate broker in the same town. The defendant relies upon his attempted revocation of the broker's contract to defeat plaintiff's recovery, which he alleges he accomplished when he secured the copy of his proposition which had been submitted to the customer. There was no time limitation on the broker's contract.

A principal cannot defeat a broker's right to compensation for procuring a customer for an exchange of real estate by revoking his authority pending negotiations with the customer. *Handley v. Shaffer,* 177 Ala. 636; *Weisels-Gerhart Real Estate Co. v. Epstein,* 157 Mo. App. 101; *Maddox v. Harding,* 91 Neb. 292; *Peach River Lumber Co. v. Montgomery,* 51 Tex. Civ. App. 487; *Petersen v. Swanson,* 51 Idaho, 49; 9 C. J. 619.

Though an agency to sell real estate may be revoked at any time before the sale, such revocation must be in

good faith, and will not obtain to appropriate the broker's services without compensation. *Branch v. Moore,* 84 Ark. 462, 120 Am. St. Rep. 78; *St. Regis Paper Co. v. Hubbs & Hastings Paper Co.,* 235 N. Y. 30; *Johnson v. Columbia Mortgage & Trust Co.,* 201 S. W. (Mo. App.) 365.

In this case the evidence supports the finding of the trial court that the broker's contract was not revoked in good faith but was canceled so that defendant could appropriate the broker's services without compensation. The broker performed valuable services for defendant which were satisfactory because he accepted the fruits of his work. The judgment of the district court is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. CITIZENS STATE BANK, APPELLEE: EDWARD J. BREDENBERG ET AL., INTERVENERS, APPELLANTS.

FILED MARCH 16, 1933. No. 28412.

1. **Banks and Banking: INSOLVENCY: PREFERENCES.** There can be no preferential claim upon the assets of an insolvent bank on account of money paid to an officer in the bank, if said payment did not actually increase and augment the funds of the said bank.
2. ———: ———: **TRUST FUNDS.** Money paid to a bank for the sole purpose of paying a specific debt, and converted to its own use by the bank, *held* trust funds, payable in full from bank assets in hands of receiver.

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

Schiefelbein & Donato and *H. A. Bryant,* for appellants.

F. C. Radke, Barlow Nye, G. E. Price, C. M. Skiles and *J. F. Berggren, contra.*

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

PAINE, J.

Three petitions in intervention to establish preferred claims against the assets of the insolvent Citizens State Bank of Wahoo, Nebraska, were consolidated and tried as one case. The trial court gave the interveners a preferred claim upon a $3,500 mortgage and $175 interest collected thereon, and gave claimants a general claim against the bank for $9,500. Two errors, set out in the brief of the appellants, are that the judgment is contrary to the evidence, and contrary to the law.

There is no dispute about the facts in the case, for the parties entered into a long stipulation in reference thereto. Briefly stated, Pete Pearson made, executed and delivered to the Citizens State Bank of Wahoo, upon February 29, 1924, three notes, two for $5,000 each and one for $3,000, which notes were secured by three first mortgages upon land which he owned in Saunders county, Nebraska. This being leap year, the notes were made payable March 1, 1929. The bank thereupon sold and delivered to Mary Hull and to Edward J. Bredenberg each a $5,000 note, and sold the remaining $3,000 note to George W. Beadle, and the said purchasers having paid full value therefor, the bank executed and delivered to them assignments of the mortgages securing their respective notes.

Upon November 5, 1928, the said Pete Pearson paid $2,000 upon the $3,000 note sold to George W. Beadle, making the payment to the bank, which upon November 6, 1928, issued its certificate of deposit for said $2,000, being certificate No. 14617, and the cashier of said bank thereupon placed said certificate of deposit in the safe deposit box of said George W. Beadle, intervener, who had no knowledge of said payment of $2,000, or the issuance of said certificate of deposit, until April 17, 1930, when said bank was closed by the department of trade and commerce.

Upon February 28, 1929, the said Pete Pearson paid to said bank the balance of $1,000 upon the note owned by George W. Beadle but the records of said bank do not disclose the disposition of the said $1,000 so paid, but George W. Beadle never received credit in his account for said $1,000.

Upon March 1, 1929, the three mortgages originally given to secure the $13,000 loan were each released of record, and the said Pete Pearson executed new notes and mortgages to the said bank for the balance due from him of $10,000, being evidenced by two notes for $3,500 each and one for $3,000, and all of said new notes and new mortgages were payable to the said bank, which sold one note for $3,500 to C. M. Anderson, who is still the owner and holder thereof, and sold the new $3,000 note to Sophia Nethaway Hapke, who is now the owner and holder thereof, and at the time of the closing of said bank the remaining note for $3,500 was placed on the inventory as an asset found in the failed bank.

The interveners, Mary Hull and Edward J. Bredenberg, who had each purchased one of the original $5,000 notes, are still the owners and holders of said notes, and have never received any payments thereon.

In open court, Mr. H. A. Bryant offered to accept the $2,000 certificate of deposit which had been issued by the bank November 6, 1928, in payment of that amount of his claim of $3,000, but no record of any acceptance of this offer is shown.

The trial judge, at the close of the argument, entered a judgment, in which he set out all of the facts hereinbefore stated, and also showed the payment by Pete Pearson to the receiver of $175 interest upon the $3,500 note and mortgage retained by the bank. He found that the three interveners were the owners of this $3,500 note and the interest collected thereon, of $175, and that the ownership thereof was 3/13 in George W. Beadle and 5/13 in Mary Hull and 5/13 in Edward J. Bredenberg, and directed the receiver to assign and turn over the note

and mortgage to the three claimants, and to pay in the above proportions to each of the three interveners their share of the $175 held by him, and that for the remainder of their claim of $9,500 they had a general claim against the bank in the same proportions as hereinbefore stated.

1. We will first consider the receipt by the bank on February 28, 1929, of a payment by Pete Pearson of $1,000 as payment upon the note owned by George W. Beadle. In this case the records of the bank do not disclose any record whatever of the receipt of this payment. This payment did not increase the funds of the bank in any way.

"A person asserting a claim for preference against an insolvent estate has the burden of showing that such estate has been increased, to some extent, by the misappropriation of trust funds or property belonging to the claimant." *Morrison v. Lincoln Savings Bank & Safe Deposit Co.*, 57 Neb. 225. See *Gering v. Buerstetta*, 118 Neb. 54.

"A *cestui que trust*, who seeks a preference out of the estate of an insolvent national bank in the hands of a receiver, must clearly prove that the trust property, or its proceeds, went into a specific fund or property which came into his hands." *Central Nat. Bank v. First Nat. Bank*, 117 Neb. 161.

For this payment of $1,000, the trial court allowed but a general claim. Under the proof, this court can do no more. There can be no preferential claim upon the assets of an insolvent bank on account of money paid to an officer in the bank, if said payment did not actually increase and augment the funds of said bank. *First State Bank v. Oelke*, 149 Ia. 662; *Zimmerli v. Northern Bank & Trust Co.*, 111 Wash. 624; *Beard v. Independent District of Pella City*, 88 Fed. 375, 31 C. C. A. 562.

2. We will next consider the collection by the bank of the payment of $2,000 made to the bank for payment upon the note owned and held by George W. Beadle. In this case the bank immediately issued for said cash pay-

ment a certificate of deposit in the name of said George W. Beadle, and the said bank placed said certificate of deposit so issued in his safety deposit box. Of these facts he had no notice or knowledge until after the failure of the bank.

This court has very recently held: "Converted proceeds of a check delivered to and received by a bank for the sole purpose of paying a specific debt of the payee *held* trust funds payable in full from bank assets in the hands of the receiver, and not deposits." *State v. State Bank of Touhy*, 122 Neb. 582. See *Beard v. Independent District of Pella City*, 88 Fed. 375. See, also, *State v. Farmers State Bank*, 121 Neb. 532.

The decision of the district court is modified to the extent of declaring that George W. Beadle is entitled to a preference, as a trust fund, from the assets of said bank to the extent of $2,000, and no more. The decree of the district court should be modified to that extent, and to show that the ownership of the $3,500 mortgage and interest payment thereon is owned by Mary Hull 5/11, by George W. Beadle 1/11, and by Edward J. Bredenberg 5/11, and, as so modified, is hereby affirmed.

AFFIRMED AS MODIFIED.

GOOD, J., dissents.

EMMA DE BRULER, APPELLANT, V. CITY OF BAYARD, APPELLEE.

FILED MARCH 16, 1933. No. 28591.

1. **Evidence: DEATH: SUICIDE: PRESUMPTION.** Ordinarily, the party alleging death by suicide must prove it, for the mere fact of death in an unknown manner creates no legal presumption of suicide.
2. ———: ———: ———: ———. The presumption against suicide does not control where there is substantial proof from which rational consideration may reach the conclusion of suicide.

3. **Master and Servant:** WORKMEN'S COMPENSATION ACT: RIGHT TO COMPENSATION: BURDEN OF PROOF. Under the workmen's compensation act, the burden of proof is upon the applicant to prove in this case that the employee came to his death by an accident arising in the course of his employment. A careful examination of the evidence, with the legitimate inferences therefrom, forces us to the conclusion that death was the result of employee's own deliberate act, and compensation is denied.

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

Morrow & Morrow, for appellant.

Yale H. Cavett and *Wright & Wright, contra.*

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

PAINE, J.

This is an application for compensation by a widow for the death of her husband, a policeman, employed by the city of Bayard. The defense was suicide. The district court denied compensation.

Fred De Bruler had been night marshal of the city of Bayard approximately six months prior to the 23d day of April, 1930, the date on which he came to his death. On the night of his death he was performing his duties as marshal. At about 1:15 a. m., he and Fred Hughes, a druggist, had a cup of coffee together at a restaurant. From there he and Mr. Hughes walked to the drug store, Mr. Hughes going in, and Mr. De Bruler starting to make his round by going up to the highway and back down the alleys. About an hour later, while Mr. Hughes was still in the drug store, he heard a noise of a gunshot coming from the alley, but did not investigate. Mr. De Bruler was found dead about 6 o'clock the next morning in the alley at the rear of the Palm Theater. He had been dead some time. The Palm Theater, which was about a block south of the drug store, has a small platform off the alley, about 4 feet by 6 feet, upon which

De Bruler's body was found. The platform was high enough so that, when a person was sitting on the platform, his feet would touch the ground. There was a bullet hole in the left side in the region of the heart. The bullet came out on the opposite side, just below the ribs, making a wound where it entered about the size of a dime, the powder burn around it being about the size of a half-dollar. The body was lying on its back, with the feet hanging over the edge of the platform. His large .45 caliber Colt revolver was in his hand, with his thumb through the trigger guard in front of the trigger. The hammer was resting upon the one discharged cartridge shell. The bullet, after leaving the body, ricocheted against objects for about 45 feet down the alley, where it was found.

Druggist Hughes said that when they were in the restaurant together, about an hour before the shot was heard, De Bruler appeared nervous and restless. Some months before his death, he told Charles Bradley, who had known him for four years, at a time when they were visiting about money matters: "Well, there ain't much use of trying. I just as well end it all."

When the body was found, nothing upon his person had been disturbed, and there were no signs of a scuffle in the alley.

1. No evidence was submitted by the widow in support of her application for compensation, as she relied upon the presumption against suicide.

It is insisted by the applicant that the presumption prevails that a sane person will not take his own life. It has been held that the party alleging suicide must prove it, for the mere fact of death in an unknown manner creates no legal presumption of suicide. Lawson, Law of Presumptive Evidence, 242; *Schrader v. Modern Brotherhood of America,* 90 Neb. 683.

The term "presumption" means that which may be taken for granted, or has the force of argument. It is simply a deduction from experience that one has a tend-

ency to cling to life rather than to destroy it. When the question is as to whether a violent death is caused by accident or suicide, the law presumes accident until suicide is established.

This is illustrated by an action brought for compensation, which was allowed by the commissioner and denied by the district court, this court reaffirming the award of the compensation commissioner, where it appeared that the deceased, who was manager of a grain elevator at Minden, was hastening to mail a report on an incoming train to the United States Grain Corporation, and was killed by an oncoming train. It was held that he did not come to his death by wilful negligence, or by suicide, but by an accident occurring in the course of his business. *Farmers Grain & Supply Co. v. Blanchard,* 104 Neb. 637.

2. In the case of *Atlas Brewing Co. v. Industrial Commission,* 314 Ill. 196, a night watchman was making his regular rounds and was required to check in at a box in a barn loft at a certain hour. He was found dead a short time later in this loft; death having occurred from hanging. Upon action for compensation, it was held that the presumption against suicide does not relieve the claimant of affirmatively showing that the death arose out of his employment, nor cast the burden on the employer to prove suicide.

Liability under compensation laws cannot rest upon guess, speculation, or conjecture, upon a choice between two views equally compatible with the evidence, but must be based upon facts established by a preponderance of the evidence.

In *Dodder v. Aetna Life Ins. Co.,* 104 Neb. 70, recovery was denied upon an accident insurance policy for $15,000, growing out of the death of Edward L. Dodder, who was found some seven miles northwest of Florence, Douglas county, sitting in his Cadillac coupé, with the brakes set, and whose death had been caused by a bullet wound in his head from a revolver bullet, and it was held by this court that the presumption against death by suicide

does not prevail in the presence of facts bearing upon the question of whether death is intentional or accidental.

And again, in a compensation case, it was held: "The presumption against suicide is a presumption of fact, and a strong one, but it does not control where there is substantial proof from which rational consideration may reach the conclusion of suicide." *Hawkins v. Kronick Cleaning & Laundry Co.*, 157 Minn. 33, 36 A. L. R. 394.

3. On the other hand, the burden of proof under the workmen's compensation act is upon the applicant, to prove by a preponderance of the evidence that De Bruler came to his death by an accident arising out of and in the course of his employment. This, we believe, the applicant has failed to prove. A careful examination of the facts, with the legitimate inferences which the court is justified in drawing therefrom, leaves scarcely a shadow of a doubt that De Bruler came to his death by his own deliberate act. The presumption against death by suicide is only *prima facie,* and in this case has been rebutted by evidence which clearly and unmistakably points the other way. *Grosvenor v. Fidelity & Casualty Co.*, 102 Neb. 629; *Sawyer v. Mutual Benefit Health & Accident Ass'n,* 121 Neb. 504; *Bartlett v. Eaton,* 123 Neb. 599; *Townsend v. Loeffelbein,* 123 Neb. 791; *Schraner v. Massman Construction Co.*, 48 S. W. (2d) (Mo. App.) 104.

In our opinion, if an inference favorable to the applicant can only be reached by speculation or conjecture, then the applicant cannot recover. Finding no error in the judgment entered by the trial court, the same is

AFFIRMED.

SOCIETE TITANOR, APPELLEE, V. PAXTON & VIERLING IRON WORKS, APPELLANT.

FILED MARCH 16, 1933. No. 28363.

1. **Corporations: CONTRACTS: ESTOPPEL.** Where a party contracts with a company and recognizes and deals with it as a

corporation, he is estopped to deny its corporate existence, although the initial contract does not specifically designate the company as a corporation, or as having a name that implies it to be a corporation.

2. Appeal: FINDINGS. The finding of a court in a law action tried without a jury, based on conflicting evidence, will not be disturbed unless clearly wrong.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

Finlayson, Burke & McKie and *Gerald M. Drew, contra.*

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

RAPER, District Judge.

This is an action by Societe Titanor against the Paxton & Vierling Iron Works, in which plaintiff asks recovery of purchase price of a quantity of bar steel sold under written contract. The petition of plaintiff sets forth the written order, and alleged delivery of the steel, and alleges in paragraph 1 that plaintiff is a corporation organized and existing under the laws of France. The defendant in its answer denies paragraph 1 of the petition, and admits giving the order and that it duly received the steel, and alleged that the steel furnished by plaintiff could not be used in the manufacture of sound, usable tools, the purpose for which same was sold and purchased; that the defendant manufactured numerous tools from the steel in accordance with instructions furnished by plaintiff and the tools resulting from said process were not commercially usable, and on March 14, 1927, notified plaintiff it would not accept the steel. These allegations were denied in the reply.

The order is dated April 16, 1926, addressed to Messrs. Societe "Titanor," Paris, France, and so far as necessary to state reads: "Please ship us to our plant at Omaha, Neb., Three (3) bars Titanor steel of each of the following dimensions: Square 1½" 1¾" 2" for cold sets. Price

—$.52 lb. To be delivered free of freight and duty to Omaha, Neb.," and is signed by Paxton & Vierling Iron Works. The plaintiff sent invoice June 30, 1926, which was received on July 22, 1926. The steel was delivered to the defendant about the first of August following. The heading on the invoice contained the words, in large type, "Societe 'Titanor,' French Titanor Corporation, Paris." No complaint was made by defendant until September 23, 1926, when defendant wrote to plaintiff, stating that defendant had been experimenting with the steel and had come to the conclusion that they did not know how to temper the steel, and stated, "unless you can give us a formula to temper this steel so it will hold up, we will have no further use for it."

There were several letters exchanged between the parties after that date, the defendant advising plaintiff that the defendant was unable to get satisfactory results from the steel, and in response to a request of defendant the plaintiff in October, 1926, sent instructions for the treatment of the steel as to manner of heating, forging and tempering. After that defendant wrote plaintiff, December 7, 1926, that the steel was not satisfactory, and in response to that plaintiff, on December 22, asked defendant to leave the affair in abeyance until one of plaintiff's officials, who would soon be there, could discuss the matter with defendant. On the 14th of March, 1927, defendant by mail notified plaintiff that the steel would not be accepted and was held subject to its order. The plaintiff wrote to defendant letters of date October 6, 1926, November 6, 1926, December 22, 1926, besides the invoice sent June 30. On the letter-head of each of these communications appeared in large type "Societe 'Titanor,' French Titanor Corporation," and the letters are signed by a "managing director." The defendant in a letter dated December 7, 1926, and in the letter of March 14, 1927, definitely rejecting the steel, addressed these letters to "Societe 'Titanor,' French Titanor Corporation, Paris, France."

After the parties had rested, in the trial to a jury both sides moved for a directed verdict. Whereupon the court discharged the jury and took the case under advisement. Later the court, with commendable zeal to get all available evidence, and by consent of parties, permitted the introduction of further testimony, and on final hearing rendered judgment for plaintiff for the full amount of its claim. Defendant appeals, alleging as errors: That the judgment is not sustained by sufficient evidence; that the judgment is contrary to law; and overruling its motion for judgment because the evidence failed to prove that plaintiff is a corporation.

The only evidence on the corporate character of plaintiff was given in a deposition of a witness in Paris, who stated "Societe Titanor is a societe organized and existing as such pursuant to the laws of the Republic of France." The defendant moved to strike out that part of the deposition, for the reason that it is a legal conclusion of the witness, and not the best evidence. The motion was overruled. Perhaps this motion should have been sustained, but no prejudice resulted, because, as we view the situation, the defendant was estopped to question the plaintiff's corporate character.

The evidence does not give a translation of the word "Societe," but the facts above set out show clearly that the defendant knew that plaintiff claimed to be a corporation. The invoice was so given, and defendant recognized plaintiff as a corporation and knew it was dealing with plaintiff as a corporation. Where a party contracts with a company and recognizes and deals with it as a corporation, he is estopped to deny its corporate existence after receiving the benefits of the contract. *American Gas Construction Co. v. Lisco,* 122 Neb. 607; Comp. St. 1929, sec. 24-221.

The appellant alleges that, as the steel was to be used for manufacturing cold sets, there was an implied warranty that the steel delivered was reasonably fit for that purpose. Comp. St. 1929, sec. 69-415. Cold sets, as ex-

plained by witnesses, mean cold chisels and some other tools for working cold iron. The appellant strongly urges that the judgment is not sustained by sufficient evidence and is contrary to the evidence, in that the evidence shows conclusively a breach of the implied warranty. Conceding that there was an implied contract that the steel was reasonably fit for the manufacture of cold sets, a reading of the testimony discloses that there were several witnesses called by both parties. Among them were experienced and skilled blacksmiths, iron workers, and there was also called on each side an expert metallurgist. Plaintiff's witnesses, including one metallurgist, testified that the steel was of good quality, superior to ordinary domestic steel, and that good cold sets could be made from same by ordinary methods, and that they had made such tools, which were offered in evidence. Defendant's witnesses, outside of the metallurgist, testified that they were employees of defendant and had repeatedly and by various methods tried to make cold sets from the steel, but were unable to get satisfactory or commercial products. The other metallurgist used what is called a pyrometer to control or gauge the heat in tempering, and with that method he could make satisfactory tools. That method is too expensive to use in practical production. But he further testified in substance that the workmen in defendant's plant might or might not be able to make commercially usable tools without using the pyrometer. He further testified that the steel was more sensitive than "we (meaning the Union Pacific Railroad Company, his employer) furnish our blacksmiths. It isn't fool proof." He further stated that the heat range of this steel is narrower than ordinary steel, having only about 20 degrees to work in, and he added: "Tool steels we attempt to use we want to be fool proof, and we ought to have as wide a range for quenching as possible." The effect of his testimony may be summarized as concluding that, while good tools could be made from the steel by use of pyrometer, the sensitive qualities and narrow heat range

render it doubtful, if not impractical, that the steel can be successfully used in the ordinary methods of manufacture. It is not unusual to have experts disagree. It will serve no useful purpose to set out the evidence of the parties more fully. In view of the whole record, it appears that, while the testimony is conflicting, there clearly is sufficient evidence to sustain the judgment.

The trial court observed the witnesses and their demeanor while testifying, and in an action at law tried to the court without a jury, where there is sufficient evidence in support thereof, the finding of the court has the same force as the verdict of a jury, and will not be disturbed on appeal unless clearly wrong. *Ayres v. Atlas Ins. Co.*, 123 Neb. 285.

The judgment is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. CITIZENS BANK OF STUART, APPELLEE: S. D. BICKFORD, ADMINISTRATOR, INTERVENER, APPELLANT.

FILED MARCH 23, 1933. No. 28478.

1. **Banks and Banking**: DEPOSIT. A deposit in a bank in the ordinary course of its business is presumed to be a general deposit.
2. ———: ———. When money is deposited in a bank as a general deposit, the relation of debtor and creditor is thereby created between the bank and the depositor.
3. ———: ———: TRUSTS. Evidence examined and *held* the deposit involved here was a general deposit and the relations between the parties never changed so as to constitute it a trust fund.

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

D. R. Mounts, for appellant.

I. J. Dunn, Frank Warner, F. C. Radke and *Barlow Nye, contra.*

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

GOSS, C. J.

The intervener, as administrator of the estate of Jane Ann Snyder, appeals from the judgment of the district court allowing a claim as a deposit but refusing to allow it as a trust fund.

On March 1, 1930, Mrs. Jennie A. Snyder, otherwise known as Jane Ann Snyder, deposited $4,900 in Citizens Bank of Stuart and received as evidence thereof a certificate of deposit due in six months. On July 22, 1930, she "died intestate in Steele county, Minnesota," and an administrator *de bonis non* was duly appointed in the probate court of that county. There have been two changes in the administrator, but the estate has continued to be duly represented in the suit. On December 1, 1930, the bank was turned over to the department of trade and commerce as an insolvent bank. G. E. Hall was the agent in charge and found the unpaid certificate in the bank. On December 17, 1930, he returned the certificate, which had been sent by a Minnesota bank on August 30, 1930, to the Citizens Bank on behalf of the then administrator for payment. The letter of transmittal by a bank and trust company says it is inclosed for "collection." The bank was insolvent on August 30, 1930. Mrs. Snyder's brother, Al Robertson, lived in Holt county. On September 16, 1930, he caused a petition for the appointment of an administrator of her estate to be filed in Holt county, praying for the appointment of James C. Flannigan as administrator. On October 11, 1930, the petition was denied, appeal bond was fixed and given, but the appeal was never perfected. January 8, 1931, a receiver was duly appointed for the bank by the district court for Holt county. His successor is in charge. The receiver classified the claim "as a preferred claim for deposit." The foregoing facts were all stipulated.

There was only one witness who testified orally—James

C. Flannigan, who was vice-president and one of the managing officers of the bank. He testified that the certificate was made out and executed by him. Demand for payment was made about the date the certificate was due. It was refused because Al Robertson and his attorney notified the bank not to pay it. This attorney was one who was usually consulted by the bank on legal matters. He filed the petition in the county court of Holt county, asking that Flannigan be appointed administrator. The Citizens Bank received several letters from the Minnesota bank requesting payment. When asked what reason was given for not paying the certificate the witness said: "The bank explained to the Minnesota bank just what the situation was."

The foregoing is a fair abstract of all the evidence. The district court found and ordered that the intervener's claim constitutes a deposit and not a trust fund.

The classification of this claim by the receiver as a preferred claim for a deposit was authorized by the statute, which gives priority to the claims of depositors, for deposits, not otherwise secured and to claims of holders of exchange. These claims, subject to federal, state, county and municipal taxes, constitute a first lien upon all the assets of the bank at the time it is closed. Comp. St. 1929, sec. 8-1,102.

The theory upon which claimant seeks priority over the position to which he was assigned by the classification as a depositor is that the deposit was, or somehow became, a trust fund. The basis for giving a trust fund priority over depositors is that the fund does not constitute "assets" of the bank, as the statute, section 8-1,102, Comp. St. 1929, puts it, but is really the property of the claimant held by the bank as trustee. The evidence shows no element of fact from which we may conclude that there was here anything but an ordinary general deposit evidenced in the form of a certificate of deposit issued in the ordinary course of the banking business.

A deposit in a bank in the ordinary course of its busi-

ness is presumed to be a general deposit. When money is so deposited, it ceases to be the money of the depositor and becomes the money of the bank. By the contract implied by law, and in this instance by the contract evidenced in the terms of the certificate of deposit, the bank became a debtor of the depositor and the depositor became a creditor of the bank to the extent of the deposit. *State v. Farmers & Merchants Bank,* 114 Neb. 378; *Harrison State Bank v. First Nat. Bank,* 116 Neb. 456.

That the Minnesota bank stated it sent the certificate of deposit for "collection" is of no avail to establish a trust. The Citizens Bank never collected it. The word "collection," as applied to the Citizens Bank, is a misnomer. It was the maker. The certificate was sent to it for payment. The forwarding bank had it for collection. Being insolvent, the maker had no right to pay it. At any rate, it did not pay it and the deposit continued to be a debt of the bank. The mere fact that it apparently based its refusal or neglect to pay upon the notice from the brother of the deceased payee and upon the impotent attempt to have the vice-president of the bank appointed local administrator of the payee's estate did not change the rights of the parties. The deposit never changed its character as such. It bears no semblance of a trust fund.

We are of the opinion the claimant has utterly failed to establish a trust fund. The judgment of the district court was right, and it is

AFFIRMED.

STATE, EX REL. CUMING COUNTY FARM BUREAU ET AL., APPELLANTS, V. THOMAS E. TIGHE ET AL., APPELLEES.

FILED MARCH 23, 1933. No. 28481.

1. **Mandamus.** The writ of mandamus cannot control judicial discretion. Comp St. 1929, sec. 20-2156.

2. ———. The writ of mandamus may not be issued in any case where there is a plain and adequate remedy at law. Comp. St. 1929, sec. 20-2157.
3. ———: DECISIONS OF COUNTY BOARDS. In passing upon a petition for the appropriation of money for a farm bureau, where it is necessary for a county board to determine questions of fact, *held* (1) that the act of the board in such determination is quasi judicial, and (2) their decision is not subject to collateral attack by mandamus in the district court, but (3) those aggrieved by the decision have an adequate remedy at law by direct proceedings in error.

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

John J. Gross, for appellants.

Zacek & Nicholson and *H. R. Ellenberger, contra.*

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

GOSS, C. J.

Relators appeal from a judgment refusing to compel the county board of supervisors by mandamus to allow money to finance the county farm bureau.

The procedure for obtaining such allowance is set out in chapter 2, art. II, beginning with section 2-1101, Comp. St. 1929. The petition for mandamus duly pleaded the organization of the bureau, the qualified status of relators, the population of the county as 13,000 to 15,000, its operation under township organization, the status of respondents as the seven members of the board of supervisors, the duty to appropriate money if a sufficient petition be filed, and the assessed valuation of the county. It alleged the filing of a petition in conformity to law, signed by 866 persons, 65 of whom signed twice, leaving 801 qualified signers, and alleged the filing of a remonstrance purporting to be signed by 1,045 persons, of whom the petition relates that the names of 7 appeared twice, 146 had previously signed the petition, 118 signers disqualified; that there were only 774 qualified signers

on the remonstrance, although 902 were needed to meet the requirements of the law; that the petition and remonstrance were considered by the respondents for several days in session as a county board and that they voted (as shown by the quoted record) that the petition and remonstrance be rejected for the reason of fraud being shown on both petitions. Relators alleged that the action of respondents was without authority of law and contrary to law, in that the duty was to allow the petition or to submit the matter to a vote of the people. Relators alleged damages in $1,000 and that they have no adequate remedy at law. The prayer is for mandamus to require respondents to allow the petition and set aside the money for the farm bureau.

Respondents demurred and the court sustained the demurrer. Relators electing to stand on their petition, it was ordered dismissed.

Under the population alleged, 500 signers of the petition were required. Comp. St. 1929, sec. 2-1101. "Whenever such petition is filed in the time, manner and form herein prescribed, it shall be the duty of the county board to accept and allow said petition and to annually allow such budget without further action on the part of the farm bureau." Comp. St. 1929, sec. 2-1102. This section also provides that if a remonstrance be filed signed by one-eighth more in number than there are signers on the petition, the matter shall be submitted to a vote of the people at the next general election.

The appellants urge that the act required of the county board is ministerial and it was erroneous not to compel it by mandamus. The appellees argue that, in determining the sufficiency of the petition, the county board exercises judicial functions, that its exercise of judicial discretion cannot be attacked collaterally and coerced by mandamus, and that relators had an adequate remedy at law by means of error proceedings from the county board to the district court. The demurrer admitted all facts well pleaded but raised the above questions of law.

In substance and effect, the county board held the petition submitted to it insufficient because of fraud in obtaining the signatures to it and so rejected it. The question before us is whether mandamus will compel respondents to act merely because there were signers in sufficient number, notwithstanding their finding that the signatures were fraudulent, or whether the relators were required to follow their legal remedy by error proceedings.

Though the writ of mandamus may be issued to any inferior tribunal, corporation, board or person to compel the performance of an act which the law specially enjoins as a duty, and may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion. Comp. St. 1929, sec. 20-2156.

"This writ may not be issued in any case where there is a plain and adequate remedy * * * at law." Comp. St. 1929, sec. 20-2157.

In *State v. Fulton,* 118 Neb. 400, there is a concise and thorough review by Judge Good of many cases in this and other courts holding that mandamus will not lie to control judicial discretion, nor to review the action of an inferior court where there is an adequate remedy at law for review by appeal or proceedings in error. We adopt, without repeating it, the argument there. It is as applicable to a county board as to a county court.

The recent case of *Red Willow County v. McClain,* 123 Neb. 209, involved the determination by the county board of actual expenses, or of current railroad rates, or of the number of miles actually traveled by the sheriff in conveying prisoners to institutions or in returning fugitives. We held that the determination of the facts in each instance would be a quasi judicial act on the part of the board. The suit was begun by the county as an original action in the district court to recover alleged overpayments. The sheriff had from time to time filed claims with the county clerk. They had been considered and allowed by the county board and no appeal had been

taken. So we further held that the decision of the county board was not subject to the collateral attack by original action in the district court.

In *Mitchell v. County of Clay*, 69 Neb. 779, Pound, C., reviewed former decisions of the courts in passing upon claims against the county. It was there said: "County commissioners act quasi judicially in passing upon claims against the county, whenever their action is not merely a formal prerequisite to the issuance of a warrant, but involves the determination of questions of fact, upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed."

It seems that the act of the county board in passing upon the petition submitted to them, taking several days for the hearings, was fully as much a quasi judicial act of the board or tribunal as would be the passing upon claims involving the finding and decision of facts. The relators pleaded that the board found fraud in the petition asking for the fund. We see no reason why the board was bound to accept the petition if enough of the signatures were procured by fraud to make it ineffectual. The taint of fraud can vitiate things involved in a board or inferior tribunal as well as in a regularly constituted court. So we are of the opinion that the board acted quasi judicially and that the remedy of relators was to have the action reviewed directly and not by this collateral attack. We are of the opinion that mandamus will not lie in such a state of facts.

The judgment of the district court was right, and it is

AFFIRMED.

JAMES C. CLARY, APPELLEE, V. R. S. PROUDFIT COMPANY, APPELLANT.

FILED MARCH 23, 1933. No. 28689.

1. **Master and Servant: WORKMEN'S COMPENSATION LAW: INJURY: NOTICE.** Timely notice to or knowledge of a foreman, whose duty requires him to report to his employer accidental injuries

to workmen, that a workman has been accidentally injured, may be sufficient as notice to the employer.

2. **Pleading:** VERIFICATION. A petition may be verified by an attorney, if plaintiff is absent from the county. Comp. St. 1929, sec. 20-831.

3. **Master and Servant:** WORKMEN'S COMPENSATION LAW: LATENT INJURY. Within the meaning of the law barring claims for compensation of a workman, if not made within six months, a latent accidental injury, seeming at first to be trifling and noncompensatory, but subsequently resulting in a progressive disease and a disability, occurs when its true nature is first discovered by him or when the diseased condition is known to have culminated in a compensable disability.

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

Rosewater, Mecham, Burton, Hasselquist & Chew, for appellant.

Harry R. Ankeny, contra.

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

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, secs. 48-101 to 48-161. James C. Clary, employee, is plaintiff. The R. S. Proudfit Company, employer, is defendant.

Plaintiff claims he suffered a compensable injury while engaged in the duties of his employment, earning $80 a month, as yardman in the lumber yard and elevator operated by defendant in Seneca, Thomas county, April 10, 1928. His disability is arthritis in his right knee, totally and permanently destroying the use of his right leg. He attributes this condition to the accidental striking of his knee on the round of a ladder which he was ascending in the elevator.

The compensation commissioner dismissed the proceeding on the ground that plaintiff did not claim compensation within six months after the occurrence of the injury.

Comp. St. 1929, sec. 48-133. Plaintiff appealed to the district court, where he recovered judgment for $12.27 a week for 215 weeks from September 11, 1928, or $2,638.05. Defendant appealed to the supreme court.

Defendant contends that plaintiff is not entitled to compensation, because he failed to give notice of the injury within the time limited by the statute, which provides:

"No proceedings for compensation for an injury under this article shall be maintained, unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same." Comp. St. 1929, sec. 48-133.

The evidence on the issue of notice is conflicting. Plaintiff testified that he notified defendant's foreman of the accident the night after it occurred or the next morning, giving place and details and saying that he bumped his knee in the elevator, but not very hard. The foreman denied as a witness that notice was given, but he knew that plaintiff's right leg was shorter than the other one, having been broken years before; admitted his limping was worse immediately after April 10, 1928. Witness said he was then defendant's foreman at Seneca and had been for many years; that it was his duty to report to his employer injuries to employees. When all the direct testimony is considered in connection with the surrounding circumstances, the preponderance of the evidence as to notice of the accident is found to be in favor of plaintiff. Timely notice to or knowledge of a foreman, whose duty requires him to report accidents to his employer, is sufficient. *Johansen v. Union Stock Yards Co.*, 99 Neb. 328; *Simon v. Cathroe Co.*, 101 Neb. 211.

The judgment below is challenged as void on the ground that the district court did not acquire jurisdiction on appeal from the compensation commissioner, because the petition on appeal was not verified by plaintiff in the

manner provided by law. The defect upon which this challenge is based is failure of plaintiff to verify his petition by oath. By supplemental transcript the petition shows it was verified by the attorney for plaintiff during the latter's absence from the county. This method of verification is authorized by statute. Comp. St. 1929, sec. 20-831.

The principal ground upon which defendant relies for a reversal of the judgment allowing compensation is the barring of the proceeding by failure of plaintiff to make a claim for compensation within six months after the occurrence of the injury. The date of the alleged accident was April 10, 1928, and plaintiff did not make his demand for compensation until he filed his petition with the compensation commissioner July 17, 1930—an intervening period of more than two years. In the argument in support of this defense reference is made to testimony of J. L. Pennington, a practicing physician at Thedford, to the effect that he treated plaintiff from May 17, 1929, to September 28, 1929; that in May, 1929, plaintiff said he had injured his knee, which was the cause of his trouble, and asked if that was the start of it; that the physician told him "it could be, as it was." Pennington testified that he did not treat plaintiff for rheumatism; that he considered his trouble arthritis, "due to some source of infection." This is not sufficient proof that plaintiff had knowledge of a compensable injury six months before he filed his claim or that the proceeding was barred by lapse of time. Dr. Clarence Emerson of Lincoln testified in effect that he got the history of the case and made a physical examination of plaintiff in February, 1930; that the use of his right knee and leg was destroyed by traumatic arthritis; that the cause of the disability was at first difficult to determine; that the disabling disease progressed slowly, culminating about the time of plaintiff's examination in February, 1930; that there was some indication of later progress but no material change afterward; that there was no evidence of

arthritis in other joints; that since the knee only was the seat of the disease, the blow there was the cause of the injury. These views were positively expressed and were supported by cogent reasons. There is no convincing evidence to the contrary. Plaintiff testified he was treated by Pennington for rheumatism and contradicted testimony that he was told his trouble was infectious arthritis. The proper deduction from the evidence as a whole is that plaintiff, from the beginning, treated the blow on his knee as a trifle; attributed his trouble, which grew gradually worse, to rheumatism; worked for defendant and drew his wages from the time of the accident until September 11, 1928, when he was totally disabled; went to a sanitarium at Edgemont September 12, 1928, and was there treated for rheumatism without improvement; visited Grand Island clinic and was there treated for the same trouble; at different times and places took baths and was exposed to Violet rays; was examined for tuberculosis of the bone; had eight teeth extracted; had tonsils removed—all for infections and all in vain as remedies for his injured knee. From his experiences and the professional advice of different physicians, he had a right to assume, as he did for months, that his slight blow on the round of the ladder was not the cause of his disability. If it was caused solely by an infection, independently of an accident, he was not entitled to compensation and, so believing, he could not previously have made conscientious claim under the compensation law. Pennington, in testifying, said he did not believe he understood the nature of the injury, though saying he told plaintiff that infectious arthritis was the cause. He did not point out a source of infection and none was shown. The weight of evidence was to the contrary. On this issue the findings are that plaintiff did not know the cause of his disability until he was examined by Emerson in February, 1930, and then learned for the first time of its origin; that the injury was slight at first, was latent, and that the diseased condition did not culminate, within the

meaning of the law, until plaintiff acquired knowledge of the fact in February, 1930; that plaintiff presented his claim for allowance of compensation before six months therefrom. Within the meaning of the law barring claims for compensation of a workman, if not made within six months, a latent accidental injury, seeming at first to be trifling and noncompensatory, but subsequently resulting in a progressive disease and a disability, occurs when its true nature is discovered by him or when the diseased condition culminates in disability. *Johansen v. Union Stock Yards Co.*, 99 Neb. 328; *Simon v. Cathroe Co.*, 101 Neb. 211; *Selders v. Cornhusker Oil Co.*, 111 Neb. 300; *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609; *City of Hastings v. Saunders*, 114 Neb. 475; *Travelers Ins. Co. v. Ohler*, 119 Neb. 121; *Astuto v. V. Ray Gould Co.*, 123 Neb. 138; *Collins v. Casualty Reciprocal Exchange*, 123 Neb. 227; *Flesch v. Phillips Petroleum Co., ante*, p. 1; *Montgomery v. Milldale Farm & Live Stock Improvement Co., ante*, p. 347.

Since the recovery is not reduced on appeal, an attorney fee of $150 for services in the supreme court is allowed in favor of plaintiff and taxed to defendant as costs pursuant to statute.

AFFIRMED.

DON L. SMITH V. STATE OF NEBRASKA.

FILED MARCH 23, 1933. No. 28658.

1. **Statutes:** CONSTRUCTION. In construing a statute, the court should ascertain therefrom the legislative intent, and, if lawful, give effect thereto.
2. **Automobiles:** OPERATING WHILE INTOXICATED. A statute providing for imprisonment of a person convicted of operating a motor vehicle on a public highway while intoxicated, and for depriving such person of the privilege of operating a motor vehicle within the state for a period of one year after conviction, is a valid exercise of the police power, and the court, in which

such conviction is had, is vested with jurisdiction to enforce the statutory provision.

3. **Statutes**: VALIDITY: MOTOR VEHICLES: OPERATION. An act is not broader than its title where it provides for the punishment of any persons found guilty of operating motor vehicles "while under the influence of intoxicating liquor," and where the title states that it is an act to provide penalties for the operation of motor vehicles by persons "while in a state of intoxication," such terms, as used by the legislature, being synonymous.
4. **Automobiles**: DRIVER'S LICENSE: REVOCATION. A license to operate a motor vehicle is issued, not as a contract, but as a mere privilege, with the understanding that such license may be revoked for due cause by the proper authorities.
5. **Evidence** examined and *held* that the verdict is amply sustained thereby.

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

Stevens & Stevens, for plaintiff in error.

C. A. Sorensen, Attorney General, and *George W. Ayres, contra.*

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

DEAN, J.

Don L. Smith was complained against in Furnas county and there charged with the wilful and unlawful operation of a motor vehicle on a public highway within that county while he was intoxicated. The jury found the defendant guilty as charged, and the court thereupon sentenced him to imprisonment in the county jail for 30 days, there to remain until the costs of prosecution are paid, and it was also ordered that the defendant shall not drive a motor vehicle within the state for a period of one year from the date of his final discharge from the county jail. The defendant prosecutes error.

The complaint herein was filed under section 39-1106,

Comp. St. 1929, as amended by chapter 103, Laws 1931, which provides that any person who is found guilty of operating a motor vehicle while under the influence of intoxicating liquor shall, for the first offense, be imprisoned in the county jail for 30 days, and, for the second offense, he shall be imprisoned 90 days or not to exceed six months in the county jail, and, for the third and each subsequent offense, he shall be deemed guilty of a felony and shall be imprisoned in the penitentiary for not less than one year nor more than three years, and "shall also be adjudged and ordered by the court not to drive a motor vehicle of any description within this state for a period of one year from the date of his final discharge from the county jail or the penitentiary as the case may be, under the judgment of conviction."

It is contended that the words relating to the discharge of a defendant "from the county jail" were inadvertently used, and that it was the intention of the legislature that the provision prohibiting one so convicted from driving a car after conviction shall refer to one convicted of a third offense only. While the above section 39-1106 may not be a model of the most complete and accurate language, in construing a statute the court should ascertain therefrom the legislative intent, and, if lawful, give effect thereto. It fairly appears that the legislature, recognizing the need for the utmost restraint against the operation of a motor vehicle by an intoxicated person, and, in the exercise of police power for the general welfare, intended that the above section should apply to all offenders, and not to one found guilty of a third offense only.

It is also urged that the county court exceeded its jurisdiction herein. A statute providing for imprisonment of a person convicted of operating a motor vehicle on a public highway while intoxicated, and for depriving such person of the privilege of operating a motor vehicle within the state for a period of one year after conviction, is a valid exercise of the police power, and the court, in which such conviction is had, is vested with jurisdiction

to enforce the statutory provision. In a similar case, it has been held: "Where a municipal court had jurisdiction of offense of transporting intoxicating liquor, fact that automobile forfeited on conviction was worth more than $500 was immaterial, since forfeiture of property follows as an incident to conviction, as proper exercise of police power." *State v. One Studebaker Automobile*, 50 S. Dak. 408.

The title to section 39-1106, Comp. St. 1929, as amended, states that the act is one to provide penalties for the operation of motor vehicles by persons "while in a state of intoxication," while the body of the act itself provides punishment for any persons found guilty of operating a motor vehicle "while under the influence of intoxicating liquor." The terms "while in a state of intoxication" and "while under the influence of intoxicating liquor," as used by the legislature, are synonymous, and the act does not appear to us to be broader than its title, as contended by the defendant.

The defendant further contends that the license to drive a motor vehicle constitutes a contract between the state and the citizen which cannot be revoked and the obligation impaired by a penal statute. But with this conclusion we do not agree. Provision is made by statute for the revocation of any driver's license for a period of one year upon his conviction of driving while intoxicated. Comp. St. 1929, sec. 60-412. The license to operate a motor vehicle was issued to the defendant, not as a contract, but as a mere privilege, and with the understanding that such license may be revoked for due cause by the proper authorities. 37 C. J. 246.

Upon an examination of the record, we conclude that there is sufficient competent evidence to warrant a finding that the defendant was in an intoxicated condition on the date named in the complaint, and that, as a consequence, he reeled and staggered when he walked, and that he drove his car in a reckless manner, and otherwise clearly indicated his condition. We have also examined several

of the instructions of which complaint is made, but we find them free from prejudicial error.

The judgment is

AFFIRMED.

IN RE ESTATE OF CASH D. FULLER.
CONTINENTAL NATIONAL BANK OF LINCOLN, APPELLEE, V. HARRIS L. FULLER, EXECUTOR, APPELLANT.

FILED MARCH 23, 1933. No. 28487.

1. Executors and Administrators: REMOVAL. A creditor of a decedent's estate, whose claim has not been adjudicated and allowed, is without standing to ask removal of the executor solely on the ground of his failure to pay the claim within the time previously limited by the order of the county court.
2. ———: PAYMENT OF CLAIMS. An executor cannot be required to pay a claim against his decedent's estate prior to the time it has been allowed and adjudicated by the county court.
3. ———: REMOVAL. An executor is not removable on the ground of failure to pay claims within the time limited by the court, when there are no funds in his possession with which to pay the same, unless it appears that, but for his neglect, funds would have been in his hands, available for the purpose.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Reversed, with directions.*

L. B. Fuller and *Perry, Van Pelt & Marti,* for appellant.

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

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

GOOD, J.

Defendant has appealed from a judgment removing him from the position of executor of the will of his father, Cash D. Fuller. The only ground in the application for removal, and on which the county court acted, was failure of defendant to pay the claims against the decedent's

estate within the time previously limited by the order of the county court.

It appears that letters testamentary were issued to defendant October 30, 1929, and the same day the county court entered an order limiting the time for filing claims to March 3, 1930, and for the payment of claims to November 1, 1930. April 25, 1931, plaintiff, a creditor of the estate, filed petition for the removal of defendant on the ground above stated. Citation was issued to defendant, to which he made a return, and a hearing was had May 9, 1931. The order of removal was not entered until November 3, 1931, and the same day the county court appointed one Bodie as administrator *de bonis non* with the will annexed. Defendant appealed to the district court, where the judgment of the county court was affirmed, and from that judgment appeal was perfected to this court.

The judgments of the county court and of the district court, alike, are erroneous and cannot be sustained for two good and sufficient reasons: First, defendant could not have paid the claim of plaintiff at the time its petition was filed, or at the time of the hearing thereon, because such claim had not been adjudicated and allowed by the county court; secondly, there were no funds in the hands of the executor with which to pay the claim, had it been allowed.

It appears that the only assets of the decedent's estate which might have been available for the payment of claims of creditors was a 1600-acre ranch located in Chase county, Nebraska, and which was incumbered with a mortgage and taxes to an amount in excess of $8,000. This ranch at one time, a few years previously, had a value of more than $40,000. At the time the inventory of the estate was filed, it was listed as having a value of a little more than $17,000, from which would have to be deducted the incumbrance thereon. It also appears that the claims filed against decedent's estate amount to approximately $9,500. The record shows more than ordinary diligence on

the part of defendant to find a purchaser for the ranch at a price that would approximately take care of the claims filed against the estate, but he was unsuccessful. At the time the petition for his removal was filed he had pending in the district court an application for license to sell the Chase county ranch, and such license was granted on the 29th of April, 1931. Pursuant to this license, the land was advertised and offered for sale. The only bid that could be obtained was for $10,000, which, had it been accepted, would have left little or nothing for the payment of creditors. In the exercise of his best judgment, defendant adjourned the sale, as he had a right to do under the statute, and later readvertised the land for sale, but prior to the time fixed for such sale he was removed by the order of the county court.

It is significant that practically all creditors of the estate, save the plaintiff, and representing more than 75 per cent. of the amount of claims, are objecting to the removal of the executor and objecting to the sale of the land at that time because, under present depressed financial conditions, its sale would not realize enough to pay any substantial portion of the claims against the estate.

The petition did not state a cause of action, in that it did not show that plaintiff had an adjudicated claim that could have been paid by the defendant; and, secondly, the petition failed to state that defendant had funds in his hands, available for the payment of claims, or any facts showing that he had been remiss in his duty to reduce the assets of the estate to cash.

Section 30-309, Comp. St. 1929, provides the grounds for the removal of an executor, and one of the grounds therein provided is that, if the executor shall neglect "to perform any decree of the court," the county court may remove such executor. In order that such neglect shall be ground for removal, it must appear that the executor has wilfully and without just cause neglected or refused to comply with the order and decree of the court. Moreover, in the instant case, there was no order that he pay

out of any funds in his hands the particular claim. The order entered was only a time limit generally for payment of claims. Certainly, the executor would not be remiss in his duties if the claims had not been allowed by the court, and, secondly, if, without any fault of his, no funds were in his hands, available for the payment of claims, he could not comply with the direction. The legal maxim, *lex non cogit ad impossibilia,* meaning, "The law does not compel a man to do that which he cannot possibly perform," is quite applicable to the situation here disclosed.

It follows that the judgment removing defendant from his position as executor is erroneous; and likewise the order, appointing Bodie as administrator *de bonis non* with the will annexed, is erroneous.

The judgment of the district court is reversed, and the cause remanded to that court, with directions to enter judgment in accordance with this opinion, and to certify such judgment to the county court for its action, in compliance with such judgment.

REVERSED.

ELLEN O'CONNOR, REVIVED IN THE NAME OF MARY O'CONNOR LYNCH ET AL., ADMINISTRATORS, APPELLEES, V. LORA POWER ET AL., APPELLEES: UNITED STATES NATIONAL BANK OF OMAHA, APPELLANT.

FILED MARCH 23, 1933. No. 28298.

Mortgages: PRIORITIES. While the mortgagee may ordinarily assert the invalidity of a prior mortgage, when that mortgage is a valid subsisting lien between the parties, and there are no intervening equities, he is estopped to question its priority when his mortgage contains an express recital that it is given subject to the prior mortgage.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Former judgment of reversal vacated, and judgment of district court affirmed.*

Morsman & Maxwell, for appellant.

W. H. Herdman and *Wear, Moriarty, Garrotto & Boland, contra.*

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

DAY, J.

This is a foreclosure suit in which the only question involved is the priority between two mortgages. In a former opinion, *ante,* p. 113, the nature of the case was set out in full. We shall refer hereafter to the owner of the fee as Power, the holder of the first mortgage as O'Connor, and the second mortgage as the bank. Formerly, the court held that, since the first mortgage had not been refiled, as provided by section 20-202, Comp. St. 1929, the bank, being a subsequent incumbrancer for value, acquired a prior lien to the first mortgage. Power executed the O'Connor mortgage April 1, 1914. The interest on this mortgage was paid up to April 1, 1923. This suit was filed January 29, 1927. Therefore, as between the parties Power and O'Connor, the mortgage, and the note secured thereby, is valid and enforceable.

Power executed the mortgage to the bank on the 30th of October, 1926, which mortgage was second in point of time to the O'Connor mortgage, and contained the provision in the granting clause that it was "subject to the balance due on the mortgage for $3,000 to John C. Fetzer." O'Connor stands in the shoes of Fetzer by virtue of an assignment. Is the bank estopped by the foregoing recital to question the priority of O'Connor's mortgage?

In *McNaughton v. Burke,* 63 Neb. 704, we held: "A conveyance of real estate subject to a mortgage is, in substance, a conveyance of so much of the property only as is not required for the satisfaction of the mortgage debt." The court cited *Hartley v. Harrison,* 24 N. Y. 170, and quoted from it as follows: "A conveyance of land

subject to a mortgage * * * is neither more nor less than a simple deed of whatever interest or estate the grantor has after the debt is satisfied out of it." And our court continues: "The land having come to the company burdened with the mortgage, it cannot now repudiate its contract to hold subject to the mortgage; it cannot claim under the deed and at the same time deny the validity of the clause limiting the interest conveyed; in short, it cannot, consistently with equity and good conscience, assert that it is the owner of an interest which it neither bought nor paid for." While the identical equities are not found in the instant case, the situation is somewhat analagous. The bank loaned money upon the equity of Power, at which time O'Connor had not refiled his mortgage, which was a valid subsisting lien as between the parties, valid as to everyone except as to "subsequent purchasers and incumbrancers for value." Recognizing the obligation of an honest debt, Power executed a second mortgage to the bank, which was executed subject to the O'Connor mortgage.

The appellant relies upon *Wallber v. Caldwell*, 79 Neb. 418, *Nelson v. Becker*, 32 Neb. 99, *Wyman v. Searle*, 88 Neb. 26, and *Fort Scott v. Hickman*, 112 U. S. 150, as authority for the proposition that a recital in a mortgage that it is subject to any balance due on the prior mortgage did not operate to stay the running of the statute of limitations as against the lien of its mortgage nor estop it from contesting O'Connor's lien. The cases cited are authority for the proposition that such a recital in a deed is not an acknowledgment of the indebtedness sufficient to toll the statute of limitations, as such acknowledgment must be made to the creditor or to some one authorized to represent him. The basis of the decision in these cases was that a mere recital was not such an acknowledgment as to be effective, since it was made to a stranger, rather than the creditor or some one acting for him. In these cases, the mortgagee was permitted to assert the invalidity of a prior mortgage.

The prior mortgage was not a valid subsisting lien against the property and the recital in the deed was not sufficient to restore its validity as between the parties. In the instant case, the mortgage debt of O'Connor was a valid subsisting lien upon the property and was a valid obligation of the mortgagor. In what better way could an honest debtor deal fairly with his creditor? Power attempted to do just this, and in the execution of the mortgage to the bank, which obligation he recognized at that time and had recognized by payment of interest within such time as to toll the statute of limitations, and, with a desire not to impair O'Connor's security, executed the mortgage to the bank with the recital in the granting clause that it was subject to the balance due on the first mortgage. *Fort Scott v. Hickman,* 112 U. S. 150, was a case of a Kansas mortgage and determined according to Kansas law, and yet Kansas recognizes the distinction, for in *Moffatt v. Fouts,* 99 Kan. 118, it was held: "Ordinarily a mortgagee may assert the invalidity of a prior mortgage, but he is estopped to do so where his mortgage contains an express recital that it was taken subject to the prior mortgage." In *Howard v. Robbins,* 170 N. Y. 498, it was held that, where a mortgage recites that it is subject to a prior mortgage made by the same mortgagor, the mortgagee does not acquire as security for its loan anything more than the equity of redemption after the discharge of the first mortgage. Again, in *National Hardware Co. v. Sherwood,* 165 Cal. 1: "Where a person accepts a mortgage which recites that it is subject to another mortgage on the same property, he is estopped thereby and is not allowed to defeat or impair the other mortgage by denying its priority or validity at the time he took it to the amount of it as recited in his own mortgage." That is undoubtedly the correct rule in this state, unless the rule is modified by section 20-202, Comp. St. 1929. We are of the opinion that the statute has more to do with record notice of mortgages than to operate as a statute of limitations. The language of the statute is

that, if the mortgage is not refiled within ten years from the date the cause of action accrues, it shall cease to be notice of the mortgage as unpaid, and the lien thereof shall cease absolutely as to subsequent purchasers and incumbrancers for value. In the instant case, the mortgagor, Power, had kept the mortgage debt to O'Connor alive by the payment of the interest. He recognized the obligation as binding upon him, and he unquestionably intended to keep the mortgage lien of O'Connor alive, because, when he executed the mortgage to the bank, he made it expressly subject to the O'Connor mortgage and the bank accepted it upon that basis. There is not any question of the notice of the filed mortgage, because the bank had the most effective notice that could have been given, which was a reservation by the mortgagor of the interest in the property intended to be subject to the lien. While the mortgagee may ordinarily assert the invalidity of a prior mortgage, when that mortgage is a valid subsisting lien between the parties, and there are no intervening equities, he is estopped to question its priority when his mortgage contains an express recital that it is given subject to the prior mortgage. For the reasons stated herein, the judgment of the court heretofore rendered is vacated, and the judgment of the district court is

AFFIRMED.

FIRST NATIONAL BANK OF DECATUR, APPELLANT, V. JAMES J. YOUNG ET AL., APPELLEES.

FILED MARCH 28, 1933. No. 28434.

1. **Chattel Mortgages: UNPLANTED CROPS: EQUITY.** As between the parties, a definite and clearly established agreement, based upon a good consideration, to execute, after they are growing, a mortgage upon crops not yet planted, may be enforced in equity if the situation of the parties and property is such that justice and equity call for such a remedy.

2. ———: FILING: UNPLANTED CROPS: NOTICE. "The filing of a chattel mortgage upon specifically described property will not operate as constructive notice of an agreement therein contained to give a chattel mortgage upon unplanted crops." *American State Bank v. Keller*, 112 Neb. 761.
3. ———: PRIORITY. A mortgagee who has notice, either actual or constructive, of the rights of another to a prior chattel mortgage is not a mortgagee in good faith and his lien will be subordinated to the rights of that other. *Weigand v. Hyde*, 109 Neb. 678; *Kelly v. Kannarr*, 118 Neb. 472.
4. ———: MORTGAGEE IN GOOD FAITH. A mortgagee in good faith is one who takes a chattel mortgage to secure a debt actually and justly owing to him without actual or constructive notice of prior equities against the mortgaged property. *State Bank of Gering v. Grover*, 110 Neb. 421.
5. ———: VALIDITY. "An oral chattel mortgage is good as between the parties thereto; it is invalid only as to creditors and subsequent purchasers in good faith. Creditor in this connection means judgment, execution or attachment creditor; a subsequent mortgagee with notice is not so regarded." *Reiss v. Argubright*, 3 Neb. (Unof.) 756.

APPEAL from the district court for Thurston county: MARK J. RYAN, JUDGE. *Affirmed.*

Howell, Tunison & Joyner and *A. P. Coleman*, for appellant.

A. D. Raun and *Stason & Knoepfler, contra.*

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

GOSS, C. J.

The plaintiff, hereinafter called First National, on July 10, 1931, sued defendant Young to establish and foreclose an equitable lien upon his crops. The suit was upon a written agreement, made on March 26, 1931, by Young, before the crops were planted, that he would give a chattel mortgage on his 1931 crops, as soon as planted and growing, to secure his note of the same date. Young had refused a demand for the mortgage. The summons was issued the day suit was filed and Young was served the next day. The record does not show that Young

ever answered or otherwise pleaded either to the petition or to the amended petition. He took no part in the trial except as a witness.

On September 26, 1931, First National filed an amended petition, making the State Bank of Decatur, hereinafter called State Bank, an additional party to the suit, and alleging that State Bank claims an interest in the same chattels by reason of a mortgage thereon, but First National alleged priority of its equitable lien.

On October 14, 1931, State Bank answered, setting up its notes executed by Young June 23, 1931, and its chattel mortgage of the same date, covering the crops and certain machinery and live stock, and claiming a prior lien. Issues between the banks were finally joined.

Trial was to the court at the February, 1932, term. The court duly found and decreed that Young was indebted to First National on his note and gave judgment for the amount due; and that Young had agreed but failed to give First National a chattel mortgage and awarded it a mortgage lien upon the crops subject to the first mortgage lien to State Bank. The court found and decreed that the State Bank chattel mortgage, executed June 23, 1931, was filed of record July 13, 1931, and was a first lien for the amount found due. First National appealed.

The evidence on the trial developed that Young's written agreement to give First National a chattel mortgage covering the 1931 crops to be planted was in the form of a recital in his March 26, 1931, chattel mortgage in favor of plaintiff and covering other chattels. That mortgage was recorded April 1, 1931. It is not involved here except as it furnishes proof that Young agreed in that writing to give the mortgage alleged in both the petition and amended petition.

As between the parties, a definite and clearly established agreement, based upon a good consideration, to execute, after they are growing, a mortgage upon crops not yet planted, may be enforced in equity if the situa-

tion of the parties and property is such that justice and equity call for such a remedy. *Sporer v. McDermott,* 69 Neb. 533; *Ryan v. Donley,* 69 Neb. 623; *Rogers v. Trumble,* 86 Neb. 316; *Skala v. Michael,* 109 Neb. 305. "The filing of a chattel mortgage upon specifically described property will not operate as constructive notice of an agreement therein contained to give a chattel mortgage upon unplanted crops." *American State Bank v. Keller,* 112 Neb. 761. A mortgagee who has notice, either actual or constructive, of the rights of another to a prior chattel mortgage is not a mortgagee in good faith and his lien will be subordinated to the rights of that other. *Weigand v. Hyde,* 109 Neb. 678; *Kelly v. Kannarr,* 118 Neb. 472. A mortgagee in good faith is one who takes a chattel mortgage to secure a debt actually and justly owing to him without actual or constructive notice of prior equities against the mortgaged property. *State Bank of Gering v. Grover,* 110 Neb. 421; *State Bank of Lushton v. Kelley Co.,* 49 Neb. 242. Under the evidence, as the district court found it and as we find it on the trial *de novo,* the following conclusions must be drawn: (1) First National was entitled in equity to judgment against Young on his written agreement to give it a chattel mortgage; and (2) State Bank was not charged with constructive notice of that written agreement by reason of its presence in Young's recorded chattel mortgage to First National; (3) State Bank had no actual or constructive notice, prior to this suit, that First National was entitled to such chattel mortgage from Young.

The chief question of fact to be decided is whether First National then knew that Young had already given such a chattel mortgage. While the decree did not expressly find that First National knew that Young had given a chattel mortgage to State Bank before Young was served with summons in this suit, that is the effect of the decree. First National says in its brief: "Only one point can be said to be in dispute, and that is, whether Mr. Way knew of the State Bank mortgage when

this suit was commenced." D. Roy Way was president of First National and handled its transactions with Young.

Mr. Way testified that he and Mr. Larson, cashier of First National, went out to see Young the afternoon of the day before the summons was served. He was cutting grain. They asked him to give the promised chattel mortgage on the crops. Mr. Larson testified that he went out with Mr. Way the evening before the summons was served. Whether the visit was before the petition was filed or before summons was issued is not clearly shown, but it was the day before the summons was served on Young. Young said he would not give the mortgage. The foregoing was in chief. For defendant, Mr. Young testified as to this matter. He said they came on July 10. Mr. Larson remained in the car, about 40 or 50 yards from the barn. Mr. Way came to Young and asked him if he was going to give a mortgage on the crops. He answered: "Roy, I have got an advance in another place, where I can get something on the crop. I gave a mortgage to Bert Rossiter on my crops." He testified he was speaking of Emmett Rossiter, the president of the State Bank. The bill of exceptions recites there was no rebuttal evidence. In this state of the evidence on this pivotal point, the trial judge who saw and heard the witnesses accepted the testimony in behalf of State Bank. If Young told the truth, First National had actual notice of State Bank's mortgage the day before summons was served and probably before the petition was filed. First National proved it was filed at 5:45 p. m., July 10, 1931.

Appellant urged that the commencement of the action at 5:45 p. m., July 10, 1931, followed by service of summons on defendant Young the next day, constituted *lis pendens* and fixed the lien of First National on the crops as superior to State Bank lien under its mortgage of June 23, 1931, but not filed until July 13. It may be noted that the record also shows a written notice of *lis pendens* was filed in the office of county clerk July 11, 1931, at 8 a. m. Appellant also claims that the unfiled chattel

mortgage of State Bank is absolutely void under section 36-301, Comp. St. 1929, on the ground that First National was "a lien-holder creditor and a subsequent mortgagee." The language of that section does not make an unfiled chattel mortgage void as against all subsequent purchasers and mortgagees. In that respect it says, "as against subsequent purchasers and mortgagees in good faith." First National was not a "lien-holder creditor" until it impounded this property by its suit. As of the moment the suit was effective the rights of the respective parties were fixed and subject to be adjudicated. Then and to that extent First National became a lien holder, as it terms it.

Section 20-531, Comp. St. 1929, begins as follows: "When the summons has been served or publication made, the action is pending so as to charge third persons with notice of pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title." The contest here is over priority between plaintiff bank, which was entitled (as events showed) to a chattel mortgage from defendant Young, and defendant bank, which already had one from the same defendant covering the same property. The purpose of the rule of *lis pendens* was to preserve the status of the rights over the specific property affected, to hold it within the jurisdiction of the court for the purpose of granting the relief sought, and to prevent third persons, during the pendency of the litigation, from acquiring any interest in the property which would preclude the court from granting the relief sought. *Merrill v. Wright,* 65 Neb. 794.

Such was the effect here. The pendency of the suit against Young impounded the crops until the court adjudged the rights of the parties interested. While the notice precluded others than the parties to the suit from thereafter acquiring interests in the crops *pendente lite,* it did not affect existing rights, nor prevent the court from adjudicating the rights of State Bank when it later

became a party and pleaded and proved them. The rights of State Bank were not, in the word of the statute, "acquired" while the action was pending. The rights of State Bank, under its chattel mortgage, were acquired June 23, 1931. As against Young, the mortgage was valid. As against First National, considered either as a creditor or as a mortgagee, was it valid if First National had actual notice thereof on July 10, 1931, as Young testified it had and as the district court held it had?

Section 36-301 makes an unrecorded chattel mortgage absolutely void as against "the creditor of the mortgagor, and as against subsequent purchasers and mortgagees in good faith." But that section has been interpreted in this jurisdiction, as in most others, as not rendering an unrecorded chattel mortgage invalid as against a subsequent mortgagee who takes with notice. A "subsequent purchaser in good faith" is one who acquires title from a mortgagor "after the execution of the mortgage and without notice thereof." *Farmers & Merchants Bank of York v. Anthony,* 39 Neb. 343. "A chattel mortgage is, in most jurisdictions, valid as against a subsequent purchaser with notice thereof, although it has not been filed or recorded." 11 C. J. 520, citing *Wagner v. Steffin,* 38 Neb. 392; *Railsback v. Patton,* 34 Neb. 490.

"A subsequent mortgagee is ordinarily regarded as standing on the same footing as a subsequent purchaser." 11 C. J. 520, citing *Reiss v. Argubright,* 3 Neb. (Unof.) 756. In the case cited, Pound, C., said: "An oral chattel mortgage is good as between the parties thereto and others having notice thereof; it is invalid only as to creditors and subsequent purchasers in good faith. *Conchman v. Wright,* 8 Neb. 1, 4; *Sparks v. Wilson,* 22 Neb. 112, 114. Creditor in this connection means judgment, execution or attachment creditor; a subsequent mortgagee with notice is not so regarded. *Earle v. Burch,* 21 Neb. 702; *Farmers & Merchants Bank of York v. Anthony,* 39 Neb. 343, 347."

So we are led to conclude that, if it or its officers had actual notice on July 10, 1931, of the chattel mortgage of the State Bank, First National cannot have priority. The evidence is not as satisfactory on this point of notice as we might wish. The trial judge saw and observed the witnesses. He accepted as true the unequivocal testimony of Young that he told Mr. Way, president of First National, on July 10, that he had already given the chattel mortgage to State Bank. Over against this is little but the testimony of Larson to the effect that Young had promised on two or more occasions to execute the chattel mortgage but had failed to do so, and on July 10 declined to execute that promised mortgage. In the circumstances, we find that First National had actual notice from Young, before this suit was effectually begun, that he had given the State Bank the chattel mortgage upon his crops. That being found, the priorities were rightly determined by the district court.

The judgment is

AFFIRMED.

ABRAHAM L. TIDD, APPELLANT, V. JOHN E. KIRKHAM, TREASURER OF CITY OF PLATTSMOUTH, ET AL., APPELLEES.

FILED MARCH 28, 1933. No. 28467.

Municipal Corporations: STREET IMPROVEMENTS: INJUNCTION. A taxpayer of a city of the second class, who stands by with knowledge of the progress of a street improvement and permits contractors to complete the work, will not be allowed to enjoin the payment of the warrants issued in payment for the improvement.

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

Abraham L. Tidd, pro se.

W. A. Robertson and *J. A. Capwell, contra.*

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

GOSS, C. J.

This is a suit to enjoin the treasurer of the city of Plattsmouth, a city of the second class, from paying certain city warrants and to have them declared void. From a decree against him and dismissing his petition the plaintiff appealed.

Abraham L. Tidd, a resident taxpayer, brought the suit for himself and others similarly situated. He testified that he had been a resident of the city of Plattsmouth for more than 30 years, had taught school there, was city attorney for a number of years and on occasion had been employed as a special attorney by the city. He has been interested in public matters. Through his efforts the city obtained the post office and public library buildings. We take notice that he has been a member of the bar of this court for nearly 30 years.

Ten-thousand dollars' worth of the warrants were issued in payment to a contractor for building a viaduct across the railroad tracks; and $8,770.32 worth of the warrants were issued in payment to a contractor for grading and graveling a new highway. All this was claimed by plaintiff to have been done without compliance with the statutes as to annual estimate and appropriation. The purposes of the viaduct and highway were to furnish safe access downtown for residents of a portion of the city and also to provide a proper and convenient road to and from a new bridge across the Missouri river at Plattsmouth.

After hearing all the evidence, the district court found that the plaintiff "was fully informed of the letting of the contracts and bids for the construction of the viaduct and * * * other street improvements, for all of which the warrants involved in this action were issued, and of the performance of the work thereunder as it proceeded; that neither the plaintiff nor those whom he purports to represent objected to the letting of said contracts, the performance of the work thereunder and the issuing of the warrants in payment therefor, and that by reason there-

of the plaintiff is now estopped to deny the validity of said warrants or any of them. The court further finds that there is no suggestion of fraud on the part of the city of Plattsmouth, Nebraska, or any of its officials, in regard to the letting of said contracts, nor the work thereunder, nor the payment therefor by the issuance of said warrants; and finds that it is not competent for plaintiff as a taxpayer to enjoin the payment for any of said improvements, all of which said city retains and enjoys, for failure to include such items of expense in the annual estimate or annual appropriation for the fiscal years 1928, 1929, and 1930."

The court found that these specific warrants constituted a just and lawful debt of the city to the several owners who were defendants in the suit.

The city had legal power to contract and pay for such improvements. The city, its citizens and its guests have continued to use the improvements since their completion by the contractors. The evidence shows that the improvements were worth all they cost. The contractors have been paid by the warrants which were delivered to them and which were in turn purchased as investments by the defendants—the school district, board of education and several private parties. The city has retained all the benefits and is satisfied. Plaintiff stood by without a complaint. In any other matter we believe it would be considered an affront to his own intelligence to say that he did not have full knowledge of the progress of the work.

"Where a city of more than 1,000 and less than 5,000 population, by its proper officers, entered into an agreement with a contractor to pave a street within the city, and the contractor proceeded with the work under his contract and under the direction of the city officers until the completion thereof, a taxpayer of the city, with full knowledge of the progress of the work, will not be heard to enjoin the payment therefor after the completion of the contract." *Hadlock v. Tucker*, 93 Neb. 510. See *Nelson v. City of Florence*, 94 Neb. 847.

Much the same principle was involved in the recent case of *Omaha Road Equipment Co. v. Thurston County*, 122 Neb. 35. The county had power to purchase road machinery but did so by an irregular exercise of that power which made the contract unenforceable. Instead of returning the machinery it retained and used it. In line with the authorities we decided that the county was liable for the reasonable value of the machinery.

We are of the opinion the judgment of the district court was right. It is

AFFIRMED.

MARTHA YOST, APPELLANT, V. GEORGE H. YOST, APPELLEE.

FILED MARCH 28, 1933. No. 28466.

1. **Bills and Notes**: CONSIDERATION. Absence or failure of consideration for a note is a defense to an action thereon by the payee against the maker, and the rule may apply to an action on a note executed by a husband in favor of his wife.
2. ———: HOLDER IN DUE COURSE. In an action by the payee against the maker of a note, plaintiff is not a holder in due course.
3. **Husband and Wife**: MARRIAGE: PUBLIC POLICY. Unless a wife has a valid ground for a divorce or a just cause for living apart from her husband, public policy requires her to continue the marriage relation.
4. ———: CONTRACTS. A wife who leaves her husband for a just cause may exact a pecuniary consideration for resuming the marriage relation with him. *Mack v. Mack*, 87 Neb. 819.
5. ———: ———. A wife's performance of exceptional duties beyond those imposed by the marriage relation may be a sufficient consideration for a pecuniary promise of the husband. *In re Estate of Cormick*, 100 Neb. 669.
6. ———: ———. A wife who leaves her husband without just cause cannot make the resuming of the marriage relation with him a valid consideration for a note payable by him to her.
7. ———. The right of a husband to a continuation of his marriage relation with his wife may be presumed in absence of evidence to the contrary.
8. ———: CONTRACTS. If a wife, without just cause, leaves her husband, refuses to return without a pecuniary consideration and thus violates her marriage vows, an antenuptial agreement

by him to leave her $2,000 at his death may not be a valid consideration for a note payable from him to her.

9. New Trial: WITNESSES: PRIVILEGED COMMUNICATIONS. A ruling which permits a husband to be sworn as a witness against his wife in a civil suit and to answer questions limited to preliminary nonprejudicial facts shown by other witnesses without dispute is not necessarily a ground for a new trial.

10. ———: ARGUMENT OF COUNSEL. A statement by counsel to the jury, though not properly reflecting the evidence, does not necessarily require a new trial, where the jury are directed from the bench at the time to follow the evidence and disregard any remarks to the contrary.

APPEAL from the district court for Clay county: J. W. JAMES, JUDGE. *Affirmed.*

Kirkpatrick, Good & Dougherty, for appellant.

C. L. Stewart and *John Paul, contra.*

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

ROSE, J.

This is an action on a 1,400-dollar promissory note dated October 9, 1928, and payable two years thence. Plaintiff is the wife of defendant. They had entered into an antenuptial contract September 2, 1927, in which each agreed to relinquish all interest in the property of the other and defendant agreed to provide a home for plaintiff and her two children and at his death to leave her $2,000 and his household property. They mutually promised to live together as husband and wife, and aid each other and strive to make life comfortable and happy for both. Plaintiff was a widow living in York with her two children. Defendant was a widower with nine children and with five of them resided on a farm in Clay county. As husband and wife the contracting parties began life together at the former's home. They had lived together about 13 months when the wife left, went to York, and sent her husband the note in suit unexecuted. He signed it and sent it to her. The facts outlined are shown with-

out dispute. In answer to the petition of the wife for judgment on the note, defendant, the husband, invoked defenses authorized by the statute, which provides:

"Absence or failure of consideration is matter of defense as against any person not a holder in due course and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise." Comp. St. 1929, sec. 62-205.

Defendant alleged further that plaintiff threatened to leave him permanently without cause, that he gave her the note under her express promise to return and live with him and that she refused to do so after procuring the note. The facts pleaded in defense were put in issue by a reply. Upon a trial of the issues the jury rendered a verdict in favor of defendant. From a judgment of dismissal plaintiff appealed.

The sufficiency of the evidence to sustain the verdict is challenged in many forms. The action is between the original parties to the note. Plaintiff, therefore, is not a holder in due course.

On the issues as to consideration, the evidence is conflicting and it has all been considered from every standpoint. The theory of plaintiff seems to be that the parties had separated and that the note was given in part payment of the settlement of their property rights. While the evidence adduced on behalf of plaintiff tends to support her view of the controversy, it is not conclusive. The jury were justified in believing testimony sufficient to sustain a finding to the effect that the consideration for the note was the agreement by plaintiff, who had threatened to abandon defendant permanently, to return to her husband and to continue in the performance of her marriage contract. There is evidence that they occupied the same bed the night before the wife left and that she had previously made her plans to leave. The record fails to show she had any just cause for a divorce or for a separation from him. In absence of a just cause for leaving him, it was her duty to perform her marriage

contract independently of the antenuptial agreement. Unless there was a valid reason for a separation, public policy required a continuance of the marriage relation. It has been held that a wife who leaves her husband for a just cause may exact compensation or a valid consideration for resuming the marriage relation. *Mack v. Mack,* 87 Neb. 819. There is also a decision to the effect that a wife's performance of exceptional duties beyond those imposed by the marriage relation may be a sufficient consideration for a pecuniary promise of the husband. *In re Estate of Cormick,* 100 Neb. 669. The law is otherwise, however, if a wife abandons her husband without just cause and refuses to perform her marriage vows. In that situation, it is her duty to return voluntarily and her husband's promissory note to induce her to do so is without consideration. *Frame v. Frame,* 120 Tex. 61, 73 A. L. R. 1512, and cases cited in note. The same principle has been adopted in Nebraska. *Esterly Harvesting Machine Co. v. Pringle,* 41 Neb. 265.

The antenuptial contract is likewise futile as a consideration for a settlement of property rights in view of the verdict for defendant. Title to the money and property which defendant agreed to leave plaintiff was not to pass to her until his death. He is still living and his promise to leave $2,000 and his household property to plaintiff never matured. Defendant's right to a continuation of the marriage relation is presumed in absence of evidence to the contrary. By leaving defendant under the circumstances and refusing to return, plaintiff violated both the antenuptial agreement and her marriage vows. The evidence, therefore, is sufficient to prove both want of consideration and failure of consideration for the note and is sufficient to support the verdict.

Instructions are criticized on the ground that they submitted issues on which there was no evidence, but a careful examination of the entire record fails to show prejudice in this respect. Error in other instructions has not been found.

An assignment of error is directed to rulings that permitted the husband to be sworn as a witness and to testify against his wife. This point is without merit for the following reasons: All questions directed to him on the witness-stand were preliminary in character and his answers revealed nothing except harmless facts otherwise shown without dispute. He was not permitted to answer other questions.

An attorney for defendant is accused of prejudicial misconduct because, in addressing the jury, he did not properly reflect the evidence in stating the amount of money defendant had already paid to plaintiff. If the amount was overstated, the error was cured at the time by a peremptory order from the bench, directing the jury to follow the evidence and disregard any remarks of counsel to the contrary. The statement, if erroneous, was not prejudicial in view of the directions to the jury to disregard it.

Upon consideration of each assignment of error in connection with the entire record, a substantial reason for reversing the judgment below has not been found.

AFFIRMED.

T. F. STROUD, APPELLEE, V. G. H. PAYNE ET AL., APPELLANTS.

FILED MARCH 28, 1933. No. 28395.

1. **Bills and Notes: CONSIDERATION.** Discharge from liability on a promissory note is a valid and sufficient consideration for the execution of a new note for like amount.
2. ———: ———. There is a valid consideration for a renewal note if there was such a consideration for the note of which it is a renewal.
3. **Limitation of Actions: PAROL EVIDENCE.** Parol evidence is admissible to prove that makers of a promissory note authorized payments thereon by a corporation, of which they were stockholders and directors.
4. ———: **INTEREST PAYMENTS.** Interest payments on a promissory note, made by a third party pursuant to oral authority given by the makers, are valid, notwithstanding the third party

was not legally bound to make such payments. The statute of frauds has no application to such a transaction.

5. ———: ———: PAROL EVIDENCE. Parol evidence is admissible to prove a contemporaneous oral agreement by the makers of a promissory note that a third party should make interest payments on the note for them.

6. ———: NOTES: VOLUNTARY PAYMENTS. Any voluntary payment made upon a promissory note by the maker, or by any one by him authorized, will be sufficient to arrest the running of the statute of limitations.

7. **Appeal.** Whether a payment made on a promissory note by a third party was authorized by the maker is a question of fact, and the findings of a jury upon such question will not be disturbed unless clearly wrong.

8. ———: ADMISSION OF EVIDENCE: INSTRUCTION. A defendant may not complain of the admission of evidence which would be incompetent as to him if it is competent as to his codefendant. Under such circumstances, he is entitled, upon request, to have the jury instructed that they shall not consider such evidence as against him. He may not complain of the failure of the court to give such an instruction unless he has requested it.

9. **Misconduct of counsel** is not ground for reversal of a judgment unless prejudicial to the complaining party.

10. **Appeal:** ISSUES. An issue, not presented in the trial court, may not be raised for the first time in the supreme court.

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

Patrick & Smith and *Warren Howard,* for appellants.

Shotwell, Monsky, Grodinsky & Vance, contra.

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

GOOD, J.

This is an action on a promissory note, brought by the payee against the five makers thereof. One of the defendants was eliminated because of his discharge in bankruptcy proceedings. Plaintiff recovered judgment against the other four defendants, and they have appealed.

In their answer defendants admitted the execution of the note, and, as defenses, alleged that it was given with-

out consideration, solely for accommodation of plaintiff, and also pleaded the statute of limitations.

The record discloses that plaintiff and defendants were stockholders and directors of the Albert Lea Farms Company (hereinafter referred to as the farms company). The farms company owned, and sought by drainage to reclaim, a large tract of swamp land in Minnesota. The farms company required more funds with which to carry on its operations and borrowed a large sum from an Omaha bank. Later the bank was unwilling to continue the credit or advance further funds to the farms company. Prior to this the farms company caused $150,000 par value of its preferred stock to be issued to defendant Payne as trustee, for which he gave his note to the farms company. This was done apparently for the purpose of showing that this additional amount of preferred stock was outstanding, and Payne was holding the stock for the purpose of sale for the company. Payne sold to others $36,500 of this stock which he held as trustee. Later he transferred the remaining $113,500 of this stock to the plaintiff as trustee, and at that time plaintiff, defendants and another stockholder and director of the farms company, in their individual names, borrowed $113,500 from the Omaha bank, and pledged as collateral security therefor $113,500 of stock held in the name of plaintiff as trustee. The money so obtained went into the treasury of the farms company. When this note matured it was renewed by all the makers save one who had died.

When the renewal note was about to mature, the bank refused to further renew the note, and insisted that it should be paid and taken up. The farms company was in urgent need of the money, and thereupon an arrangement was made whereby plaintiff, in his individual name, borrowed from the bank $113,500, and pledged collateral of his own to secure his note. At the same time, plaintiff contends, before he would enter into this arrangement to borrow the money, he insisted upon indemnity, and to

indemnify him the defendants gave to him their note for $113,500, the note reciting that it was secured by $113,-500 face value of the preferred stock of the farms company. When this note matured, it was renewed, on August 14, 1924, for $113,500, and this note recites on its face: "$113,500 Pref. Stock Albert Lea Farms Co. Deposited as Collateral."

Defendants contend that, when the $113,500 of preferred stock was transferred from Payne to plaintiff as trustee, he purchased it outright, and that the note, given to the bank, for $113,500, which was signed by plaintiff and defendants, was to enable him to procure the money with which to pay for his stock. After plaintiff took the stock as trustee, $15,000 par value thereof was sold, and the proceeds were credited upon the note given by defendants to plaintiff. The indorsements upon the note for this sum were October 3, 1924, $5,000; November 10, 1924, $10,000. It is conceded that the farms company has paid all the interest upon this note and on the note of which it is a renewal. The following interest payments, with their respective dates, have been made upon the note in controversy out of the funds of the farms company, to wit, August 17, 1925, $3,486.30; February 17, 1926, $3,020.64; February 20, 1926, $426.86; August 13, 1926, $3,447.50. The present action was begun within five years from the date of the last indorsement, but more than five years after the due date of the note.

We will first consider the question as to whether the note was without consideration and given for the accommodation of the plaintiff. It may be observed that some of the defendants frankly admit that this note was regarded as an obligation of the farms company. There is evidence tending to prove that, in order to take up and cancel the note on which all the defendants and plaintiff were liable to the bank, and which the bank was pressing for payment, defendants executed to plaintiff their note for $113,500, and plaintiff gave to the bank his note, secured by his individual collateral for a like amount, and

thereby the note on which defendants were liable was taken up and canceled. The evidence warranted the jury in finding that the defendants secured their release from a pressing obligation by the execution of their first note to plaintiff, and that there was a valid consideration therefor. If there was a valid consideration for that note, of course it extended to the renewal of the note.

A more serious question is the plea of the statute of limitations. The question is whether the last payment of interest, to wit, August 13, 1926, is sufficient to toll the running of the statute.

There is evidence from which an inference may be drawn that defendants arranged with the plaintiff for the payments of interest by the farms company, and that they knew such payments were being so made. They were directors of the farms company and, as such, are chargeable with notice of the business transactions of that company. *Merchants Bank v. Rudolf,* 5 Neb. 527.

Defendants further contend that, since the payments of interest were made by the farms company and not out of their individual funds, and since the plaintiff alleged such payments to have been made by the defendants, there was a total failure of proof in that respect, and that the court erred in receiving in evidence the note on which the suit is based. They contend that the interest payments were made by a third party, without their direct authority, and that such payments are insufficient to arrest the running of the statute of limitations. They also contend that, since there is no written agreement by which the farms company was to pay the interest, parol evidence thereof was inadmissible; and further contend that, since the farms company was not bound by any written contract to pay the interest, the oral contract was to answer for the debt of another and was void under the statute of frauds.

It will be observed that this is not a suit against the farms company to collect interest or principal, and the question of the statute of frauds is not involved; nor does

parol evidence that the farms company was to pay the interest contradict or vary the terms of the written instrument. It did not relieve the defendants of the obligation to pay the interest. The situation is not unlike that where one whose interest obligation is due, or to become due, refers his creditor to his banker, who, he says, will advance the interest for him. Of course, the banker, unless some other arrangement is made, is not required to advance the interest, but, if he does so, the advancement is made on behalf of the individual. So, in this instance, if the defendants had arranged with the farms company to pay the interest upon the note in controversy, while the farms company, in the absence of some agreement binding it, would not be liable, still, if the farms company paid it, it was for the benefit of the defendants and at their instance, and such payment inured to their benefit and was, in effect, made by them.

In 4 Jones, Commentaries on Evidence (2d ed.) sec. 1644, it is said: "There are certain matters which, of necessity, rest in parol, and which unquestionably permit of proof by extrinsic evidence. For example, the fact of payment or release of a negotiable instrument may be established by parol. It may also be shown, as between the original parties, that a note has been discharged by the performance of an oral agreement. * * * Nor is it any violation of the 'parol evidence' rule to show by extrinsic evidence an entirely distinct and collateral contract; or to show that the instrument was given in satisfaction of a former note, or as security therefor."

In *Rugland v. Thompson,* 48 Minn. 539, it was held: "The payee and holder of a promissory note having accepted from the maker certain personal property and services, proof is admissible that it was orally agreed, when the note was made, that whatever should be thus supplied to the payee should be applied in payment on the note; such evidence being admissible, not to vary the agreement expressed in the note, but only as bearing upon and characterizing the subsequent delivery and acceptance of the property and services."

We are satisfied that the court did not err in receiving the note in evidence, and that the parol evidence was admissible to show the contemporaneous oral agreement as to the payment of interest by the farms company.

In 37 C. J. 1160, speaking of part payment tolling the statute of limitations, it is said: Payment "may be made by one expressly authorized to make it, * * * by a stranger who makes it at the request and in the presence and with the consent of the debtor, by the creditor pursuant to the direction and authority of the debtor, or by one whose unauthorized act is afterward approved and ratified by the debtor." And in the same volume, at page 1164, it is said: "But where the payment is made by the one to whom the creditor has been referred for payment by the other, or upon request of, by direction of, or under an express agreement with, the other, or with the knowledge and consent or subsequent ratification of the other, or as his tacit agent, it will toll the statute as to the other."

In 17 R. C. L. 924, sec. 287, it is said: "Part payment, within the meaning of a statute which does not say by whom, nor under what circumstances, a payment must have been made in order to arrest the running of the statute, or independent of any statutory provision, must be made voluntarily either by the debtor sought to be charged with the effect of it, or in pursuance of his consent or direction."

In *Brockman v. Ostdiek,* 79 Neb. 843, it is held: "What may be received in payment of a debt is a matter of contract between the interested parties, with which, in the absence of fraud or mistake, the courts will not interfere." The question under consideration was whether a partial payment made by one, other than the maker of a promissory note, would toll the statute of limitations. In the opinion it is said (p. 844): "It appears that the defendant was a partner in a firm engaged in the mercantile business, to which firm the plaintiff was indebted for merchandise. The defendant's partner was urging

payment of the account, and the plaintiff appealed to the defendant to adjust this item of indebtedness for him. Both agree that the defendant consented to do so." The court held that the question was one of fact, and that the evidence was sufficient to show that the payment was made by authority of the defendant, and operated to toll the statute. This court has held, and we think it is the general rule, that any voluntary payment made upon a contract by the debtor or by his authority will be sufficient to arrest the running of the statute of limitations. *Bosler v. McShane,* 78 Neb. 86, 91.

There is evidence also in the record that at the time the last interest payment was made, which is relied on to arrest the running of the statute, all of the defendants were present, the interest payment was discussed, and a check was drawn on the account of the farms company, in the presence of all, and delivered to the plaintiff in payment of the interest. The question as to whether the payment was authorized by defendants was one of fact, concerning which the evidence was in conflict. It was the province of the jury, and not of this court, to determine that question.

Defendants also complain that certain evidence was admitted that was competent as to defendant Payne but not as to the other defendants, and that this evidence should not have been received, or, if so received, the jury should have been instructed to consider it only in considering the liability of Payne. There is nothing in the record to show that defendants requested the court, either at the time the evidence was received or at any other time, to instruct the jury with reference to its effect. The court could not exclude the evidence, because it was competent as to one of the defendants, and, had the court been requested so to do, it no doubt would have specifically directed the jury to consider it only as to the defendant Payne. Failure of defendants to make such request is a waiver of their right to have had such instruction

given to the jury. *Carleton v. State*, 43 Neb. 373; *Chicago, R. I. & P. R. Co. v. Holmes*, 68 Neb. 826.

Complaint is made of the conduct of counsel for plaintiff. It appears that during the progress of the trial there were a number of unseemly wrangles between counsel which should have received the rebuke of the court. We find nothing, however, in the remarks, of which complaint is made, that was prejudicial to the rights of the defendants.

Counsel also suggest in their reply brief that, in any event, the obligation was that of all the defendants and the plaintiff jointly, and that plaintiff should have had judgment for only a *pro rata* portion of the obligation. No such issue was raised in the trial court. It may not be presented for the first time in this court.

No error prejudicial to defendants has been found.

JUDGMENT AFFIRMED.

ELIZABETH FRIESEN, APPELLANT, V. PETER REIMER, APPELLEE.

FILED MARCH 28, 1933. No. 28461.

Witnesses: PRIVILEGED COMMUNICATIONS. Under section 20-1207, Comp. St. 1929, if a plaintiff in a suit for personal injuries testifies with reference to her physical condition, she will be deemed to have waived her right of privilege as to her former family physician, who had attended her in consultation after the accident, and for many years prior thereto, and is called to testify as to her physical condition.

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

John C. Hartigan, for appellant.

Denny & Denny, contra.

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

PAINE, J.

This action for damages was brought against the defendant for injuring plaintiff by backing his car into the car occupied by her. The jury returned a verdict for the defendant. Motion for new trial was overruled, and judgment against plaintiff entered for $80.60, defendant's costs.

The facts may be briefly stated as follows: The plaintiff, Mrs. Elizabeth Friesen, aged about 29 years, was sitting in their Star coach, in a churchyard west of Jansen, Jefferson county, Nebraska, about 9:30 p. m., October 16, 1929, with a three-year-old daughter sleeping on the back seat and a five-year-old daughter sitting on the front seat with the plaintiff, who was behind the steering wheel, when the defendant, without warning, backed his Ford into their car and immediately drove off. The collision was of sufficient force to bend the fender and the frame and break the running board of plaintiff's car. The five-year-old girl fell against her mother's side, and, in addition, plaintiff was badly shaken by being thrown against the wheel and side of the car. Plaintiff was at that time six months along in pregnancy, and labor pains began that night after she reached home, and a doctor, being called, remained about two hours. About 3 o'clock the next morning he was called again, and remained until morning. The plaintiff suffered labor pains and chills, and the doctor put cold packs on her head, raised the foot of the bed, and applied hot applications to allay the pain. A premature childbirth was avoided at that time, but plaintiff was compelled to remain in bed for about three weeks, and remained under the doctor's care until the child was born, upon January 11, 1930, and testified that she had been unable to do all of her housework from the date of the accident up to the time of trial. The plaintiff also testified that upon the night of December 25, 1929, she had been taken sick again with labor pains, and, in addition to Dr. Reynolds, who had treated her the night of the accident, they called Dr. Brugh, who had been their family doctor for some

years. The plaintiff testified that she had had a miscarriage when her first child was born, and that about a year and a half afterwards she had a miscarriage, and that after that she had given birth to two perfectly normal children. Dr. S. A. Brugh testified that he attended plaintiff in childbirth July 31, 1922, and that it was a full-time pregnancy, with an instrumental delivery, but that the child died shortly after birth; that she was in labor for some time; that in the fall of 1924 she gave birth to a child normally, and he also attended her at the births of two other children. When Dr. Brugh was asked about attending the plaintiff at the time of childbirth, an objection was made, reading as follows: "Objected to as incompetent, irrelevant and immaterial and not within the issues, and the witness is an incompetent witness as physician of the plaintiff, unless plaintiff waives the privilege, which she does not;" and this objection was to continue throughout the examination into former childbirths without repetition.

1. In the motion for a new trial it is set out that the court erred in admitting Dr. Brugh's testimony concerning all matters growing out of his relationship as family physician of the plaintiff previous to the accident in question.

From a careful reading of the briefs, it appears that this appeal rests entirely upon what is meant by privileged communications and when such prohibition is waived under sections 20-1206 and 20-1207, Comp. St. 1929. Section 20-1206 reads as follows: "No practicing attorney, counselor, physician, surgeon, minister of the gospel or priest of any denomination, shall be allowed in giving testimony to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." And no complaint is offered in reference to the rulings relating to this section of our statute.

Section 20-1207, in so far as it applies to the issues in this case, provides generally, and may be stated rather freely, as follows: That the prohibitions of the preceding section do not apply, first, to cases where the party in whose favor the respective provisions are enacted waives the rights thereby conferred, or, second, if a party to any such action shall offer evidence with reference to his physical or mental condition, or the alleged cause thereof. In either of these cases such person shall be deemed to have waived the right conferred in section 20-1206, hereinabove set out, as to any physician who shall have attended such party. This section 20-1207 appeared in Comp. St. 1922 as section 8841, and simply provided that the prohibitions in regard to privileged communications did not apply when the party in whose favor the provisions were enacted waived the rights thereby conferred, and this came up for an exhaustive examination by Judge Letton in the case of *Culver v. Union P. R. Co.*, 112 Neb. 441, released by this court July 18, 1924. A verdict for $50,000 had been returned in favor of the plaintiff because of an injury that Culver alleged was brought on by twisting his back while lifting a hand-car. The plaintiff testified that he had had malaria about a month while in the army on the Mexican border, but had suffered with nothing else that he could recall at that time. On cross-examination he was asked whether he had not been treated for a chancre while on the border, and the objection to this question was sustained, and the defendant offered to prove by a sergeant of the United States army, who was not a physician, nor acting under a physician's orders, and who was acting under the regulations of the army, and who was not a trained nurse, that he had given the plaintiff prophylactic treatment for the control of venereal disease on numerous occasions while he was with the United States army, stationed on the Mexican border, which evidence was contained in an offer to prove, the objections to which were sustained, and the evidence was not permitted to go before the jury, and it was held that this

evidence tended to support the defendant's theory that the injury to his spine was the result of syphilitic affection, and the exclusion of this testimony was reversible error.

The next legislature, by an act approved March 30, 1925 (Laws 1925, ch. 74) repealed section 8841, Comp. St. 1922, and enacted in its place the section involved in this case, and now known as section 20-1207, Comp. St. 1929.

For years communications between certain parties have been privileged. As early as the end of the second century A. D., the rule was established in Roman law that a slave could not testify for or against his master. At common law, communications between an attorney and client were privileged, but no privilege existed as to communications between physician and patient.

Our statute seals the lips of the physician against divulging in a court of justice the information which it was necessary for him to acquire during the performance of his professional duties. This privilege is, therefore, for the patient's protection, but the patient may always waive it by express consent, or by calling his physician to testify, or by offering his own evidence in reference thereto.

We cannot refrain from the belief that, in justice, the strict rule, prevailing in some jurisdictions, should be somewhat relaxed in an action wherein a patient voluntarily submits his physical or mental condition for adjudication, and this conclusion finds support in the following cases:

"A patient having been treated by physicians may waive her privilege to object to testimony of the physicians as to matters ascertained by them while treating her, either by calling the physician to testify as to privileged matters, by calling other witnesses to testify to the same facts, or by herself giving testimony with reference to the transaction." *Woods v. Lisbon*, 130 N. W. 372 (150 Ia. 433).

"When part of a confidential communication between physician and patient is put in evidence by one party, the other party may give the whole communication 'on

the same subject.' The trial court must determine whether the evidence offered is on the same subject, and its ruling will not be regarded as erroneous unless there is a clear abuse of discretion." *Struble v. Village of DeWitt,* 89 Neb. 726.

"Where, in an action for injuries, plaintiff testified to complaints to his physician indicating injury to his back, vertebræ, or spine, he thereby waived the right to claim a privilege to prevent the physician from testifying that no complaints as to those particular injuries were made." *Reed v. Rex Fuel Co.,* 141 N. W. 1056 (160 Ia. 510).

One injured in a railroad wreck, who, in a suit to recover damages for the injuries, testifies as to the injuries and the treatment given him, and calls his own physician to testify as to such injuries, waives the provision of the statute making incompetent as a witness a physician or surgeon concerning information acquired from a patient while attending him in a professional character, and other physicians who treated him for such injuries at the time of the accident may therefore testify as to their extent and the treatment given. *Epstein v. Pennsylvania R. Co.,* 250 Mo. 1, 48 L. R. A. n. s. 394, Ann. Cas. 1915A, 423, and note; *National Annuity Ass'n v. McCall,* 103 Ark. 201, 48 L. R. A. n. s. 418; *Koskovich v. Rodestock,* 107 Neb. 116; *Sovereign Camp, W. O. W., v. Grandon,* 64 Neb. 39; *Coca Cola Bottling Works v. Simpson,* 158 Miss. 390, 72 A. L. R. 143; *Lampel v. Goldstein,* 167 N. Y. Supp. 576.

We do not believe that it was reversible error for the trial court to admit the evidence of Dr. Brugh which was objected to by the plaintiff. He had attended the plaintiff as family physician for many years, and had attended her in normal childbirths and in premature pregnancies and threatened miscarriages. In addition to that, he had been called in consultation with Dr. Reynolds, and remained for hours, treating her for a threatened premature birth, upon December 25, 1929, following this accident, and Dr. Reynolds had testified in detail about the occurrences of that night for the plaintiff.

In the case of *Roeser v. Pease,* 37 Okla. 222, the plaintiff had brought an action for injuries, and testified that prior to the accident she had enjoyed good health, and that since the accident she had suffered headaches, which she had never had before. The question arose as to whether she could so testify and then prevent the testimony of her physician, which would be the only available impeaching evidence. The opinion held that a person is entitled to have her physical disabilities protected from public curiosity, but when she bases an action for damages upon the existence of certain disabilities, and herself testifies in reference thereto, she is no longer entitled to claim a privilege for her condition, as the opinion holds that the statute does not contemplate protecting her in such a case.

In our opinion, section 20-1207, Comp. St. 1929, provides in clear and simple language that, when a party offers evidence with reference to her physical condition, the right of privilege is waived as to *any* physician who shall have attended said party. The court should not read into a statute exceptions not made by the legislature. *State v. School District,* 99 Neb. 338. And also we have held that, where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice. *In re Estate of Bayer,* 116 Neb. 670.

In this case the defendant does not deny backing into the plaintiff's car. The evidence clearly proves that when she reached home she suffered severe pains, and while a premature birth was avoided by the treatment given her by her physician, yet for the pain and suffering, which the undisputed evidence shows she was subjected to by the negligence of the defendant, she was entitled to at least nominal damages, and because such damages were not awarded, the judgment is reversed and the cause remanded for a new trial.

REVERSED.

JENNIE A. SAVARD, APPELLANT, V. PHYSICIANS CASUALTY COMPANY, APPELLEE.

FILED MARCH 28, 1933. No. 28479.

1. **Bankruptcy: GARNISHMENT.** When the original judgment, upon which garnishee proceedings are based, ceases to be effective because of the adjudication in bankruptcy of the judgment debtor, the garnishee summons, based on such original judgment, and all power and rights under it, cease.
2. **Garnishment.** When a garnishee appears in court in response to a garnishee summons, he is to be governed, as to garnisheed funds in his hands, by the directions and orders of the court, made as provided in section 20-1029, Comp. St. 1929. If the court finds that such garnishee proceedings attempt to hold funds within the four months' period prior to the adjudication in bankruptcy of the judgment debtor, and makes no order affecting the garnishee, this releases the garnishee from all liability under the summons, and no judgment can be obtained against such garnishee under the provisions of section 20-1030, Comp. St. 1929.

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

W. A. Ehlers, for appellant.

W. W. Slabaugh, contra.

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

PAINE, J.

This is an action for a judgment for $793.50, based on a failure of the defendant, appellee, under section 20-1030, Comp. St. 1929, to make answer in garnishment proceedings, and for surrendering money in its possession to the debtor after it was served with a garnishment summons. Jury was waived, and judgment was entered for the defendant. Plaintiff appeals.

Jennie A. Savard secured judgment against Velva F. Betts and her father, now deceased, upon June 26, 1926, and filed transcript thereof in the district court for Douglas county, and upon May 13, 1931, served a garnishee

summons upon the defendant corporation, which summons directed the defendant to appear in district courtroom No. 1 upon June 15, 1931, at 9:30 a. m., and make answer touching the goods, chattels, rights, and credits of Velva F. Betts in its possession or control, and said summons was accompanied by the statutory fee of $3.

Upon June 12, 1931, Miss Betts, the judgment debtor, who was an employee of the defendant company, filed her petition in voluntary bankruptcy, and the next day she was adjudicated a bankrupt, which adjudication, it is insisted by the appellee, rendered void *ab initio* the whole garnishment proceedings.

The garnishee, defendant, paid to Miss Betts $83.33, being one-half of her month's salary, upon May 15, 1931, and upon June 1 made another payment upon her salary in the same sum.

At the time required by the garnishee summons, the garnishee appeared, as commanded in the summons, before Honorable Fred A. Wright, district judge. The attorney for Miss Betts thereupon announced to the court that she had been adjudicated a bankrupt two days prior thereto, and insisted that the district court was without jurisdiction to hear or receive the answer of the garnishee, and the court agreed with this contention. The garnishee was present by its secretary-treasurer, but he was not asked any questions by the court or counsel, and made no answer, either oral or in writing, nor did he refuse to make any, nor did he ask for any instructions from the court. The court, on its part, did not make any entry in any docket concerning the garnishee. There is no material dispute as to these facts in the record.

Upon trial of the case at bar, founded upon the facts set out, a jury having been waived, the court found generally in favor of the defendant, and entered judgment that the defendant go hence without day and recover its costs. Motion for new trial being overruled, the judgment was appealed to this court. The errors relied upon by the appellant are: That the court erred in overruling

plaintiff's motion to strike from the defendant's answer all allegations concerning the bankruptcy of Velva F. Betts, on the ground alleged that they do not constitute a defense available to the defendant; and, further, that the court erred in receiving in evidence the certified copy of her adjudication in bankruptcy; and, further, that the court erred in rendering judgment for the defendant under section 20-1030, Comp. St. 1929. Appellant also insists that the court erred in holding that the statutory liability imposed by said section 20-1030 upon a garnishee who fails to answer, or to hold money of the judgment debtor until final disposition by the court, could not be enforced, for the reason that the judgment debtor had been adjudicated a bankrupt under section 67 (f), ch. 7 of the bankruptcy act. Appellant further insists that, where a garnishee appears as directed in the garnishee summons, but does not answer orally or in writing, or request an order releasing it from liability for money in its possession, and no such order is made, the court erred in failing to hold said garnishee, and erred in releasing the garnishee from liability under the statute for payments made after such garnishee summons was served upon him.

The appellee, in paragraph 3 of its answer filed in the district court, set out the bankruptcy proceedings, and alleged that said garnishment was, by the adjudication in bankruptcy, entered June 13, 1931, wholly dissolved and rendered void, as provided in chapter 7, sec. 67, clause (f) of the bankruptcy law of the United States, which said clause provides as follows:

"All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudicated a bankrupt, and the property affected shall be deemed wholly discharged and released." 30 U. S. St. at Large, p. 564.

It is provided in 2 Collier on Bankruptcy (13th ed.) 1591, that an order of a court of bankruptcy, relating to

the moneys collected under a garnishee order, is not an unauthorized interference with the process of a state court. Money collected under garnishee order, issued against the salary of the bankrupt during the four months' period, belongs to the trustee, but that collected prior to such period should be paid to the judgment debtor. The trustee may sue to recover the money garnisheed, and the right to recover will not be affected by his failure to intervene in the action in which the judgment was obtained upon which the writ was issued.

The same contention made here by the appellant has been before this court in the case of *Hall v. Chicago, B. & Q. R. Co.*, 88 Neb. 20, in which it was held that the bankruptcy laws are binding upon the state courts, and that an adjudication in bankruptcy of an insolvent debtor is a complete defense to the enforcement of judgments rendered by state courts against a garnishee within four months of the filing of the debtor's petition in bankruptcy.

In the case of *Farmers & Merchants Nat. Bank v. Mosher*, 68 Neb. 713, it was held that a garnishee, turning over money upon the order of the principal debtor, is liable to the creditor therefor, and it is contended by the appellant in this case that the defendant garnishee should have turned over the two semimonthly payments of salary to the plaintiff. This would be true if the bankruptcy court had not intervened.

A garnishee, who has duly appeared in court in response to a garnishee summons, is to be governed as to garnisheed funds in his hands by the directions and orders of the court, made as provided in section 20-1029, Comp. St. 1929. If the court finds that such garnishee proceedings attempt to hold funds within the four months' period prior to the adjudication in bankruptcy of the judgment debtor, and makes no order affecting the garnishee, this releases the garnishee from the summons.

Under the bankruptcy law, which state courts are bound to respect, all garnishee proceedings in this case were rendered null and void, and upon the date the garnishee

was commanded to appear in court, the state court was powerless to make any order, and the garnishee was thereby released, for the bankruptcy court had taken charge of the debtor and her assets and liabilities. *Anderson v. Billingsly,* 46 S. Dak. 17, 25 A. L. R. 96.

Even the original judgment, upon which the garnishee proceedings were based, had ceased to be effective, because of its having been duly listed by the bankrupt, and the adjudication in bankruptcy duly entered thereon. Therefore, the garnishee summons, based on the original judgment, and all power and rights under it cease.

There being no error in the action and judgment of the district court, the same is hereby

AFFIRMED.

NATIONAL BOND & INVESTMENT COMPANY, APPELLANT, V. CHARLES HAAS, APPELLEE.

FILED MARCH 28, 1933. No. 28485.

1. Chattel Mortgages. A chattel mortgage upon an automobile does not pass the title thereof to the mortgagee.
2. ———: REPAIRS. If a chattel mortgage upon an automobile includes a provision that the owner and mortgagor covenants to keep it in first class condition at all times at his own expense, it is the duty of the owner to have it repaired when wrecked.
3. ———: ARTISAN'S LIEN: PRIORITY. The lien of an artisan under section 52-201, Comp. St. 1929, for repairing an automobile, at the request of the owner, who delivers the car to the garageman, is superior to that of a chattel mortgage, not recorded in such county, and of which the artisan had no knowledge.

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

Robert G. Fuhrman and *Harold R. Jordan,* for appellant.

Harvey R. Ellenberger, contra.

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

PAINE, J.

The plaintiff and appellant, National Bond & Investment Company, of Chicago, replevied an automobile from defendant, Charles Haas, a garageman, who claimed a lien for repairs. Jury being waived, court entered judgment for the amount of repairs. Plaintiff appeals.

Upon July 23, 1931, Everett Witcher, residing at Robertson, Missouri, gave a mortgage for $495 to the St. John's Motor Car Company, of St. Louis, Missouri, upon a 1931 Plymouth coupé, and upon the same chattel mortgage blank there was an assignment of said mortgage from the said Motor Car Company to the National Bond & Investment Company, of Chicago, Illinois. Upon the trial of this case, all of the evidence was stipulated, and such stipulation, together with one letter and the original note and mortgage, constituted all of the evidence in the case.

In examining the stipulations, it is found that one was drawn up on behalf of the plaintiff and agreed to by the defendant, and another was drawn up on behalf of the defendant and agreed to by the plaintiff. Additional facts shown in the stipulation may be briefly stated as follows: Everett Witcher paid the monthly instalment payments, which were due upon the 23d of August, September, and October, 1931, but defaulted as to all other payments, and that there was due and owing upon the note and mortgage $371.25, with interest; that during the month of November, 1931, the said Everett Witcher, without the knowledge of the plaintiff, drove said car from the state of Missouri to Cuming county, Nebraska, where the car was wrecked, and without the knowledge of the National Bond & Investment Company, assignee of said note and mortgage, placed said car in the possession of the defendant, Charles Haas, for repair, and the defendant agreed to make the repairs, which included straightening three bent fenders, straightening the frame and body and hood, bumper and shell, and front axle, and welding the engine hanger, and making many other re-

pairs, as itemized in the answer, and for which said Everett Witcher, owner of the car, agreed to pay to the defendant the full sum of $175. It was stipulated that such sum was the fair and reasonable value of the work and materials placed upon the automobile, no part of which has been paid or collected; that the defendant, Charles Haas, had no knowledge or notice whatever of the rights of the plaintiff, or of its chattel mortgage, until all of the work contracted to be done by the owner had been entirely completed; that thereafter said automobile was taken from the possession of the defendant by a writ of replevin, obtained by the plaintiff. The fair and reasonable value of the automobile when so taken was $350, and plaintiff never authorized the defendant to repair said automobile, and had no knowledge that said automobile was out of the state of Missouri, or at West Point, Nebraska, or in possession of the defendant at his garage in said town, until November 24, 1931, when plaintiff received a letter from Everett Witcher, the owner of said car, mailed from New Orleans, Louisiana, reading as follows:

"Dear Sirs: Am unable to meet my payments. My car is at West Point, Nebr., at the top & body shop. Everett Witcher."

Thereafter the plaintiff, National Bond & Investment Company, filed its amended petition in the district court for Cuming county, Nebraska, setting out the facts in the case, and alleging that plaintiff made demand upon the defendant for possession of said automobile to the plaintiff, and plaintiff prayed judgment for the return of the automobile, or for the sum of $371.25 and damages in the sum of $50.

The defendant in his answer admits that Everett Witcher was the owner and in possession of the automobile, and as such owner delivered the automobile to the defendant, and employed the defendant to make the repairs thereon, and the defendant prayed judgment for the return of the automobile or for the value of the de-

fendant's possession in the sum of $175. The reply was a general denial. A jury was waived by the parties, and cause submitted upon the stipulation and exhibits, and the court found that the defendant was entitled to possession of the automobile at the time of the commencement of the action, and that the automobile was of the value of $350 when it was taken on writ of replevin, and that said automobile should be returned to the defendant within five days or, failing so to do, the plaintiff should pay to the defendant the sum of $175 as the value of his right of possession and the sum of $1 for the unlawful detention, and gave defendant judgment accordingly.

In its motion for a new trial the plaintiff set out the following reasons for a reversal of the judgment: First, that the judgment was contrary to law; second, that it was contrary to the evidence; and, third, that the court erred in refusing to state in writing conclusions of fact found separately from the conclusions of law, as requested in writing by the plaintiff in accordance with the provisions of section 20-1127, Comp. St. 1929.

This case involves the determination of the rights of a repair man in a mortgaged car which he has repaired. In 1913 our artisan's lien law was passed, which is found in sections 52-201 to 52-203, Comp. St. 1929, which provides, as applied to this particular case, that any person who repairs an automobile at the request of the owner shall have a lien on such automobile while in his possession for his reasonable or agreed charges for work done or material furnished, and shall have the right to retain said property until the charges are paid, and such person making such repairs shall file in the office of the clerk of the county in which the work was done, within 60 days after performing such work, a verified statement and description of the work done or material furnished, and that such verified statement so filed shall be prior and paramount to all other liens upon said property except those previously filed in the said office of the county clerk in the county where the work was done, and

shall be treated in all respects as a chattel mortgage, which may be foreclosed within one year after the filing of such lien, but such lien shall be subject to the rights of third parties who have purchased the property prior to the filing of said lien without knowledge or notice of the rights of the artisan.

An additional law was enacted in 1923 which gives a lien for services performed upon any personal property, and is found in sections 52-601 to 52-605, Comp. St. 1929, and provides that a person who has performed work or advanced material has a lien upon personal property for the reasonable or agreed charges, and is entitled to retain said property until his claim is satisfied, as such property shall be exempt from attachment or execution until the lien is satisfied, and provides that, if the claim is not paid within 90 days, he may advertise and sell the property at auction at a specified time and place, and out of the proceeds of the sale the lien for work and materials shall first be paid, with costs of sale. Then section 52-605 provides: "At any time before the goods are so sold, any person claiming a right of property or possession therein may pay the claimant the amount necessary to satisfy his lien and pay the reasonable expenses and liabilities incurred in serving notices of advertising and preparing for sale up to the time of such payment. The claimant shall deliver the goods to the person making such payment if he is a person entitled to the possession of the goods on the payment of the charges thereon."

Considering all of these provisions together, it provides that the artisan has a lien superior to all liens except those previously filed in the office of the county clerk in his own county, and it further provides that, if the artisan is holding the property, planning to sell the same for his charges, another person may pay off the artisan's lien and secure the property. If the mortgage had been filed in another county in Nebraska, it is clear from this law that the artisan's lien would have been superior to

such mortgage lien, and the mortgage filed in St. Louis cannot have any greater rights than would a mortgage filed in another county in Nebraska, and the lien under a Missouri law could not supplant the statutes of Nebraska, which protect the right of the artisan in Cuming county for the repairs made upon the car under the direction of the owner.

The facts in this case show that the artisan was not at fault in any wise. The owner of the car delivered the car to him in a wrecked condition, and they agreed upon the price of $175 for putting the car in good condition. The artisan had the car delivered to him by the owner of the car, and for such work, so ordered and agreed upon, he is entitled under the law to a lien to protect him for his labor and material.

It is insisted by the appellant that our court has already passed upon the question, and decided that the lien of an artisan is inferior to that of the vendor of the automobile. It may be admitted that, in the case referred to, being *General Motors Acceptance Corporation v. Sutherland,* 122 Neb. 720, in a well-reasoned opinion, this court held that the repairer of an automobile sold under conditional sales contract had no possessory lien under section 52-201, Comp. St. 1929, as against unpaid conditional vendor, in absence of showing that repairs were made at the request of, or with the consent of, the conditional vendor or assignee. It is stated in that opinion that there is a marked difference between the position of a mortgagor and a conditional sales vendee; that the former must own the property which he mortgages, which is not true as to the conditional sales vendee, who holds possession under an executory contract to purchase, and while he may have equitable rights in the property to the amount of the payments he has made, he is not the owner.

"A chattel mortgage in this state merely creates a lien and does not pass title to the mortgagee. It is in the nature of a pledge to secure payment of the debt." *Ap-*

pel Mercantile Co. v. Kirtland, 105 Neb. 494. It is clear that no Nebraska case cited holds other than that the garageman has a lien which extends to all repairs made at the owner's request, but that such a lien does not prevail against a conditional seller who has not parted with the title. 10 Neb. Law Bulletin, 160.

The act of 1913, as set out in sections 52-201 to 52-203, Comp. St. 1929, put into our statute the old common-law right of lien, and the Code, being but a continuation of the common law, is to be construed therewith, and in this enactment the Code but declares the lien already recognized by the common law, which was discussed at length in the case of *Drummond Carriage Co. v. Mills,* 54 Neb. 417. This case, arising in 1894, before the days of automobiles, concerned a buggy which a physician used in his business, and upon which a chattel mortgage was outstanding, and as the buggy needed repairs, it was left at a shop for that purpose, and there retained to enforce the lien for the repairs. This court held that the mortgage lien was subordinate to the common-law lien in force in 1894, since the recitals of the mortgage disclose that the mortgagor had at least implied authority from the mortgagee to have the repairs made. In this case, reference was made to the English case of *Williams v. Allsup,* 10 C. B. n. s. *417, which appears to be one of the leading cases on this subject. It was heard before the court of common pleas in 1861. The owner of a steamboat, Loch Lomond, executed a mortgage thereon to certain bankers at Chester upon October 1, 1856, and registered such mortgage at the custom house in Liverpool, this mortgage being set out in the opinion. Such steamboat was condemned as unseaworthy, and the government surveyor refused to renew her certificate to enable her to be used and navigated, of which facts the mortgagees were ignorant, and the owner thereupon turned the ship over to a ship builder at Preston, who did work and furnished material to the amount of over 870 pounds, and thereby greatly improved its value, and

enabled the ship to be used and navigated, and without which repairs she was unseaworthy. The mortgagees demanded possession of the boat, which was refused until the repairs were paid. The owner was adjudicated a bankrupt. Chief Justice Erle held that the mortgagee having allowed the mortgagor to continue in apparent ownership of the vessel created the implication that the mortgagor might do all that would be necessary to keep her in an efficient state, and when the vessel was condemned the mortgagor did that which was obviously for the advantage of all parties interested. It was provided in the seventieth section of the merchant shipping act that a mortgagee shall not, by reason of his mortgage, be deemed to be the owner of a ship, nor shall the mortgagor be deemed to have ceased to be the owner thereof, and that it was much to the interest of the mortgagee that the mortgagor should be held to have power to confer a right of lien for ship repairs necessary to keep her seaworthy.

In line with this holding, we find by examining the Missouri chattel mortgage that, in the case at bar, it is provided therein that the mortgagor admits that the automobile was in good condition and repair at the time it was received by him, and he covenants to keep it in first class condition at all times at his expense, which provision clearly implies that it is the duty of the owner and mortgagor to have the automobile repaired whenever necessary to keep it in good running order.

Complaint is made of the fact that, although seasonably requested in writing, the trial court did not set out in writing his conclusions of fact and law separately, as required by section 20-1127, Comp. St. 1929. An examination of the record in this case discloses that all of the facts in the case were stipulated; there was no question of fact disputed between the parties. But, while not set out in separate paragraphs, the trial court did find that the defendant was entitled to possession of the property at the commencement of the action, and the value of that

possession and the value of the car. These findings cover the important points in the case, and the failure to find additional facts set out in appellant's brief did not constitute reversible error.

Finding no error in the record, the judgment is

AFFIRMED.

ELIZABETH MANN, APPELLANT, V. JOHN A. MANN, APPELLEE.

FILED APRIL 7, 1933. No. 28501.

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

Anson H. Bigelow, for appellant.

Wayne E. Sawtell, contra.

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

PER CURIAM.

Plaintiff appeals from a decree, rendered May 2, 1932, granting defendant an absolute decree of divorce, ordering him to pay her $35 a month for 48 months as permanent alimony and granting her the home and household goods, requiring him to pay her attorney's fee and taxing to him the costs, and in effect giving her allowance for costs of transcript, bill of exceptions, briefs and attorney's fee, in case of appeal.

A suit was brought in the district court May 23, 1925, in the same docket number there, by plaintiff against defendant for support and maintenance for herself and four minor children (the only two other children then being of age) and for such other and further relief as might be found equitable. On December 22, 1925, the court entered in that suit a decree ordering defendant to pay plaintiff $80 monthly until the further order of the court. On November 16, 1928, the district court modified the decree on account of changed circumstances of the parties,

making the payments $60 each month. The court there found that plaintiff and a minor son were earning certain stated sums, that another son was now of age, that there was one dependent in school, and that plaintiff's expenses were not so great as when the decree was entered.

The present phase of the suit was begun on June 18, 1930, by the filing of a petition by defendant for a modification of the decree. He alleged that at the time the original decree was entered he was earning approximately $200 a month and now approximately $135 a month; that at the time the original decree was entered there was a mortgage of approximately $900 on the home and there were five minor children, whereas the mortgage has nearly been paid out of funds furnished by defendant under the decree and the children have all become of age except one who was then 18; that since the beginning of the action plaintiff has been extremely cruel toward defendant in that she has failed and refused to live with him and that the parties have been separated for a period of five years.

The plaintiff joined issues by an answer in which she included a cross-petition. In the latter she pleaded that the home was held on a contract of purchase in the names of both husband and wife and was now within a few dollars of being paid for, all out of her own funds. Defendant, on November 14, 1931, by leave of court, filed a supplemental petition in which he states that he dismissed his petition for a modification of decree; then he sets up in more detail his cause of action for divorce on grounds of cruelty. After a portion thereof was stricken on plaintiff's motion, plaintiff traversed this petition also in greater detail than in her original answer and cross-petition.

The district court in its decree found and specified certain acts of plaintiff toward defendant which were found by the court to "constitute extreme cruelty such as to utterly destroy the legitimate objects of matrimony." It

would serve no good purpose to set out these specifications and the evidence upon which they were based. None of them reflect in the slightest degree upon the morals or upon the very creditable management of plaintiff in keeping her children until maturity and in preserving and paying for the home in the hard domestic circumstances in which she found herself.

The elaborate brief of plaintiff contains many points and propositions. We do not find it desirable or necessary to take these up and discuss them, one by one. Plaintiff argues that the decree of 1925 barred defendant from seeking a divorce for cruelty after that term of court. This cause in equity was tried to the court and not to the jury. While the court allowed testimony to be introduced on behalf of both sides relating to events occurring prior to the original decree, yet neither the district court considered it nor does this court consider it on this trial *de novo*. It is well recognized that such testimony is to be laid out of view in making a decision. The decree is expressly based upon events after December 22, 1925. That is the date of the original decree.

Plaintiff argues that the testimony of defendant was uncorroborated. It was sufficiently corroborated by the testimony of others, and by proper inference therefrom, to form a basis for the decree in the district court. While we try the case anew, we may consider that the trial judge saw and heard the witnesses. Though the facts present a rather unusual situation, yet we are disposed to adopt the view of the district court that the ground for divorce was present and proved.

Other alleged errors are assigned, but we do not find they were prejudicial. The judgment of the district court is affirmed. In consideration of the circumstances of the parties and in view of the language of the decree in contemplation of an appeal, it is deemed equitable to direct that the costs of the appeal, including an attorney's fee of $50, in favor of appellant, be taxed against appellee.

AFFIRMED.

E. H. LUIKART, RECEIVER, APPELLEE, V. BARBARA HUNT, APPELLANT.

FILED APRIL 7, 1933. No. 28512.

1. **Banks and Banking**: INSOLVENCY: RECEIVERS. "Ordinarily a receiver takes charge of banking affairs where the bank left them, and cannot generally, in absence of fraud, mistake, or violation of law, open closed transactions which would conclude the bank, if solvent." *State v. South Fork State Bank*, 112 Neb. 623.
2. ———: ———: FRAUD. Where a bank is insolvent and its officers have committed a fraud upon depositors and creditors and have violated the law by disposing of its assets in anticipation of imminent receivership, the receiver may question the transaction.
3. ———: ———: ———. An insolvent bank may not prefer a depositor by giving him a good note and mortgage taken from its assets in its note case in exchange for the depositor's certificate of deposit against the bank. In such a case the depositor is charged with notice of a fraud upon other depositors and of a violation of law and thus subjects his title to the note and mortgage to question.

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

J. A. Donohoe, for appellant.

F. C. Radke, I. J. Dunn, Frank Warner and *Barlow Nye, contra.*

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

GOSS, C. J.

This is the first in a series of four similar cases argued the same day and involving preferences to favored depositors by an insolvent bank. From a judgment in this suit canceling the bank's transfer and assignment of a note and mortgage to defendant, ordering them reconveyed to the receiver, and enjoining any other assignment or any attempt to collect them, defendant appeals. The decree awarded defendant the amount of the note and

mortgage as a valid claim for a deposit entitled to share with all the other general depositors of the bank in the general assets thereof.

The transaction complained of took place on November 22, 1930. This depositor, Barbara Hunt, had been a customer of the bank for many years and had about $7,000 of deposits evidenced by certificates. In December, 1929, or January, 1930, she consulted the bank officers about investing part of the money in other securities. She first spoke to the cashier about it. He said she would have to talk to James C. Flannigan, the vice-president of the bank, who was then absent. Not long after that she conferred with Mr. Flannigan, who advised her to get a real estate mortgage. He told her some one would need some money before long and he would be on the lookout and would let her know. She heard nothing further on the subject until November 22, 1930, when she was on the sidewalk in front of her place, and the cashier stopped his car and told her Mr. Flannigan wanted to see her at the bank that afternoon. She went to the bank and dealt with Mr. Flannigan. As a result of negotiations, he then and there assigned and transferred to her a $3,000 mortgage and note on a quarter section of Holt county land. The note and mortgage were executed on November 3, 1930, by Walter Clare and wife in favor of the Citizens Bank of Stuart. The assignment in the name of the bank was executed by James C. Flannigan, Vice-President, and attested by Thomas S. Mains, Cashier, on November 22, 1930. In exchange Mrs. Hunt turned over one certificate of deposit for $1,410.44, which had become due the day before, another certificate for $1,295.15 to become due December 26, 1930, and a third certificate for $357, to become due March 22, 1931. In the adjustment she received a new certificate of deposit for $100 and $14.76 in cash. She also had other certificates on the bank for $4,000. On the trial it was stipulated that the bank had conveyed the farm to James C. Flannigan on June 29, 1927, and he had conveyed it to Walter Clare

on November 3, 1930, the same day Clare and wife executed and delivered to the bank the note and mortgage in question. They were assets of the bank. Mrs. Hunt had never before bought any notes, mortgages, or bonds from the bank. The evidence does not show that Mrs. Hunt had actual knowledge or notice that the bank was insolvent.

The receiver alleged that, at the time of the transfers, the bank was insolvent and its officers and defendant Hunt had notice and knowledge thereof; that the assets of the bank were a trust fund for all its creditors and the officers of the bank had no right to make the transfers; that said transfers were not in the ordinary course of business, were in violation of the laws of Nebraska with reference to banks and insolvency and were null and void; and that the transfers of the note and mortgage to Barbara Hunt constituted an unlawful preference. Mrs. Hunt denied the material allegations of the petition, alleged she purchased the note and mortgage in good faith for a valuable consideration, paid for them by a surrender of the certificates of deposit, and had no notice or knowledge of the insolvency of the bank. Plaintiff for reply denied new matter. The trial court found generally for plaintiff, but left "open the question of the knowledge of the defendant Hunt with reference to the insolvency of said bank for the reason that said question is immaterial."

The evidence shows that the bank had been impaired, and the officers had known it, for a long time. They recognized it as early as July 30, 1930, when they met at the banking department by request of George W. Woods, state bank commissioner, and went over the affairs of the bank with him and the chief examiner. In that conference it was discovered that at the most favorable appraisal the assets of the bank were worth $122,000 less than they purported to be. Its capital was impaired and they were notified to make it good. The commissioner polled the officers and they personally pledged themselves

to eliminate the particular assets and to put that amount of real money in their place. On that occasion the cash reserve was low. It should be at least 15 per cent. of the deposits. Comp. St. 1929, sec. 8-134. It was less than 9 per cent. They promised also to bring the reserve up. Incidentally, the reserve was less than 3 per cent. on November 22, 1930. They did not keep their pledge to restore their impaired capital and in November they began with Mrs. Hunt their practice of paying favored depositors out of the good assets in their note case. The bank was then definitely insolvent and the officers knew it. The bank closed December 1, 1930. The department of trade and commerce put it in the hands of an agent. The receiver was appointed January 8, 1931.

A state bank is insolvent when the actual cash value of its assets is insufficient to pay its liabilities to its depositors, or when it is unable to meet the demands of its creditors in the usual and customary manner, or when it shall fail to make good its reserve as required by law, or when the stockholders, upon notice from the department, shall fail to make good an impairment of its capital. Comp. St. 1929, sec. 8-116.

The power of the state over banking arises out of the fact that it is a quasi public business. The authority in this state to regulate and control the business of banking resides in that fact duly declared by the legislature. The general definition of banking is coupled with the declaration. Comp. St. 1929, sec. 8-114. The machinery to carry out the regulation, supervision and control of the banking business is provided by statute. Banking may be carried on only by a corporation duly organized for such purpose under the laws of this state. Violations of the law are subject to penalties, including receivership and winding up of the business.

Whenever the practices or condition of a state bank are such that it is taken charge of by the department of trade and commerce, all attachment liens acquired within thirty days are dissolved. Comp. St. 1929, sec. 8-181.

And notice of possession of a bank by the department forestalls all future liens, unless the bank be continued as a going concern. Comp. St. 1929, sec. 8-187. If a receiver be appointed, the affairs of the bank are closed up by him under the supervision of the court in accordance with the provisions of law.

The general rule of law, as stated by defendants in several of this series of cases and supported by citations from other jurisdictions, to the effect that a receiver of an insolvent bank is merely an assignee, that he has only such rights as the bank had, so that the rights of third parties are not increased, diminished or varied by his appointment, that he stands in no better position than did the bank as a going concern, and the like, has certain qualifications and conditions in this jurisdiction.

This is the rule here: "Ordinarily a receiver takes charge of banking affairs where the bank left them, and cannot generally, in absence of fraud, mistake, or violation of law, open closed transactions which would conclude the bank, if solvent." *State v. South Fork State Bank,* 112 Neb. 623; *State v. Farmers State Bank,* 112 Neb. 788; *State v. American Exchange Bank,* 112 Neb. 834. The implication from this statement of the rule is that, if fraud or a violation of law inheres in a preference, by an insolvent bank, of one depositor over the mass of depositors, then the receiver may assert that fraud or violation of law as against one who has received a preference.

The functions of a bank are to receive deposits from its customers, to keep them safe, and to repay them when demanded and due. To compensate for this service the bank invests its capital and the money intrusted to it by its depositors. The integrity and the continued existence of a bank depend upon the good-will of the depositors. That good-will is secured and held by the idea and practice of equality of treatment of depositors with preferences to none. The legislature was so careful to protect the rights of depositors in the fund they create that,

when a bank becomes insolvent and closes, the claims of unsecured depositors and holders of exchange have priority over all other claims, except taxes, and become a first lien on all the assets of the bank. Comp. St. 1929, sec. 8-1,102. The funds of depositors are received by a banking corporation with the knowledge and notice given by this wise principle of the law, not only to the officers of the bank, but to every depositor, that all assets of the bank, which are largely created by these deposits, will always be a fund subject to *pro rata* repayment to depositors, whenever the bank ceases to function as a going concern and to pay its depositors in the ordinary course of business. With such a spirit and understanding of the law, may the officers of a bank, knowing its insolvency, realizing that its receivership is imminent, thus prefer certain depositors over all others by the subterfuge of trading the best assets in the bank's note case for deposits, in some instances not yet due? We think not. To decide otherwise would be a manifest travesty upon justice. The mere announcement of such a rule would be at once an invitation to and condonation of recreant and conscienceless bank officers. It would authorize and encourage them to plunder their banks and to carve out and apportion to a chosen few the choicest assets of the corporation, leaving to the other depositors and creditors little more than a myth or shadow to which they may resort for the payment of their claims. We reject the idea, and are of the opinion that the officers of the bank committed a fraud upon the other depositors and violated the law when they took the note and mortgage out of the bank's note case and traded it for Mrs. Hunt's certificates of deposit.

If within the limits of section 8-136, Comp. St. 1929, or if beyond that, by permission of the department, the bank might have rediscounted the note and mortgage to third parties. That would have been a lawful method by which it could have disposed of the note and secured cash to increase its depleted reserve without lessening

its assets. But this transaction was entirely out of the ordinary course of business of a bank. The law and the facts put Mrs. Hunt upon her notice. We are of the opinion that, as a matter of law, she was charged with notice of the unlawful act of the bank and of its fraud upon the other depositors, and so the district court was right in holding that the question of the knowledge of Mrs. Hunt as to the insolvency of the bank was immaterial.

The district court correctly allowed her a depositor's claim. The judgment of the district court was in all things right and it is

AFFIRMED.

E. H. LUIKART, RECEIVER, APPELLEE, V. JOE C. TIMMERMANS ET AL., APPELLANTS.

FILED APRIL 7, 1933. No. 28525.

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

J. J. Harrington, for appellants.

F. C. Radke, I. J. Dunn, Frank Warner and *Barlow Nye, contra.*

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

GOSS, C. J.

This is the second case argued in a series of cases quite similar in general facts and applicable rules of law, where Citizens Bank of Stuart, when insolvent, turned over assets to depositors, and the receiver sued to recover the assets so paid. The bank was turned over by its officers to the department of trade and commerce on December 1, 1930.

The evidence shows that defendant Mrs. Joseph Timmermans (Josephine Timmermans) held a certificate of deposit against the bank for $2,500, dated February 25,

1930, due 12 months after date, with interest at 4 per cent.; that defendant Joe C. Timmermans held a certificate of deposit against the bank for $532.48, dated March 1, 1930, due 12 months after date, with interest at 4 per cent.; that defendant Simon Timmermans held a certificate of deposit against the bank for $100, dated February 18, 1930, due 12 months after date, with interest at 4 per cent.; that the bank had in its note case as assets of the bank a note of one Albert E. Timmermans for $2,236.18, secured by chattel mortgage, and had also certain school warrants valued at $823.57.

The evidence further shows that on or about November 29, 1930 (some of the bank entries were made December 1, 1930), defendants surrendered the above described certificate of deposit, and in consideration therefor the bank assigned to them the above described assets of the bank and paid them $166.79 in cash. Defendants had collected the school district warrants before the trial.

The court found generally for the plaintiff, adjudged the transfers void, and ordered them set aside, rendering personal judgment against defendants on account of their inability to restore the collected school warrants, and allowed defendants a claim as general depositors.

The case is ruled by the principles announced in the opinion in *Luikart v. Hunt, ante,* p. 642. No further discussion is needed.

The judgment of the district court is

AFFIRMED.

E. H. LUIKART, RECEIVER, APPELLEE, V. HORACE SHANK, APPELLANT.

FILED APRIL 7, 1933. No. 28526.

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

J. J. Harrington, for appellant.

F. C. Radke, I. J. Dunn, Frank Warner and *Barlow Nye, contra.*

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

GOSS, C. J.

This is the third case argued in a series of cases quite similar in general facts and applicable rules of law, where Citizens Bank of Stuart, when insolvent, turned over assets to depositors, and the receiver sued to recover the assets so paid. The bank was turned over by its officers to the department of trade and commerce on December 1, 1930.

In this case there were five causes of action, each involving the transfer by the bank from its assets of a separate note and real estate mortgage. The first three occurred on November 14, the fourth on November 18, and the fifth on November 20, all in 1930. The mortgages totaled $36,000 on their face. Defendant had on deposit in the bank more than that sum. The notes and mortgages were mailed to him and the $36,000 was charged to his account. The court found generally for the plaintiff, adjudged the transfers void, and ordered them set aside, but allowed defendant a claim as a general depositor.

The case is ruled by the principles announced in the opinion in *Luikart v. Hunt, ante,* p. 642. No further discussion is needed.

The judgment of the district court is

AFFIRMED.

E. H. LUIKART, RECEIVER, APPELLEE, V. JOHN STEPHEN ET AL., APPELLANTS.

FILED APRIL 7, 1933. No. 28535.

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

J. J. Harrington and *Ross Amspoker,* for appellants.

F. C. Radke, I. J. Dunn, Frank Warner and *Barlow Nye, contra.*

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

GOSS, C. J.

This is the fourth and last case argued in a series of cases quite similar in general facts and applicable rules of law, where Citizens Bank of Stuart, when insolvent, turned over assets to depositors, and the receiver sued to recover the assets so paid. The bank was turned over by its officers to the department of trade and commerce on December 1, 1930.

In this case the evidence shows that on November 28, 1930, the bank transferred to the defendants out of the assets in its note case one note and real estate mortgage for $10,000 and another note and real estate mortgage for $3,280. They were paid for by surrender of a certificate of deposit dated June 12, 1930, due December 12, 1930, in favor of John Stephen, for $8,700, and interest thereon amounting to $159.50; and by surrendering another certificate of deposit, dated June 12, 1930, due December 12, 1930, in favor of Allen Stephen, for $4,250, and interest thereon amounting to $77.88; and by surrendering a third certificate of deposit, dated June 30, 1930, due December 30, 1930, in favor of Pearl Stephen, for $2,100, and interest thereon amounting to $34.30. The difference in favor of defendants was adjusted partly by payment in cash and partly by credit in checking account in the bank.

The court found generally for plaintiff, adjudged the transfers void, and ordered them set aside, but allowed defendants a claim as general depositors in the sum of $13,280.

The case is ruled by the principles announced in the opinion in *Luikart v. Hunt, ante,* p. 642. No further discussion is needed.

The judgment of the district court is

AFFIRMED.

ARTHUR A. DOBSON ET AL., APPELLANTS, V. OCEAN ACCIDENT & GUARANTEE CORPORATION, LTD., APPELLEE.

FILED APRIL 7, 1933. No. 28480.

1. **Declaratory Judgments.** A court may refuse to enter a declaratory judgment where it would not terminate the uncertainty or controversy giving rise to the proceeding.
2. ———. Declaratory judgments act is applicable only where there is a present, actual controversy, and only where justiciable issues are presented and all interested persons are made parties to the proceeding.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Woods, Woods & Aitken, for appellants.

Kennedy, Holland & De Lacy, contra.

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

GOOD, J.

From an adverse decision, in an action for a declaratory judgment, the plaintiffs have appealed.

The following pertinent facts appear from the record: January 10, 1926, a policy of insurance, running for a period of one year, was issued to plaintiffs by defendant, wherein, respecting plaintiffs' liability for personal injuries, including death at any time resulting therefrom, the company agreed "To insure the assured against loss by reason of the liability imposed by law upon the assured for damages on account of such injuries, and to pay and satisfy judgments finally establishing assured's liability in actions defended by the company, all subject to the limits expressed in paragraph 9 of the declarations." During the life of the policy John Campbell met his death as a result of falling into an open, unguarded trench, excavated by plaintiffs in a street in the city of Gillespie, Illinois. The trench was excavated by plaintiffs in performance of a contract with said city for the construction of a sewer.

In May, 1926, an action was begun in the circuit court of Macoupin county, Illinois, by the administratrix of the estate of said Campbell against the city of Gillespie, to recover against said city for negligently causing the death of Campbell. Plaintiffs herein were not made parties to that action. The ground alleged for the recovery of damages was the negligence of the city. No negligent act of the contractors, plaintiffs herein, was alleged in that action. Plaintiffs were notified of the action, and they, in turn, notified defendant, and requested it to defend said action. Defendant did not appear or defend in that action, on the ground that no judgment was sought against the plaintiffs herein, and no negligence of theirs was alleged. In that action the administratrix recovered a judgment against the city of Gillespie, only a small part of which has been paid by the city. The city is now threatening to bring action against plaintiffs, on the ground, as it claims, that the plaintiffs are liable to the city, under its contract, for the loss the city has sustained or will sustain by reason of the judgment recovered by the administratrix of Campbell, deceased. Plaintiffs sought a declaratory judgment, determining that, if they were liable under their contract to the city of Gillespie, such liability was one imposed by law, and that the policy of insurance, issued by defendant to plaintiffs, protected them from loss arising from such liability.

Section 6 of the uniform declaratory judgments act, being section 20-21,145, Comp. St. 1929, reads as follows: "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

In *Lynn v. Kearney County,* 121 Neb. 122, this court held: "Declaratory judgments act examined, and *held* to be applicable to actions wherein there is an actual controversy, and where only justiciable issues are presented by proper parties. So construed, the act does not confer on the courts nonjudicial powers."

The questions, then, presented for our determination are whether the judgment, as sought by plaintiffs, if rendered, would terminate the uncertainty or controversy giving rise to the proceeding; and are justiciable issues in an actual controversy presented by proper parties? Unless both propositions are answered in the affirmative, plaintiffs are not entitled to the relief demanded.

It is clear that the trial court in this case had no jurisdiction to determine any controversy between plaintiffs and the city of Gillespie, because the city is not a party to this action. No judgment rendered by this court would be binding upon the city, and if not binding upon the city, neither would it be binding upon the plaintiffs with respect to any liability claimed against them by the city. Hence, it follows that, had the trial court attempted to render a judgment in conformity with the prayer of plaintiffs' petition, it would not terminate the uncertainty or controversy.

The policy of insurance, the provision of which plaintiffs seek to have construed, has long since terminated, and there is no claim of any other possible liability, except that growing out of the accident resulting in the death of Campbell. Any attempt to construe the policy, except with respect to that possible liability, would not present any justiciable issue. There would be no actual legal controversy. True, there might be a difference of opinion as to the proper construction of the provision of the policy. The declaratory judgments act, however, does not undertake to decide or declare the right or status of parties upon a state of facts which is future, contingent or uncertain. *Tanner v. Boynton Lumber Co.*, 98 N. J. Eq. 85.

In *Washington-Detroit Theatre Co. v. Moore*, 249 Mich. 673, the supreme court of Michigan, in speaking of the declaratory judgments act, said (p. 676): "That the present act does not constitute a court a fountain of legal advice to fill the cups of loitering wayfarers is also amply sustained by judicial opinion." In that case it

was also said (p. 677): "There must be an actual and *bona fide* controversy as to which the judgment will be *res adjudicata*. Such a case requires that all the interested parties shall be before the court. * * * The court will not decide as to future rights but will wait until the event has happened, unless special considerations otherwise require."

We are of the opinion that the present record does not present a case where there are justiciable issues arising out of an actual, present controversy; nor are all parties, necessary to a determination of the question, before the court.

The judgment of the trial court denying relief to plaintiffs is right and is

AFFIRMED.

FEDERAL TRUST COMPANY, APPELLEE, V. EMMA DAMRON ET AL., APPELLANTS: HARRY E. FARQUHAR ET AL., APPELLEES.

FILED APRIL 7, 1933. No. 28334.

1. **Attorney and Client.** An attorney, after receiving the confidence of a client, may not enter the service of others whose interests are adverse to such client and those in privity with him, in the same subject-matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof.
2. **Corporations: CONTRACTS: ESTOPPEL.** If an officer of a corporation, or other person, assuming to have power to bind the corporation by a given contract, enters into the contract for the corporation, and the corporation receives the fruits of the contract, and retains them after acquiring knowledge of the circumstances attending the making of such contract, as well as the terms thereof, such corporation will thereby become estopped from afterwards rescinding the same, and will be deemed to have adopted it.
3. **Trusts.** "A trustee, accepting a trust, receiving and holding the trust property, will not be permitted to set up a claim of title in himself to such property." *Miles v. Miles*, 120 Neb. 436.

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

Francis V. Robinson and *Herman Ginsburg*, for appellants.

John J. Ledwith and *Beghtol & Foe, contra.*

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

EBERLY, J.

This is a proceeding under the Nebraska uniform declaratory judgments act. The Federal Trust Company filed a petition in the district court for Lancaster county asking for a declaration determining its rights and duties as to the proceeds of a life insurance policy of $50,000 issued by the Aetna Life Insurance Company of Hartford, Connecticut, covering the life of Corl E. Reynolds, now deceased, and late president of the petitioner.

This pleading also sets forth the following allegations, among others: (1) That this policy was applied for by the assured on June 12, 1926, bears date July 2, 1926, was delivered July 9, 1926, and required payment of premiums to be made monthly. This policy also provides: "During the lifetime of the insured, the right to receive all cash values, loans and other benefits accruing hereunder, to exercise all options and privileges described herein and to agree with the company to any change in or amendment to this policy shall vest alone in the insured (herein called the life owner);" and further provided in substance that the "beneficiary" may be changed as often as desired upon written request of assured, etc.; and that the amount specified in the policy shall be payable immediately upon receipt at the home office of the insurer of due proof of death of the insured, to the beneficiary, Federal Trust Company, of Lincoln, Nebraska, as trustee. It was further stipulated in the policy: "The Aetna Life Insurance Company of Hartford, Connecticut, shall not be responsible for the application or disposition of the proceeds of this policy by the trustee, and payment to and receipt by the trustee shall be a full

discharge of the liability of said insurance company hereunder."

(2) That on July 9, 1926, this policy was delivered to and accepted by the insured (also hereinafter designated as grantor), and the first month's premium paid to the insurer out of insured's own funds.

(3) That on the 9th day of July, 1926, an agreement in writing was executed by Corl E. Reynolds in his own behalf, and by the "Federal Trust Company of Lincoln, Nebraska, Trustee, by C. E. Reynolds, President. Attest Roscoe J. Slater, Secretary." This agreement, revokable at the option of the grantor, provided that the trust company on death of insured should collect such insurance money and, less collection fees, etc., pay certain indebtedness therein referred to and described, and the balance remaining to be then considered as part of the assets of the insured's estate. It was provided in the sixth paragraph of this agreement: "The grantor agrees to pay all premiums on said policy during the continuance of said trust, and it is further agreed that the trustee shall in no way be bound to pay such premiums or see that the premiums of such insurance are kept in force. The trustee shall have no duty in respect thereto until it receives the proceeds thereof at the maturity of said policy."

On April 22, 1927, another agreement, expressly made revokable at the option of grantor, was entered into in the same manner as the agreement of July 9, 1926. This agreement, which was substituted for, and in effect annulled the agreement of July 9, 1926, provided for the collection of the insurance money by the Federal Trust Company of Lincoln, as trustee; directed its use in the discharge of certain obligations of the grantor, and the payment by trustee of the balance of the fund then remaining to the representatives of the grantor's estate. Further this instrument provided: "7th. The grantor agrees to pay all premiums on the said policy during the continuance of this said trust or cause same to be paid

and it is further agreed that the trustee shall in no way be bound to pay such premiums or see to it that said insurance is kept in force. The trustee shall have no duty in respect thereto until it receives the proceeds thereof at the maturity of said policy."

On August 21, 1930, the last trust agreement in writing, which is the agreement in controversy in this case, was made. It was signed by Corl E. Reynolds in his own behalf, and the "Federal Trust Company, by C. E. Reynolds, President," in the presence of two witnesses who executed the document as such on the part of the trust company. (Corl E. Reynolds and "C. E. Reynolds, President" are one and the same person.) This instrument recites that the Federal Trust Company has paid all the premiums to date on said policy of life insurance; expressly cancels the trust agreement of April 22, 1927; provides for the collection of the $50,000 policy by the Federal Trust Company as trustee; and provides: "2d. The trustee shall, after paying any necessary expenses incurred in the collection of said insurance, repay to the Federal Trust Company all advancements made by it to pay premiums on said policy of life insurance, together with interest on each advancement from the date of the making thereof to the date of the death of the grantor at the rate of six per cent. per annum, the repayment of said premiums and the interest thereon to be a first lien and claim against the proceeds of said policy of life insurance;" also provides for the payment of certain unpaid indebtedness of the insured existing at the time of his death, and for the loan of the remaining funds, after making the above payments, to the Federal Trust Company upon certain conditions without interest for the period of two years; and further recites: "At the end of said period of two years, or sooner if the control of said Federal Trust Company shall change as hereinbefore provided," the trustee shall pay certain amounts thereof to individuals specified and described, and in the event the sum for distribution is more than sufficient to pay

distributees in full, then the balance remaining shall be paid said Federal Trust Company absolutely.

The petition further states, and the evidence is undisputed to the effect, "that said Corl E. Reynolds died on the 27th day of December, 1930, and said Aetna Life Insurance Company, on proof of loss being duly made by plaintiff, paid on January 17, 1931, the sum of forty-seven thousand nine hundred thirty-four and 66/100 dollars ($47,934.66) to the plaintiff as trustee in full of the obligation of said policy."

The petition also set forth that at a duly called special stockholders' meeting of the Federal Trust Company, held on April 14, 1931, a resolution was duly adopted by the stockholders thereof which ratified and confirmed in all respects the trust agreement of August 21, 1930, and this corporation was thereby directed to carry out the terms and conditions thereof as therein provided.

To this petition John J. Ledwith and other stockholders, constituting a minority of the outstanding stock, filed a pleading in the nature of an answer and cross-petition. Essentially all the allegations of the petition leading up to and including the receipt of the fund in controversy by the Federal Trust Company are admitted. The validity of the trust agreement of August 21, 1930, and of the ratification thereof by the stockholders in the meeting of April 14, 1931, is challenged and denied. It is alleged that such action of the stockholders was wholly due to the fact that stock in the trust company, owned by Corl E. Reynolds in his lifetime, which constituted more than 50 per cent. of the outstanding stock thereof, was by his executors, at such meeting, without authority, wrongfully and illegally voted for the adoption of the resolution of approval and ratification; and that without such illegal votes such resolution would not have been adopted. It is also alleged that the trust fund in controversy was, in his lifetime, purchased by Corl E. Reynolds, the president and managing officer of the Federal Trust Company, a corporation, as a life insurance policy covering his own

life, for the use and benefit of the corporation, and was paid for by this company, and is its exclusive property. As relief, these minority stockholders ask that the stockholders' resolution of ratification and affirmance adopted in the manner set forth on April 14, 1931, as well as the trust agreement of August 21, 1930, be declared ineffectual, null and void; that the Federal Trust Company of Lincoln, Nebraska, be declared the sole owner of the fund in controversy; and that all other persons be enjoined from asserting a right thereto.

To the petition, and the pleading of the minority stockholders, the beneficiaries designated as such in the trust agreement of August 21, 1930 (exclusive of the petitioner) joined with the owners of a majority of the stock of the corporation, and by their answer admitted the allegations of the petition, but tendered issues as to allegations of fact and law set forth and relied upon by John J. Ledwith and the minority stockholders associated with him in their answer and cross-petition hereinbefore set out. By way of prayer they asked that the Federal Trust Company be directed and instructed to recognize and enforce each and every one of the provisions of the agreement of August 21, 1930 (the trust agreement in suit), and that all other defendants herein be enjoined from interfering in any manner with the strict enforcement thereof. To this pleading replies were filed.

The trial in the district court resulted in a finding and judgment for John J. Ledwith and the minority stockholders associated with him, determining, specially, "that the resolution of ratification (of April 14, 1931) * * * is null and void; * * * that the Federal Trust Company, as trustee, pay the fund in question, together with interest thereon, to the Federal Trust Company as sole owner thereof and not subject to the conditions and obligations of the trust agreement herein in question."

From the order of the trial court overruling their motion for a new trial, the beneficiaries appeal.

The trust company, it will be remembered, is a Nebraska corporation. The articles of incorporation form-

ing a part of the contract of membership is not found in the record. However, it is expressly empowered by statute, "To accept and execute all such trusts as may be committed to it by any * * * person;" to "take, accept and hold * * * by gift, grant, assignment, transfer * * * any * * * personal property in trust;" to "care for, manage and convey the same in accordance with such trusts;" and "perform any and all such trusts," to "loan money upon * * * collateral security (within defined limitations);" and "to buy, hold and own and sell * * * warrants, bills of exchange, notes, mortgages and other investment securities, negotiable and nonnegotiable;" and lastly to "perform all acts and exercise all powers connected with, belonging to or incident to, or necessary for the full complete exercise and discharge of the rights, powers and responsibilities hereinbefore granted, and all provisions of this article shall be liberally construed." Comp. St. 1929, sec. 8-206.

Under the terms of the statute from which the foregoing excerpts are quoted, the rights and powers of petitioner "as trustee" upon the death of the insured, to accept and receive the proceeds of a life insurance policy on his life, payable to it as trustee, is unmistakably conferred. Its corresponding duty to execute and perform such trust as validly declared and directed by the settlor thereof is equally clear and undisputable.

Corl E. Reynolds in his lifetime was the owner of 504 of the 1,000 shares of issued stock of the Federal Trust Company. He was its president and managing officer. From facts in the record it may be inferred that he largely dictated the policies that controlled its business affairs, to such an extent that this institution may be justly termed a "one-man company." From the beginning to the end of the transaction or transactions out of which this litigation has grown, his was the responsible, controlling, and dominating mind. Yet the record before us, both pleadings and evidence, contains nothing that challenges his integrity or casts the slightest doubt upon

his honesty of purpose, but on the contrary it establishes his entire good faith, and fully negatives any participation on his part in actual fraud, or fraudulent conduct in the business which forms the subject of investigation in this suit.

On August 20, 1930, Corl E. Reynolds was suffering from sarcoma, and since the previous May had been confined to his home. He was preparing to leave Lincoln in search of medical aid.

The insurance policy, the basis of the present suit, had been in force 38 months, and an equal number of monthly premiums had been paid. This policy, together with the first trust agreement of July 9, 1926, and the second trust agreement of April 22, 1927, which superseded it, were then reposing in the "trust files" of the Federal Trust Company. The first five monthly premiums on this policy had been paid from the insured's own funds; the subsequent payments for that purpose had been remitted by his order from the moneys of the trust company; and from the same source he had been reimbursed for the five monthly premiums paid thereon by himself. The books of the trust company covering these transactions are not before us, but there is no complaint that they do not correctly reflect these transactions; neither is concealment charged. From the evidence it affirmatively appears that the trust files, as well as the books of the trust company, were at all times open to reasonable inspection, not only by executive officers but by directors and stockholders as well. But in view of the admitted facts, whatever the form of the book entries may have been, the transactions themselves, to the extent of the money paid out for premiums, created a debtor and creditor relation between Reynolds and his trust company. The solvency and financial responsibility of Reynolds is not questioned.

An officer of a corporation "is bound to account to the corporation for all moneys that come into his hands by virtue of his official position, as well as for sums of

money which he has wrongfully accepted from the funds of the corporation." 14A C. J. 109.

On August 20, 1930, the sick man called to his home H. B. Reynolds, his brother, who was then and for many years had been a director and stockholder of the Federal Trust Company. To this brother was dictated the substance of the document which appears in this record as the trust agreement of August 21, 1930, and which supersedes the agreement of April 22, 1927. This proposed agreement, typewritten in temporary form on yellow paper, was immediately submitted to John J. Ledwith, a practicing attorney at law, at his office in Lincoln. Mr. Ledwith, after careful examination and deliberate consideration, approved the proposed instrument as valid and as "a fine agreement," and made recommendations as to the manner and form of execution, all of which were complied with. In reliance upon this opinion, and in conformity therewith, the trust agreement of August 21, 1930, was thereupon executed. On December 27, 1930, Corl E. Reynolds died.

Now, Mr. Ledwith in this court, in his capacity as a stockholder in and a director of the same trust company, as a party to the joint answer and cross-petition filed herein on behalf of the minority stockholders thereof, and as the sole attorney for those so associated with him, challenges the validity of the instrument he formerly approved and the transaction it evidences.

But, he was such director and stockholder when his former opinion of approval was rendered, reliance on which resulted in the execution of the trust agreement of August 21, 1930. And it is to be remembered that prior to this last agreement the Federal Trust Company, due to the terms of the life insurance policy from which the fund here in litigation was derived, had no assurance of receiving from Corl E. Reynolds more than the amount of money which had been employed in the payment of the monthly premiums with legal interest thereon. These premiums on August 21, 1930, totaled $4,180, exclusive

of interest, and the cash value of the $50,000 policy was then but $950.

By the execution of the approved agreement of August 21, 1930, the repayment of the advances made by the trust company with interest at 6 per cent. was made a first lien on the proceeds of the life insurance policy payable on the death of the insured; and provisions were also incorporated in this instrument for the benefit of the trust company, through which it will receive as a gift more than $7,000, in addition to the repayments directed.

But, not satisfied with these returns, the minority stockholders in the present proceeding seek to have appropriated to the private use and benefit of the stockholders of the Federal Trust Company the sum of $47,934.66, being the entire proceeds of the $50,000 life insurance policy which, under its terms, was paid to that corporation "as trustee," and also seek to have the provisions of the trust agreement of August 21, 1930, adjudged void and of no effect.

As to Mr. Ledwith, it is thought that the applicable rule is: An attorney, after receiving the confidence of a client, may not enter the service of others whose interests are adverse to such client, in the same subject-matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof. 1 Thornton, Attorneys at Law, 307.

It is clear that the contract here in suit was executed after the approval of Mr. Ledwith, and in reliance upon his advice. As to objections he now urges, he was silent then. Corl E. Reynolds is now silent in death, and his power to correct an honest mistake, if mistake there was, has ceased. In good conscience, in view of the surrounding circumstances, the silence of the attorney, relied upon in the transaction we now consider, must remain unbroken, for this, a court of equity and conscience, may not hear complaint in his behalf that should have been made, if at all, when Reynolds yet lived.

"A man shall not be allowed to blow hot and cold—to affirm at one time and deny at another—making a claim on those he has deluded to their disadvantage, and founding that claim on the very matters of the delusion." Broom's Legal Maxims (9th ed.) 116. See, also, *Goble v. O'Connor,* 43 Neb. 49.

The contention of the minority stockholders that, due to uncertainty and lack of mutuality, the trust agreement of August 21, 1930, is void cannot be sustained. The insurance moneys covered by this contract were actually accepted and received by the proper officers of the trust company. The business was of a nature which the statute expressly empowered it to transact. The receipt of the proceeds of this insurance policy by the company and the agreement now in controversy were expressly and formally called to the attention of the board of directors of the trust company at their regular January meeting following its receipt. Later, special directions were made by this board in reference to the keeping and use of this money by the trust company. Following this, at a special meeting of the stockholders duly called to consider the matter, and after proper explanations as to the facts of the transaction, it appears that, while there was a divergence of views as to the ultimate disposition of the fund, the action of the executive officers in accepting and receiving the proceeds of the life insurance policy under the terms of the policy "as trustee" was not even criticized, and by fair implication almost unanimously approved. The beneficiaries of the contract were also ascertainable at the time the money was received by the trust company. The conclusion therefore follows that an enforceable trust was thereby created.

"Wherever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter and the obligation may be enforced by assumpsit." *Estate* of *Devries v. Hawkins,* 70 Neb. 656.

"Where a life policy, payable to a certain person as trustee, discloses neither the terms of the trust nor the

beneficiary, the declarations of the trustor, parol as well as written, are admissible to establish the beneficiary and the terms of the trust." *Kendrick v. Ray*, 53 N. E. 823 (173 Mass. 305). See, also, *Crowley v. Crowley*, 72 N. H. 241.

In *Estate of Devries v. Hawkins, supra*, a parol declaration was held sufficient, in connection with the surrounding circumstances, to identify the beneficiary and establish the terms of the trust.

But this written instrument, as we have seen, was also executed by an officer of the trust company. These facts invoke the rule: "If * * * an officer of a corporation, or other person, assuming to have power to bind the corporation by a given contract enters into the contract for the corporation, and the corporation receives the fruits of the contract, and retains them after acquiring knowledge of the circumstances attending the making of the contract, it will thereby become estopped from afterwards rescinding or undoing the contract. In other words, by retaining the fruits of the unauthorized contract with knowledge of the circumstances which entitle it to its election either to affirm or disaffirm it, the corporation ratifies the contract and makes it good by adoption." 3 Thompson, Corporations (3d ed.) 698.

"A corporation cannot be heard in retaining the fruits of an unauthorized contract to advance the defense of *ultra vires* when sued on the contract, especially when the contract is an entirety and indivisible. Then every proposition therein contained must stand or fall together." *Griffin v. Bankers Realty Investment Co.*, 105 Neb. 419. See, also, *Alexander v. Culbertson Irrigation & Water Power Co.*, 61 Neb. 333; *Sturdevant Bros. & Co. v. Farmers & Merchants Bank*, 62 Neb. 472; *Johnson v. Nebraska Building & Investment Co.*, 109 Neb. 235.

In addition, it may be said the petitioner "as trustee" not only received, and has since retained, the insurance moneys covered by the foregoing trust agreement, but by the payment "as trustee" therefrom to itself in its indi-

vidual capacity of the sum of $5,930.70 and also payment therefrom made to certain other beneficiaries of said trust, all as required by the terms thereof, has brought itself squarely within the rule announced by this court in *Miles v. Miles*, 120 Neb. 436, viz.: "A trustee, accepting a trust, receiving and holding the trust property, will not be permitted to set up a claim of title in himself to such property."

It follows that the so-called trust agreement of August 21, 1930, considered as a unilateral instrument executed by Corl E. Reynolds alone as trustor, as a declaration of trust in connection with the payment and receipt of the insurance by the trust company, affords ample evidence to establish the creation of the trust, to identify the beneficiaries, and defines and enumerates the duties and obligations which its terms require to be performed.

We conclude that, in view of the facts of this case, the trust agreement here in question is to be deemed in all respects valid and enforceable, and that its several terms should be strictly carried out and performed, and that the district court erred in the judgment and decree entered.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter a decree in accordance with this opinion and as prayed by the majority stockholders.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. NEWMAN GROVE STATE BANK, APPELLANT: CENTRAL NATIONAL BANK OF COLUMBUS, INTERVENER, APPELLEE.

FILED APRIL 7, 1933. No. 28498.

1. **Banks and Banking**: TRUST FUNDS. Items sent to a bank for collection and the proceeds thereof are held in trust for the owner.
2. ———: ———. Such trust is executed when owner requests and accepts exchange of the bank.

3. ———: ———. Letter transmitting a collection item to bank with instruction, "When paid, kindly forward us your draft in payment," is such a request for the exchange of the bank as terminates the trust relation when and if the draft issues.

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

F. C. Radke, Barlow Nye, G. E. Price, H. Halderson and *Moyer & Moyer,* for appellant.

Wagner & Wagner and *Kelsey & Kelsey, contra.*

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

DAY, J.

This is an action to recover from the receiver of the Newman Grove State Bank the proceeds of an item sent to it for collection by the Central National Bank of Columbus. The item was collected and the collecting bank sent its draft for the proceeds, which was not paid because of the insolvency of the Newman Grove bank. The trial court held that the claim was a trust fund. This transaction took place between the 15th and the 17th days of July, 1929. Section 12, ch. 41, Laws 1929, commonly known as the uniform collection code, now section 62-1812, Comp. St. 1929, is not, therefore, applicable to this case, since it did not go into effect until July 25, 1929. The Newman Grove bank was the agent of the Columbus bank to make the collection and transmit the proceeds to the Columbus bank. It held the collection item and the proceeds in trust for the Columbus bank. *State v. Nebraska State Bank,* 120 Neb. 539; *Anheuser-Busch Brewing Ass'n v. Morris,* 36 Neb. 31; *Griffin v. Chase,* 36 Neb. 328; *State v. Bank of Commerce,* 61 Neb. 181; *State v. Citizens State Bank,* 117 Neb. 358; *Eifel v. Veigel,* 169 Minn. 281.

The controversy in this case arises over the fact that, in the letter of transmittal, the Columbus bank instructed the Newman Grove State Bank as follows: "When paid,

kindly forward us your draft in payment, less your customary charge." Does this instruction operate to terminate the relationship of principal and agent and establish the relationship of debtor and creditor upon the issuance of a draft to cover the amount, which is accepted by the Central National Bank, but which was not paid due to the insolvency of the Newman Grove State Bank? It is generally held that the trust is destroyed where the forwarding bank requests and accepts from the collecting bank its own obligation or where there is an agreement that the bank's own obligation shall be substituted for the moneys collected. In accord with this, it has been held that, where a bank received payment of a note placed with it for collection, and in compliance with the request of the owner, he is sent a cashier's check for the amount when there is cash on hand sufficient to meet it, the owner becomes a creditor of the bank, entitled to no preference over ordinary creditors upon the failure of the bank, leaving an unpaid draft. *Massey-Harris Harvester Co. v. First State Bank,* 122 Kan. 483; *Colorado & S. R. Co. v. Docking,* 124 Kan. 48; *Lummus Cotton Gin Co. v. Walker,* 195 Ala. 552. Practically to the same effect is our holding in *State v. First State Bank,* 123 Neb. 643, where a trust fund in a bank was paid at the request of the beneficiary by means of a draft, it was held that a request for payment by draft was equivalent to the purchase of the exchange of the bank. The trust character of the fund was destroyed by a request for and an acceptance of a draft in exchange.

The above cited cases are from jurisdictions which have adopted the trust theory with respect to collections made of items forwarded to a bank for collection, and even in these jurisdictions, it is generally held that the trust relationship is terminated when the owner of the item requests collection and payment by draft and pursuant to this request a draft is issued. It is equivalent to taking the cash which the bank has collected and purchasing exchange of the bank with it. The cases

which hold that the issuance of a draft does not terminate the trust relationship are based upon the theory that, the draft having been issued to pay an obligation that is of a trust character, the issuance of the draft does not destroy that character, but they are, without exception, cases in which there was neither a request for nor the voluntary acceptance of a bank draft. See *Milne v. Capital Trust & Savings Bank,* 170 Minn. 66; *National Bank of the Republic v. Porter,* 44 Idaho, 514.

It is argued that whether or not a bank which has made a collection and remitted by its draft to the owner of the item is a debtor or trustee depends upon the intention of the parties. *Federal Reserve Bank v. Peters,* 139 Va. 45, is relied upon to support this sound rule. In this case, says the appellant, the intention was that the bank was to collect the money and remit, it being the intention of the Central National Bank that the collecting bank would remit the cash or its equivalent. The intent of the parties in the present transaction must be inferred from the letter of transmittal, and in that letter the instruction is unequivocal that the collecting bank should, "When paid, kindly forward us your draft in payment, less your customary charge." There is no ambiguous language which would require us to go beyond the letter of instruction to determine the intent of the parties. In view of this positive and definite instruction, the forwarding bank asked for and received exchange of the Newman Grove State Bank, and as a holder of such exchange, it is entitled to a prior claim against the assets of the bank in common with the depositors.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter a judgment finding that the intervener, the Central National Bank, is a holder of exchange, entitled to be paid as a depositor from the assets of the bank, but is not entitled to have a trust impressed upon the assets of said bank.

REVERSED.

J. M. CREWS, APPELLEE, V. HARMAN J. ALBERTS, APPELLANT.

FILED APRIL 7, 1933. No. 28514.

1. Mortgages: FORECLOSURE: SALE: CONFIRMATION. Inadequacy of price will prevent confirmation of foreclosure sale, if sufficient to shock conscience of court or to amount to fraud.
2. ———: ———: ———. Trial court has duty to determine, by unrestricted means, whether at foreclosure sale price is adequate or whether at a subsequent sale more would be realized.

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

J. F. Ratcliff, for appellant.

Lehman & Swanson, contra.

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

DAY, J.

This is an appeal from an order confirming a sale under a decree of foreclosure. The trial court found that the real estate sold for its fair and reasonable value and that a subsequent sale probably would not realize a greater amount.

There was testimony of several witnesses that the value of the land was more than it brought, but these witnesses, including appellant, also testified that they did not know any one who would pay any more if a resale was ordered. There was other evidence that the land sold for its full present value. The price bid was sufficient to pay the mortgage debt. Upon the hearing of the motion of confirmation, the court entered an order that, if the appellant could procure a bidder within thirty days who would bid $300 in excess of the amount of the sale, it would be set aside and a new sale ordered. No such bidder was produced, and the sale was confirmed. The finding of the trial court was justified by the evidence, especially since it was evident that a subsequent sale would not produce a higher bid. *Seymour v. Lawson*, 111

Neb. 770. The evidence does not support a finding that the price was inadequate. *Lemere v. White,* 122 Neb. 676; *Lindberg v. Tolle,* 121 Neb. 25. The judgment of the district court is therefore affirmed, with leave to the appellant to redeem before the issuance of mandate.

AFFIRMED.

COLUMBUS LAND, LOAN & BUILDING ASSOCIATION, APPELLANT, V. GEORGE W. PHILLIPS, APPELLEE.

FILED APRIL 7, 1933. No. 28468.

Mortgages: FORECLOSURE: STAY OF SALE. The district court is powerless to extend the time for filing a request for stay of the order of sale on a decree of foreclosure beyond the 20 days provided by section 20-1506, Comp. St. 1929.

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

Wagner & Wagner, for appellant.

Otto F. Walter, contra.

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

PAINE, J.

This case is brought here on an appeal from an order of the district court recalling an order of sale and allowing a request for a nine months' stay to be filed after the 20 days had expired.

The decree of foreclosure was entered March 25, 1932, and more than 20 days thereafter, to wit, upon April 16, 1932, an order of sale was issued by the clerk of the district court to the sheriff of Platte county to sell the property, and legal advertisement of said sale was begun in the newspaper. Thereafter, and upon May 3, 1932, the defendant, George W. Phillips, filed a motion, asking that the sheriff be required to immediately return to the office of the clerk of the district court the order of sale issued some 17 days prior thereto, and moving the court to

issue an order authorizing him to be permitted to file a request for a nine months' stay. Said motion was supported by an affidavit of the defendant, setting out that shortly after the foreclosure suit was commenced he had an attorney prepare for him a formal request for a stay, and, being without funds, he had not employed counsel for any other purpose; that the attorney mailed the request for a stay to him with instructions for signing and filing it after the decree of foreclosure was entered, but that he had mislaid the request for a stay among a multitude of other papers in his files, and that the matter had entirely slipped his memory until he observed the first publication of notice of sale of his property in the newspaper. He further set out that he had had severe financial reverses and family trouble, which had caused him mental pain and suffering, so that his health had been broken, and his mental condition, memory, and ability to attend to details of business had been seriously impaired.

Upon this motion and affidavit the trial court, upon May 14, 1932, partially granted the request, and entered an order that the sheriff should proceed under the order of sale with reference to the real estate described therein, except as to the homestead of the defendant, against which the order of sale was stayed, and the defendant was authorized to file his request for stay of execution, and supersedeas bond was fixed in the sum of $200. Upon May 16, 1932, notice of appeal was given and bond filed by the plaintiff, Columbus Land, Loan & Building Association. The plaintiff thereupon proceeded with the sale, but the court has held the confirmation of said sale in abeyance, so that more than nine months have elapsed, and said sale has not yet been confirmed.

Section 20-1506, Comp. St. 1929, provides that the order of sale on all decrees of foreclosure shall be stayed for the period of nine months whenever the defendant shall, within 20 days after decree, file with the clerk a written request for the same, but if no such request is filed the

order of sale may issue immediately after the expiration thereof.

We are cited in the brief of the appellee to but one authority in support of the action of the trial judge, which is the case of *State v. Laflin,* 40 Neb. 441, which the appellee cites as holding that the court has power to recall an order of sale for the purpose of permitting the defendant to file a stay. In the case cited, it was held that the filing in this court of a petition in error to review an order of the district court, recalling an order of sale and permitting the request for stay to be filed, does not vacate or suspend such order, and that mandamus would not issue when its effect would be to reverse or vacate an order of a court having jurisdiction to make the order, although the order might be palpably erroneous, and that such an order of the district court could be reviewed on error or appeal.

In the case of *Hawkins v. Mullen,* 119 Neb. 567, it was held that, in a suit in equity to foreclose a contract to purchase land, where said contract is treated as a mortgage lien, the vendor is entitled to a stay of nine months if the request for such stay is filed within the 20 days.

In *Jenkins Land & Live Stock Co. v. Attwood,* 80 Neb. 806, it was held that, where the request for stay was on file prior to the entry of the decree, it was as effective to stay the issuance of an order of sale as though it had been filed within 20 days thereafter, for such filing constitutes a continuing request for such stay. It is also held that the statute plainly limits 20 days subsequent to the decree as the time within which the stay may be filed, and that a stay filed thereafter is inoperative, and that it is not within the power of the courts to enlarge that time.

In the case of *Hoyt v. Little,* 55 Neb. 71, decree of foreclosure was entered June 5 for $363. July 11, order of sale was issued; July 20, a remittitur of $20 was entered in open court, changing the decree to one for $343; and on the same day a request for stay was filed,

the claim being that such request so filed would stay the sale, but this court held that the fact that a remittitur was filed on July 20 did not vacate the decree of foreclosure entered on June 5, any more than a payment on the decree on said date would have vacated the order of sale, and that the request for stay was not filed within 20 days after June 5.

The case at bar was argued orally by the appellant only, and the defendant's attorney mailed a letter to the court, stating that his client had died since he had filed his brief. In this case no claim is made that the defendant was prevented from filing his request for stay by any failure on the part of any officers of the court, but his affidavit sets out the fact that he had been subjected to so much domestic and financial trouble that he forgot and left the request for stay among his papers, and did not file it within the period granted by the statute of 20 days.

No sufficient ground has been presented to this court to set aside the clear requirements of the statute, and we find that the district court was without any authority to recall the order of sale and allow request for stay to be filed after the 20 days had expired. If a longer period for filing such request seems needed by economic conditions, relief in that regard must come from the legislature. The judgment of the district court is hereby

REVERSED.

CONTINENTAL NATIONAL BANK OF LINCOLN, APPELLEE, V. MARGARET WILKINSON ET AL., APPELLANTS.

FILED APRIL 7, 1933. No. 28516.

Set-Off. A claim on the part of a defendant, which he will be entitled to set off against the claim of the plaintiff, must be of a reciprocal demand, existing between the same persons, in the same capacity, at the same time, and arising out of the same transaction.

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

Stout & Baird, for appellants.

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

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

PAINE, J.

The plaintiff brought suit in equity to secure judgment on defendants' promissory note of $11,500, and to foreclose and sell collateral deposited therewith. A counterclaim, asking judgment for $17,464, was dismissed by the district court. Judgment entered for plaintiff. Defendants separately ask a new trial, and appeal to this court from the overruling of such motions.

This was a suit brought against Rees Wilkinson and his wife, Margaret, upon a promissory note signed by both of them, and to foreclose and sell the collateral put up with the note. The original note was for $25,000, but payments had been made thereon by the defendants, and the final renewal note sued upon is for $11,500, dated October 11, 1931, and due November 11, 1931, and bearing 10 per cent. interest from that date.

In the answer and cross-petition, Rees Wilkinson admits the execution of the note, and sets up a counterclaim for loss on a bond transaction of $17,464, which brings up for examination a series of dealings between the parties hereto. It appears that the original deal was between Rees Wilkinson, who was president of the Indemnity Company of America, and William Seelenfreund, who was at that time the president of the Continental State Bank, now the plaintiff, the Continental National Bank.

The negotiations for the purchase of approximately $25,000 worth of bonds, to place in the reserve of the Indemnity Company of America, lasted for several months. Mr. Wilkinson contends that Mr. Seelenfreund understood exactly the purpose of buying the bonds, and

that it was agreed between them that the bank would, at any time, upon demand, repurchase the bonds, or any of them, at the price paid, less one month's interest.

Mr. Wilkinson, the managing officer of the Indemnity Company of America, contends that his acts in the purchase of the bonds to go into the reserve of that company, and the raising of the money by himself and wife to be furnished to the corporation to buy the bonds, were all one and the same transaction, but, in the manner in which this transaction was handled by William Seelenfreund for the bank, it was distinctly two entirely separate transactions, distinct and independent of each other, for Mr. Wilkinson and his wife borrowed $25,000 on their promissory note, and pledged as collateral security therefor 140 shares of stock of the National Automobile Insurance Company and 300 shares of stock in the National Old Line Life Insurance Company, together with four surplus notes of $5,000 each, issued by the Indemnity Company of America to Margaret Wilkinson, and indorsed by her, which surplus notes could only be retired by the company issuing them in a certain way, from certain designated profits.

On receipt of this $25,000 note, so secured, Mr. Seelenfreund caused to be issued to Margaret Wilkinson a cashier's check, of the same date as the note, June 30, 1928, but this check was not delivered to her, but retained by the bank. She was compelled to come to the bank and there indorse the check, which was, on the same day, July 9, 1928, deposited to the credit of the Indemnity Company of America. Then J. C. Heitkotter, treasurer of that company, gave the company's check, in the amount of $24,409.67, dated August 30, 1928, for the bonds for which Mr. Wilkinson had bargained, which bonds thereupon became a part of the reserve of that company. A report was immediately issued by that company, showing that these specific bonds were a part of its reserve, and stating that the Continental State Bank had agreed to repurchase these bonds whenever requested, a copy of

which was given to Mr. Seelenfreund. The evidence also discloses that a few of these bonds were resold to the bank, according to the strict terms of the agreement, the bank rebuying them at a loss, as the prices had further declined.

Mr. Seelenfreund retired as an officer of the bank when it was nationalized, and thereafter, when Mr. Wilkinson, on December 10, 1931, tendered back additional bonds, to be purchased on the terms set out, the officers then conducting its affairs disclaimed any knowledge of the alleged oral contract, and refused to even discuss the matter. Mr. Wilkinson claims that he paid a premium in order to secure this repurchase agreement, and that, by a decline in the value of the bonds below the purchase price, and by the refusal of the Continental National Bank to repurchase the same, he has been damaged in the sum of $17,464, for which amount he asks judgment.

The appellant claims that, as he entered into the contract for the benefit of himself and the Indemnity Company of America with the knowledge and consent of the other contracting parties, he may bring this action against the bank, as set out in his counterclaim, without joining with him the Indemnity Company of America, and cites as authority therefor section 20-304, Comp. St. 1929; *O'Shea v. North American Hotel Co.*, 109 Neb. 317; *Coe v. Nebraska Building & Investment Co.*, 110 Neb. 322; *Male v. Lafferty*, 105 Fed. 564.

On the other hand, the appellee contends that a recent decision of this court has made such a claim untenable, and refers us to the case of *Bank of Crab Orchard v. Myers*, 120 Neb. 84, in which the defendant endeavored to offset a deposit he had made in the bank as administrator of the estate when a suit was brought against him on his own promissory note. This court held that mutuality of demand was necessary to entitle a defendant to a set-off, and that the respective demands must be between the same persons and in the same capacity, and showing that an administrator was not personally liable

for the loss of funds of his decedent deposited in a bank unless he was negligent in selecting the depository.

Sections 20-812 and 20-816, Comp. St. 1929, provide the rules to follow in setting up a legal set-off. The ruling of Judge Shepherd in this case was strictly in accord with the decision in the case of *Bank of Crab Orchard v. Myers, supra,* and in the later cases this court has not changed that opinion. In *Bank of Dakota County v. Pedersen,* 121 Neb. 760, this court refused to allow a certificate of deposit, purchased by the defendant after the bank was taken over by the guaranty fund commission, to be set off against his promissory note, and again held: "'A claim on the part of a defendant, which he will be entitled to set off against the claim of a plaintiff against him, must be one upon which he could, at the date of the commencement of the suit, have maintained an action on his part against the plaintiff.' *Simpson v. Jennings,* 15 Neb. 671."

In *American Gas Construction Co. v. Lisco,* 122 Neb. 607, defendant attempted to set up a counterclaim and cross-petition on another contract made between the same parties, but different from the one sued upon by the plaintiff. It was held that the set-off did not arise out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim; that mutuality of demands is necessary to entitle a defendant to a set-off. In other states having statutes similar to the Nebraska statute, it has been held that mutuality is essential to the validity of a set-off, and that the word "set-off" itself implies reciprocal demands existing between the same persons, in the same capacity, at the same time. *Proctor v. Cole,* 104 Ind. 373.

Courts have had some difficulty in finding a wholly satisfactory definition of the term "transaction" as relating to counterclaim. It is generally agreed that it is broader in meaning than the word "contract," for it includes torts. The fact that two transactions originate at the same time and place, and even between the same

parties, as in the case at bar, is not the test, and the important question to be decided in such cases is: Did each cause of action accrue or arise out of the same transaction, that is, the same thing done? Was this transaction, sought to be counterclaimed, one that arose out of an independent contract, or were all of the dealings between the parties embraced in a single contract?

This court must, under the decisions cited herein, find that the trial court was right in dismissing the set-off of the defendant, Rees Wilkinson, for the loss, if any, upon these bonds will clearly fall upon the Indemnity Company of America, which owns the bonds.

This decision does not mean that such company may not have a cause of action, under the alleged repurchase agreement, but our holding simply goes so far as to say that, in the suit brought against the defendants upon the note signed by them, the defendant Rees Wilkinson cannot set off the demand, claim, or rights of the Indemnity Company of America as a defense in this suit. The judgment of the district court is

AFFIRMED.

GEORGE L. BRINTON, APPELLEE, V. GRAND LODGE, ANCIENT ORDER OF UNITED WORKMEN, APPELLANT.

FILED APRIL 14, 1933. No. 28489.

1. Insurance: POLICY: CONSTRUCTION. Provisions in a fraternal policy of insurance will be given a practical and reasonable construction, consistent with fairness, and with a view to avoiding, rather than enforcing, a forfeiture, if the terms of the instrument will justly permit it.
2. Evidence examined and *held* to sustain a finding of total permanent disability of the insured within the terms of the insurance contract.

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

Ray M. Higgins and *W. G. Kieck*, for appellant.

O. B. Clark and *L. R. Doyle, contra.*

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

GOSS, C. J.

Plaintiff held an "ordinary life benefit certificate," hereinafter called a policy, issued by defendant. He sued on the policy for total permanent disability and had judgment for $542. Defendant appealed.

Plaintiff had been a plasterer and mason for about 25 years, is 58 years old and has resided at Elmwood for 17 years. He had been a member of defendant fraternal order and insured therein 18 years. About four years ago the rates were raised and the present policy was issued in lieu of the former one. In January, 1930, he first noticed manifestations of heart trouble. About July 18, 1930, while he was plastering in Elmwood, a scaffold collapsed and he fell, injuring his foot so that it was in a cast for four weeks. Then he walked with the aid of crutches for about eight months.

The policy provided: "If the member becomes totally and permanently disabled, whether by accident or disease, while this certificate is in full force, and if the fact and cause of such total and permanent disability shall be proved to the satisfaction of the Order upon blanks provided for that purpose, the member shall be placed upon probation for a period of six months, during which period all assessments and dues shall continue to be regularly paid by said member. At the end of such probation period, if the disability continues, the Order will consider it total and permanent and will pay to the member in cash, the entire reserve value of this certificate or the sum of Five Hundred and no/100 Dollars (one-half the face amount of this certificate), whichever amount is the greater, as a total permanent disability benefit, upon the surrender of this certificate properly receipted."

The issue was whether the accident and plaintiff's disease totally and permanently disabled him within the meaning of the policy.

The school board for which plaintiff was working when injured paid him compensation for 47 weeks. He has been unable to do the physical work of plastering entailed in the handling and spreading of plaster. More than ordinary walking or use of his injured leg causes his ankle to swell and pain him. Physical exertion produces objective symptoms of angina pectoris. He has ceased to take contracts for plastering and execute them as he did before his injury. His 23 year old son carries on that business. Plaintiff, by reason of his acquaintance and experience, is able to aid in securing for the son that sort of engagements, to make the estimates and to supervise the work to some extent. The father gets no definite wages. The son gives him such financial support as he needs. Plaintiff has no preparation or capacity for mental or clerical work. A physician testified that he ought not to engage in manual labor.

The assignments of error are two: First, that the evidence was insufficient to support the verdict; and, second, that the court erred in the instruction to the jury defining total disability.

The evidence already recited was ample to support a verdict under the quoted terms of the contract set up in the policy. Plaintiff's condition of total disability continued almost without evidential contradiction for a much longer period than that of the contracted "probation for a period of six months" after his accident. Defendant agreed in the policy that, at the end of the probation, if the disability continued, it would consider it "total and permanent" and pay the insured either the reserve value or $500.

The insurer having denied liability, the court's instruction defined plaintiff's condition as one of total disability, if he was wholly incapacitated by accident and disease, or either of them, from performing any and every kind of business for which he was qualified, either as a plasterer, mason, or manual laborer, even though his injury would not prevent him from doing mental work if he

was fitted for it. This last idea of "mental work" is said by defendant to have misled the jury. The argument of defendant, as we understand it, is that the court meant thereby to say that plaintiff might still be capable of what defendant describes as "a more reputable or more dignified occupation, earning just as much money and still be considered totally permanently disabled." The instruction would naturally be understood by the jury in the setting in which it was given. Defendant had little of what is commonly known as education, as he testified and as his oral and written language showed. He could measure walls and estimate costs in the line of his life-work. The intent of the instruction, of course, was to tell the jury that, to the extent that the evidence showed he could do that type of mental work, it would not negative total permanent disability. The jury were not likely to understand that, if he had suddenly become an Einstein or a Shaw, and fabulously increased his income by reason of a mentality undiscovered before, but promoted by, his disease and accident, they were still to find that he was totally and permanently disabled. We do not regard the instruction as prejudicial to defendant.

On this subject of total disability, "the several provisions contained in an accident insurance policy will be given a practical and rational construction, one consistent with reason and common fairness, and with a view to avoiding, rather than enforcing, a forfeiture, if the terms of the instrument will fairly and justly permit it." *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18; *Eastep v. Northwestern National Life Ins. Co.*, 114 Neb. 505. None the less ought this rule to be applied in the construction of a contract of insurance between a fraternal order and one of its members.

The judgment of the district court is

AFFIRMED.

CARL V. E. NEWMAN, APPELLEE, V. DEPARTMENT OF PUBLIC WORKS, APPELLANT.

FILED APRIL 14, 1933. No. 28469.

1. **Eminent Domain**: HIGHWAYS. The department of public works of the state has authority to condemn land of a private individual for highway purposes in absence of an agreement for compensation. Comp. St. 1929, sec. 39-1403.
2. ———: ———: DAMAGES. In a proceeding to condemn land of a private individual for a public highway, the measure of damages is the difference between the value of the property taken or damaged immediately before and immediately after the change resulting in the right to compensation.
3. **Trial**. The jury are the judges of the credibility of witnesses and of the weight of their testimony.
4. **Appeal**: INSTRUCTIONS. Where an instruction which does not misstate the law is criticized as incomplete, the record for review should generally show a request for more complete directions to the jury.
5. ———. On appeal, a substantial ground for a reversal or for a remittitur should be shown as a condition entitling appellant to such relief.

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

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

Sandall & Webster, contra.

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

ROSE, J.

The department of public works of the state of Nebraska instituted this proceeding before the county judge of York county to condemn for highway purposes land owned by Carl V. E Newman. Authority to do so was granted by the legislature. Comp. St. 1929, sec. 39-1403.

Newman's land, situated a mile and a quarter north of York, consisted of an 84-acre farm with his dwelling-house and other buildings in the northwest corner. Fed-

eral Highway 11, running east and west, is north of the farm and Federal Highway 81, running north and south, was formerly on the west. The land taken for the right of ways is in the form of a "Y" with the upper arms in wide curves opening out of Federal Highway 11, converging near the center of Newman's farm and running south into York. The new Y-roads accommodate traffic from both Federal highways named.

The land actually appropriated for highway purposes amounted to about 7.9 acres. The Y-roads divide the farm into three irregular tracts. On the east there are approximately 39 acres in one tract and on the west 29.3 acres in another tract. The tract between the upper arms of the "Y", bordering the highway on the north, contains about 8 acres.

Appraisers appointed by the county judge viewed the premises, considered the issue of damages and awarded Newman $6,300. Both parties appealed to the district court, where the jury rendered a verdict in favor of Newman for $6,960.32. From a judgment therefor the department of public works appealed to the supreme court.

The sufficiency of the evidence to sustain the verdict for damages in the sum of $6,960.32, is the material question presented by the appeal. A recognized measure of damages is the difference between the value of the property taken or damaged for a public highway immediately before and immediately after the change resulting in the right to compensation. *Lowell v. Buffalo County,* 119 Neb. 776; *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239. Both parties directed evidence to that issue and the testimony of all witnesses indicated substantial damages. Witnesses differed in their estimates, but there was testimony on both sides that the value of the farm immediately before the taking of land for the new roads was $175 an acre. On behalf of Newman there were estimates of value as high as $200 an acre. Opinions of witnesses as to value afterward were also conflicting, but

there was testimony that the value of the land after the change was as low as $85 an acre. The jury rejected the highest and lowest estimates of value and awarded damages between the extremes. The appraisers appointed by the county judge and the jury in the district court viewed the premises. The difference in their findings was only $660.32. Owing to the condition in which the farm was left, substantial injury to the land not taken was recognized by the department of public works. Counsel for the state conceded in argument that the evidence would sustain a judgment for $5,000, but insisted the recovery should be reduced to those figures. The difference between that sum and the verdict is $1,960.32, but the proofs are clearly sufficient to sustain the judgment. The jury were the judges of the credibility of the witnesses and of the weight of their testimony.

An instruction not misstating the law is criticized as incomplete, but prejudicial error therein is not shown in absence of a request for more complete directions to the jury.

A substantial ground for a remittitur or a reversal has not been shown.

AFFIRMED.

LINCOLN TRUST COMPANY, APPELLANT, V. JOHN M SWEENEY ET AL., APPELLEES.

FILED APRIL 14, 1933. No. 28477.

1. **Fraudulent Conveyances.** As to an existing creditor, a conveyance by the debtor to delay collection of the debt is declared by statute to be void. Comp. St. 1929, sec. 36-401.
2. ———: CONVEYANCE FROM PARENT TO CHILD. A deed by a father to his son is presumptively fraudulent as to an existing creditor, and in litigation between him and the parties to the conveyance over its alleged invalidity the burden is on them to establish the good faith of the transaction by a preponderance of the evidence.
3. **Parent and Child:** SERVICES OF CHILD. In absence of a contract or other evidence, the presumption is that an unmarried

son, while living with his parents, is performing his duties as a member of the family without liability of his parents for compensation for his services.

4. Fraudulent Conveyances. It is the legal duty of a debtor to discharge his obligations to existing creditors before making a conveyance of his property as a consideration for future services or support by grantee.

5. ———: CONVEYANCE FROM PARENT TO CHILD: SETTING ASIDE IN EQUITY. Where a conveyance of land from a father to his son is void as to existing judgment creditors, they may have it set aside in equity, if it delays them in the collection of the debt, though the debtors have other land which is encumbered but of sufficient value to secure payment thereof.

6. ———: ———. A conveyance of land from a father to his son *held* void as to an existing judgment creditor.

7. Creditors' Suit. In equity, a judgment creditor seeking relief by creditor's bill may be required to exhaust property on which he has a specific lien before resorting to other property on which he subsequently acquires a lien by a decree canceling a conveyance of the debtor.

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

Perry, Van Pelt & Marti, J. P. O'Gara and *Arthur E. Perry,* for appellant.

Lanigan & Lanigan, contra.

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

ROSE, J.

This is a suit in the nature of a creditor's bill to cancel a deed from parents to their son and to subject the land described in the deed to the payment of a judgment in favor of plaintiff, the Lincoln Trust Company, on the ground that the deed was invalid as to it, having been executed for the nominal consideration of one dollar only, with intent to hinder and delay plaintiff in collecting its judgment. In the deed John M. Sweeney, Sr., and Nellie T. Sweeney, his wife, were grantors and John M. Sweeney, Jr., was grantee. The Sweeneys defended the suit on the

grounds that the deed was executed, delivered and registered in good faith when the father was solvent; that the consideration, in addition to "one dollar," was past services and promised future services of son to father; that plaintiff at the time had a lien on other land of grantors, which afforded ample security for payment of the judgment. The district court found and adjudged the issues in favor of defendants. Plaintiff appealed.

Upon a trial *de novo,* does equity require cancelation of the deed as to plaintiff? The circumstances under which it was executed are material inquiries in connection with the rules of law and equity applicable to the facts.

John M. Sweeney, Sr., and family reside in Greeley county. He owns the following tracts of land: In Custer county, a 1,120-acre farm, encumbered by a purchase money mortgage securing a note for $28,000, and also an 800-acre farm; in Greeley county, a quarter section of land, mortgaged for $6,000, and his home farm of 160 acres, mortgaged for $3,000.

Under an assignment dated January 14, 1927, plaintiff became the owner of the 28,000-dollar note and mortgage. In the transaction C. C. Carlsen of Lincoln represented plaintiff as an executive officer. He went to Broken Bow, inquired about the security, and learned before making the purchase that the 800-acre farm was unencumbered. From there he went to Greeley county and conferred with Sweeney, the owner of the Custer county farms, and was advised by him that he had executed the note and mortgage for $28,000 and that there was no defense to those obligations. Both testified the 800-acre farm was mentioned at the time. Carlsen said on the witness-stand that he relied on Sweeney's ownership of the 800-acre farm and that otherwise he would not have purchased the mortgage. After default, there was a demand for payment, and Sweeney, mortgagor, offered to convey the 1,120-acre farm in satisfaction of his indebtedness to plaintiff, but the offer was declined.

The title to the 800-acre farm was conveyed to the son, John M. Sweeney, Jr., February 25, 1931, by a deed reciting "one dollar" as the consideration. Grantee at the time was not yet 23 years of age, was unmarried and lived with his parents. In an action on the 28,000-dollar note in the district court for Greeley county, plaintiff recovered a judgment October 26, 1931, for $31,600. A transcript thereof was docketed in the district court for Custer county November 16, 1931. An execution on the judgment was issued in Custer county January 11, 1932, and returned by the sheriff wholly unsatisfied. At that time the judgment debtor had no personal property in his own name, having previously turned it over to his son, and he had no unencumbered real estate subject to execution in either county or elsewhere. After execution of the deed to the son, his father retained such control over him and over the 800-acre farm as enabled the father to induce the son to execute a mortgage thereon to secure an indebtedness owing by the father alone to M. J. McDermott, mortgagee.

The deed from father to son in fact delayed plaintiff in the collection of its judgment for $31,600, because it was effective to prevent the sale of the 800-acre farm on execution. The proper deduction from the evidence is that the father intended the natural and obvious result of his own act in deeding the farm to his son—the delay of plaintiff in collecting the debt which had been reduced to judgment. There is nothing in the defense to overcome this inference. As to an existing creditor, a conveyance with such an intent is declared by statute to be void. Comp. St. 1929, sec. 36-401. It is well settled law that a deed by a father to his son is presumptively fraudulent as to an existing creditor, and that in litigation between him and the parties to the conveyance over its alleged invalidity the burden is on them to establish the good faith of the transaction by a preponderance of the evidence. *Christensen v. Smith,* 123 Neb. 388, and cases cited in the opinion. In the present instance, past or

future service as a consideration for the deed is without support in the evidence. There is no proof that the son was emancipated before reaching his majority or that he earned agreed compensation before or after the age of 21. The presumption is, in absence of a contract or other evidence, that an unmarried son, while living with his parents, is performing his duties as a member of the family without liability of his parents for wages. The parties to the deed did not prove a contract between father and son for compensation for the latter's services, past or future. There is nothing in the record to show that the son performed for his father any services of a definite value or contributed to his father's estate in any form the equivalent of the land conveyed. More than a nominal consideration for the deed was not shown. The conveyance from father to son amounted to no more than an attempt to make a gift in violation of the rights of an existing creditor. It is the legal duty of a debtor to pay his obligations to existing creditors before conveying property to provide for future services or support. In a former case it was held:

"Property conveyed by a debtor in consideration of an agreement for his future support may be subjected to the payment of a judgment, where there is no other means of enforcing payment, to the extent that the value of the property exceeds the amount of support actually furnished by the grantee in good faith." *Blanchard v. McMillan,* 113 Neb. 275.

Since the conveyance from father to son was invalid as to plaintiff for reasons already explained, the alleged defense that the debtor retained in his own name property of sufficient value to secure payment of the judgment does not defeat the creditor's bill. *Shreck v. Hanlon,* 66 Neb. 451. In equity, plaintiff was entitled to a decree canceling the deed as to it and making its judgment a lien on the 800-acre farm. Whether the 1,120-acre farm was of sufficient value to secure the payment of the mortgage thereon or the judgment on the note for $28,000

was a controverted issue with evidence on both sides. From the standpoint of equity on this feature of the case, in view of the uncertain values of the real estate, plaintiff should exhaust its remedy against the 1,120-acre farm before resorting to the 800-acre farm.

The judgment below is reversed and a decree will be entered in the supreme court canceling as to plaintiff the deed from John M. Sweeney, Sr., and wife to their son John M. Sweeney, Jr., making the judgment for $31,600 a lien on the 800-acre farm, but subordinate to the McDermott mortgage which secured $8,000, requiring plaintiff to exhaust its remedy against the 1,120-acre farm before resorting to the 800-acre farm, remanding the cause and directing the district court to carry into effect the decree of the supreme court.

REVERSED.

CLARENCE WALLACE, APPELLEE, V. ELLEN CLEMENTS ET AL., APPELLEES: JOHN CLEMENTS ET AL., APPELLANTS.

FILED APRIL 14, 1933. No. 28502.

1. Courts: TERMS. Where the district court fixes a regular term and keeps it open continuously by specific order until adjournment *sine die*, a recess between meetings during the term is not vacation.
2. Mortgages: FORECLOSURE: SALE: CONFIRMATION. "Mere inadequacy of price in a sale under foreclosure will not justify a court in refusing a confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud." *Lemere v. White*, 122 Neb. 676.

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

A. R. Oleson, for appellants.

Zacek & Nicholson, contra.

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

ROSE, J.

This is a suit in equity to foreclose a mortgage on a tract of land in Cuming county. The district court found the amount due on the mortgage to be $12,076 and entered a decree of foreclosure April 8, 1931. Under an order of sale issued February 10, 1932, the sheriff sold the mortgaged land to Clarence Wallace, plaintiff, for $12,000. Over objections of defendants, the district court confirmed the sheriff's sale March 25, 1932. Defendants appealed from the confirmation.

A reversal is sought on the ground that the decree of foreclosure and the sale thereunder are void, because the decree was rendered during vacation in absence of a call for a special session, when the district court was without jurisdiction. The point is not well taken. For Cuming county, the district court had fixed two terms for 1931. The first term began March 30 and the second term September 28. The March term was not adjourned *sine die* until September 28, 1931, and the September term was not adjourned *sine die* until March 14, 1932. The court met for short sessions at intervals during these terms, adjourned for recesses at the close of meetings or sessions, and by specific orders kept the regular terms open until final adjournments. This course was within the power of the court to fix times for hearings, meetings and sessions, to order recesses, to control proceedings, to conduct trials and determine issues. Under the method pursued, the court was not in vacation during temporary recesses between meetings. The decree, therefore, was not rendered in vacation and was not void for the reason assigned.

Inadequacy of price for which the land was sold is also urged as a ground for a reversal. On the issue of value, the differences between the estimates of witnesses and the price bid and accepted are not so great as to make the sheriff's sale unconscionable or fraudulent within the meaning of the established rule:

"Mere inadequacy of price in a sale under foreclosure will not justify a court in refusing a confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud." *Lemere v. White,* 122 Neb. 676. Leave given to redeem at any time before issuance of mandate.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FARMERS STATE BANK, APPELLANT: FEDERAL RESERVE BANK, INTERVENER, APPELLEE.

FILED APRIL 14, 1933. No. 28499.

1. **Banks and Banking**: COLLECTIONS: TRUST FUNDS. Items sent to bank for collection and the proceeds thereof are held in trust for the owner.
2. ———: ———: ———. Where collecting bank attempts to remit by draft on a collection item, which attempt fails on account of its insolvency, the trust character of the fund is not destroyed, in the absence of a request for or an agreement to take exchange of the bank in payment.
3. ———: ———: CHECK AS PAYMENT. Check or draft ordinarily does not discharge an obligation, unless paid.
4. ———: ———. Whether bank, which fails, after collecting an item, is a debtor or trustee will be determined by the intent of the parties.

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

F. C. Radke, Barlow Nye, G. E. Price and *H. Halderson,* for appellant.

H. G. Leedy and *W. L. Dowling, contra.*

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

DAY, J.

This is a proceeding to establish a claim against the insolvent Farmers State Bank of Newman Grove and to impress the assets thereof with a trust. The Federal

Reserve Bank of Kansas City sent by mail direct to the State Bank for collection various checks drawn upon it. The two banks did not carry reciprocal accounts, but the State Bank, as the collecting bank, was bound to remit the proceeds. This the State Bank attempted to do by sending its draft on a correspondent bank, which was not paid because of the insolvency of the State Bank. The trial court held that the Federal Reserve Bank had a valid claim against the State Bank and impressed the assets with a trust, entitled to priority over claims of depositors and general creditors.

This transaction occurred a few days before section 62-1812, Comp. St. 1929 (the uniform collection law) took effect, so it is not governed by it.

The checks and the proceeds thereof were held by the State Bank as trustee (*State v. Nebraska State Bank*, 120 Neb. 539; Laws 1925, ch. 29) and the judgment of the trial court is right, unless, as contended by the receiver of the State Bank, there was an express or implied agreement that remittance should be made by draft, which amounted to a purchase of the exchange of the Farmers State Bank by the Federal Reserve Bank. Under an express agreement between the two banks, the State Bank was to collect and remit. By custom of long standing, the State Bank had remitted by draft, and from this it is argued that the Federal Reserve Bank, with knowledge of this custom, exchanged its checks for the draft of the State Bank and established the relation of debtor and creditor, rather than that of principal and agent. If this be true, then the character of the fund was changed immediately upon the issuance of the draft.

In the instant case, the contract between the forwarding and receiving banks did not arise out of a custom, but out of an agreement between them, by which the collecting bank agreed to collect the items sent to it and remit at once to the forwarding bank. The forwarding bank in this case had no desire or intention to purchase the exchange of the State Bank. It was their purpose,

by this transaction, to collect upon the checks drawn on the State Bank in cash or its equivalent. While it is true that for a long time the State Bank had remitted by means of its draft and that the Federal Reserve Bank had accepted said draft, the draft was the medium by which the State Bank attempted to remit and heretofore had transferred funds of which it was trustee. If the draft accomplished the purpose of transferring the trust fund from the State Bank to the Federal Reserve Bank, then the trust fund was extinguished by payment, but if, on the other hand, the draft was not paid upon presentation, then there was no transfer of the funds. A check or draft is never payment of an obligation unless the check is paid. A bad check never discharges a valid obligation. *Omaha Nat. Bank v. Brady State Bank,* 113 Neb. 711. In determining whether or not a bank which, after collecting a check upon itself, fails is a debtor or a trustee, the court will look to the intent of the parties. *Federal Reserve Bank v. Peters,* 139 Va. 45; *Bank of Poplar Bluff v. Millspaugh,* 313 Mo. 412.

A collecting bank's obligation is to pay the proceeds of a collection in cash or its equivalent. This duty is not discharged until the fund is put into the possession of the owner. When the bank chooses to transfer the fund by means of a draft, it has not discharged its obligation until the fund is actually transferred. In the instant case, it was unquestionably the intention of the parties to transfer the trust fund by means of a draft. The fund, represented as it was by a draft, did not change in character because of the means chosen to accomplish the transfer. Custom in this case did not amount to an agreement to accept the exchange of the bank. Heretofore, the obligation of the bank to remit had been discharged by a check or draft that had been paid. It was impractical to remit by a shipment of currency, and it was convenient and proper to transfer the fund by means of a good check or draft. In an annotation, 73 A. L. R. 71, it is said: "As regards the establishment

of a preference in the assets of an insolvent bank in favor of one who forwarded to it an item for collection, and received from it by way of remittance a cashier's check for the amount thereof, it appears as in other cases where a bank collects items forwarded to it and retains the proceeds, to be necessary (1) that the collection and retention of the money created the relation of trustee and beneficiary between the bank and the creditor, (2) that the assets of a bank were thereby augmented, and (3) that the creditor be able to trace the fund into the hands of the receiver. If this test, in all its parts, is met, then the creditor is entitled to a preference for the amount of the proceeds collected, or cashier's check sent by way of remittance thereof." See *Colorado & S. R. Co. v. Docking*, 124 Kan. 48; *Hawaiian Pineapple Co. v. Browne*, 69 Mont. 140; *Hornick, More & Porterfield v. Farmers & Merchants Bank*, 56 S. Dak. 18; *National Bank v. Porter*, 44 Idaho, 514.

A different rule prevails in some jurisdictions. *Peurifoy v. First Nat. Bank*, 141 S. Car. 370; *Leach v. Battle Creek Savings Bank*, 202 Ia. 871. However, this court has long been committed to the doctrine that the collecting bank holds both the item and the proceeds thereof as trustee, and in the absence of an intention to accept in payment rather than as a means of payment the exchange of the bank, the relationship is not changed. There is no intention on the part of the Federal Reserve Bank, either express or implied, to accept the exchange of the Farmers State Bank as payment. It was the usual means of transmittal, but when it was not paid, it failed in its purpose and was not, in fact, payment.

The judgment of the district court is

AFFIRMED.

GOODMAN-BUCKLEY TRUST COMPANY, ADMINISTRATOR, APPELLANT, V. SAM K. POULOS, APPELLEE: REBECCA J. DANASIS ET AL., INTERVENERS, APPELLANTS.

FILED APRIL 14, 1933. No. 28517.

1. **Fraudulent Conveyances: EQUITY.** It is a general rule that a court of equity will not aid a fraudulent grantor to recover from his grantee property or its proceeds transferred in fraud of creditors.
2. ———: ———. "If plaintiff can make out his case without disclosing the alleged fraud, defendant will not be allowed to show, as a reason why plaintiff should not recover, the fraud in which defendant himself participated." 27 C. J. 657.
3. ———: ———. Where, as in this case, plaintiff, which is administrator of grantor's estate, with no unpaid claims, cannot establish its case without proving fraudulent conveyance to defraud creditors, it cannot recover.

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

Halligan, Beatty & Halligan, Milton C. Murphy and *Hoagland, Carr & Hoagland,* for appellants.

Beeler, Crosby & Baskins, contra.

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

DAY, J.

This is a suit brought by the administrator of the estate of John K. Poulos, deceased, which has for its purpose the discovery and recovery of property belonging to the estate. The petition of the plaintiff alleges that the deceased and Sam K. Poulos, the defendant, were engaged as partners in business and, as such, were the owners of certain personal and real property in which the deceased had one-third interest; that the partners in October, 1923, prior to the death of the deceased in December, 1927, entered into an arrangement whereby all the property of said partnership was placed in the name of the defendant, and that the interest of the deceased was held by the defendant in trust; that the deceased was at the

time of his death entitled to a conveyance of said property from the defendant; that the defendant is a trustee of the property of the deceased and refuses to account therefor. From these allegations, plaintiff seeks a decree finding that the deceased was the owner of one-third interest in the property, formerly held by the partnership but now held in the name of defendant, and that the defendant be decreed to be a trustee of said property for the benefit of the estate; that the defendant be required to account for the partnership business before and after decedent's death. Defendant files a general denial. The two sisters of the deceased, who, with the defendant and Peter Poulos, another brother, are the sole and only heirs at law, filed a petition of intervention with substantially the same allegations and prayer as that of the plaintiff. The trial court found in favor of defendant.

The basis of the decision of the trial court was that in 1923, when the deceased conveyed the property to his brother Sam K. Poulos, defendant in this case, it was a fraudulent conveyance for the purpose of defrauding creditors.

If the conveyance of the deceased to his brother four years before his death was fraudulent, and for the purpose of defrauding creditors, the grantor himself could not have recovered the property. It is a general rule that a court of equity will not aid a fraudulent grantor to recover from his grantee property or its proceeds transferred in fraud of creditors. The court will not decree a reconveyance. 27 C. J. 655; *Martin v. Shears,* 78 Neb. 404. The authorities supporting this proposition are too numerous for citations within the proper limits of this opinion.

Since the grantor cannot recover, neither can his heirs. If the grantor conveyed the property for the purpose of defrauding creditors, the deceased had no legal estate which upon his death descended to his heirs. If grantor during his life could not recover, consequently his heirs are not entitled to recover. *Robertson v. Sayre,* 134 N. Y. 97.

"The object of the rule is not to protect the fraudulent grantee, but to protect society, and its purpose cannot be achieved without allowing the grantee to retain his ill-gotten gains." 27 C. J. 656. See *Saint v. Saint,* 120 Cal. App. 15; *Snitzer v. Pokres,* 324 Mo. 386.

Section 36-401, Comp. St. 1929, provides that such a fraudulent transfer in fraud of creditors shall be void. But in *Beels v. Flynn,* 28 Neb. 575, it was held that this section limits recovery to persons injured, leaving conveyance valid between parties. The court said: "The evident intention was to limit the right of recovery to those who had suffered by the act complained of, while as between the parties to it the sale would not be disturbed." Such conveyance is valid against all except creditors of grantor at time of conveyance. *Veeder v. McKinley-Lanning Loan & Trust Co.,* 61 Neb. 892. In the instant case, the creditor whose claim inspired the fraudulent conveyance was ultimately paid by the grantor. There are no unpaid claims against the decedent's estate.

Section 30-415, Comp. St. 1929, provides that in case of fraudulent conveyance by deceased where there is a deficiency of assets in the hands of an administrator, and when the deceased has, in his lifetime, conveyed any property with the intent to defraud his creditors, the deeds or conveyances are void as against creditors, and the administrator may prosecute a suit for the recovery of same, for the benefit of the creditors.

An administrator is authorized by the foregoing statute to maintain an action to recover property, the subject of a fraudulent transfer to defraud creditors, but the suit cannot be maintained unless there are creditors and an insufficiency of assets in his hands to pay them. *Hofmann v. Tucker,* 58 Neb. 457. There being no unpaid creditors of the estate of the decedent, the administrator was without power to maintain this suit.

It is argued by appellant that if the plaintiff can make a *prima facie* case without disclosing fraud, it must prevail, since the defendant cannot set up as a defense the

fraud in which he participated. The cases cited which lend support to this view are: *Barwick v. Moyse,* 74 Miss. 415; *Lefmann v. Brill,* 142 Fed. 44; *Lufkin v. Jakeman,* 188 Mass. 528. The rule is stated by one authority in the following language: "If plaintiff can make out his case without disclosing the alleged fraud, defendant will not be allowed to show, as a reason why plaintiff should not recover, the fraud in which defendant himself participated." 27 C. J. 657.

Can plaintiff make out a *prima facie* case without disclosing the fraud? It requires an analysis of the evidence to determine this question. The decedent, the defendant, a brother and a cousin, were a partnership, operating a candy kitchen in North Platte prior to 1923. In that year the cousin made a *bona fide* sale of his interest to defendant. At the same time and by the same instrument, the decedent conveyed his interest in the partnership and its property to the defendant. The defendant issued a check for $10,000 to the decedent in payment for this property, which check was paid upon presentation to the bank. At this point in the evidence a good faith sale is established and the plaintiff would not be entitled to a recovery under any circumstances. The property that was decedent's was transferred to defendant.

But the plaintiff then offers more evidence to show the circumstances and conditions surrounding this transfer. Bankers are brought into court who testify that defendant did not have $10,000 in the bank until a few days prior to the transaction. The fact is developed that defendant borrowed several thousand dollars from a brother-in-law in Iowa and some from the cousin, who was a partner, which sums were repaid from the money realized by decedent from cashing the check. In fact, it is definitely established that, within a few days of the transaction, the defendant had received back at least $9,500 of the money or it had been paid upon his obligations. The record pictures an elaborate but crude scheme to surround this

transaction with evidentiary facts to indicate a good faith sale but which did not reveal the truth. They went to much trouble to borrow money and build up a bank account, so that a check could be issued to show payment. It is so complicated and intricate that it forces the conclusion upon us that it was a fraudulent transfer.

But the plaintiff offers the deposition of the cousin, who was a partner and who knew all about the transaction, for at the same time and by virtue of the same instrument he made a good faith sale of his interest in the partnership to defendant. He corroborates the testimony relative to the details of the transfer already noted, and upon cross-examination testified that the transfer of the property involved herein, made four years before the death of decedent, was for the purpose of defrauding creditors. The purpose was to defraud a bank which decedent owed about $5,000. The decedent had to pay this debt some years later, and it is not now a creditor. This witness testified to a part of the details of the transfer and the other facts were developed by proper cross-examination. The plaintiff was not entitled to show a part of the transaction and suppress a part. But the plaintiff developed on redirect examination that decedent would still be a partner just the same after the suit of the bank was over. This evidence is merely cumulative and confirms the finding from the method of transfer that it was a fraudulent conveyance. The plaintiff in this case is in this unfortunate situation: If the sale is *bona fide,* it cannot recover because decedent divested himself of his property before death, and if the transfer was fraudulent to defraud creditors, it cannot recover because both grantor and grantee were equally involved in the fraud. The court will leave the parties where it found them and only a defrauded creditor could attack the conveyance. The plaintiff herein cannot make a *prima facie* case without disclosing the fraud. The judgment of the trial court is the judgment of this court.

AFFIRMED.

WESTERN SECURITIES COMPANY, APPELLEE, V. CHARLES F. NAUGHTON, APPELLANT.

FILED APRIL 14, 1933. No. 28527.

1. Mortgages: ASSIGNMENT: PROOF. Where mortgage has been assigned, assignment is best evidence of ownership.
2. ———: OWNERSHIP: PROOF. Plaintiff's testimony that he is owner and holder of notes and mortgages, received without objection, is sufficient proof of plaintiff's ownership, particularly where there is no evidence in conflict.
3. ———: RIGHT OF RECOVERY: PRESUMPTION. Where execution and delivery are admitted by pleadings, plaintiff's right of recovery is presumed.
4. Usury. To constitute usury, brokerage charge and interest for term of loan must exceed legal maximum.
5. ———. "Where a note provides for a lawful rate of interest from date until maturity and a higher and lawful rate of interest afterwards, the rate of interest which the note draws from its date to maturity is the contract rate for that time; and the rate which the note draws after maturity is the contract rate from that date." *Havemeyer v. Paul*, 45 Neb. 373.

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

Battelle, Travis & Strehlow, for appellant.

Clarence T. Spier and *Arthur C. Bailey, contra.*

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

DAY, J.

This is a suit to foreclose two real estate mortgages. There are two defenses: (1) Plaintiff was not the owner of the notes and mortgages, and (2) usury. The trial court found in favor of plaintiff on both defenses and the defendant appeals.

The evidence is sufficient to support a finding that the plaintiff is the owner of the notes and mortgages. The plaintiff was the mortgagee, who had assigned the notes and mortgages to another, who in turn had reassigned to plaintiff. Neither the notes nor the reassignment were introduced in evidence. This omission is incomprehensible

to the writer. The possession and production of the notes uncanceled and unextinguished by indorsement or otherwise by plaintiff is *prima facie* evidence of ownership.

It was stated by the attorney that they were in the hands of the trial judge, but the knowledge of an appellate court is circumscribed by the record, which does not show that the notes were in court. The reassignment was said by a witness for the plaintiff to be available, but it was not produced, although demanded by the defendant. It should have been introduced in evidence.

The assignment of error is directed to the proposition that the evidence does not support a finding that the plaintiff was the owner of the notes and mortgages. The execution and delivery of the notes and mortgages and the assignment by the plaintiff as mortgagee to another are admitted by defendant. The reassignment is denied, thereby putting in issue the ownership thereof. The instrument reassigning the notes and mortgages is the best evidence of plaintiff's present ownership.

However, an officer of plaintiff company testified without objection that the loans and mortgages in question were repurchased by plaintiff and it "is now the owner and holder of the notes and mortgages securing the notes." In this case, that is sufficient for us to find that the plaintiff is the owner and holder of the notes and mortgages, particularly since it is noted that there is no evidence in conflict. *Michigan Mutual Life Ins. Co. v. Klatt,* 2 Neb. (Unof.) 870. Where, as in this case, the execution and delivery are admitted, plaintiff's right of recovery is presumed. *Bank of Stockham v. Alter,* 61 Neb. 359. This is not to say that the usual and proper way to prove plaintiff's ownership of notes and mortgages is to offer in evidence the notes and the reassignment of the mortgages. *Stewart v. Hoagland,* 3 Neb. (Unof.) 142. The notes and mortgages should have been canceled by the entry of the decree. But the assignment of error only reaches the question of ownership.

The question of usury, as presented in this case, has been before this court several times. The assertion that the contract was usurious is based upon the claim that the parties contracted to pay more than the legal rate of interest. The agreement, as evidenced by the notes as set out in the petition, and the mortgages, was that the defendant agreed to pay 6 per cent. interest and in addition thereto the taxes on the interest of the mortgagee in the real estate and to keep the premises insured at expense of mortgagor. And further as a part of this loan of $25,000, the mortgagor was required to pay a commission of $500 and some incidental expenses, such as abstract expense and legal examination of the same. Thus far, the contract is not usurious. The figures of the appellant, as showing usury during the first year, are erroneous in that the entire commission for a five-year loan was added as interest for one year, when it should be spread over the entire term. *Upton v. O'Donahue,* 32 Neb. 565; *Detweiler v. Forman,* 120 Neb. 780. "To constitute usury, it is of course essential that an excess of the legal maximum be exacted in consideration of the loan." 27 R. C. L. 223, sec. 24. See *McGovern v. Union Mutual Life Ins. Co.,* 109 Ill. 151. To constitute usury, brokerage charge and interest for term of loan must exceed legal maximum.

The other expenses of making the loan were not excessive, and even if added to the charge would not be sufficient, when spread over the entire term, to make the contract usurious. They were not therefore a subterfuge to avoid the usury law. This is also true of the taxes. The taxes added by appellant in his computation for the first year of the term had been levied and were due, an obligation of the mortgagor, at the time of the execution of the instrument in this case, and cannot be added to the interest charge for the first year.

The provision which increases the interest after maturity on both principal and interest notes engages our attention now. As heretofore determined, the contract

rate of interest to maturity was not usurious. There was no intention of the parties that the notes should be defaulted. In *Havemeyer v. Paul,* 45 Neb. 373, it was held: "Where a note provides for a lawful rate of interest from date until maturity and a higher and lawful rate of interest afterwards, the rate of interest which the note draws from its date to maturity is the contract rate for that time; and the rate which the note draws after maturity is the contract rate from that date." In *Omaha Loan & Trust Co. v. Hanson,* 46 Neb. 870, it is said: "Where by the terms of a promissory note it is provided that it shall bear interest until maturity at a given rate, and thereafter at a higher lawful rate, such contract is not usurious, nor is the agreement for the higher rate of interest after maturity a mere penalty." It is the duty of the court to compute the interest accordingly.

The contract for the maximum legal rate of interest after maturity was a separate contract, was lawful, and did not constitute usury. *Upton v. O'Donahue,* 32 Neb. 565. There is no attempt to collect for taxes in this case after maturity, since neither party has paid any taxes on the property during the term except from the rents, which were assigned at the time of the execution of the notes and mortgages. The provision for the payment by the mortgagor of taxes, the amount of which is uncertain and unknown, does not make the transaction usurious, because at the time it could not have been within the contemplation of the parties so that the agreement could have been for a usurious rate of interest. *Stuart v. Durland,* 115 Neb. 211; *Menzie v. Smith,* 63 Neb. 666. It follows that provision in the contract for payment of taxes by mortgagor, in addition to the maximum legal rate upon default, and after maturity, is not an agreement to pay usurious interest. If, after maturity, the total amount claimed amounts to a usurious rate, the excess cannot be collected. *Stuart v. Durland,* 115 Neb. 211.

The judgment of the district court is

AFFIRMED.

FRANK H. COX, EXECUTOR, ET AL., APPELLANTS, V. JOSHUA COX ET AL., APPELLEES.

FILED APRIL 14, 1933. No. 28464.

1. **Tender.** Acts which are insufficient in themselves to make a complete tender may operate to protect the rights of a party under a contract of indemnity, when a proper tender has been rendered impossible, through no fault of the plaintiff, prior to bringing suit.
2. **Banks and Banking: SALE OF STOCK: INDEMNITY: TENDER.** In an action by a purchaser of bank stock, upon a contract of indemnity from loss by reason of his purchase thereof, a tender of the stock, if it is absolutely worthless, is not essential to a right of recovery.

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

Craft, Edgerton & Fraizer, for appellants.

Kirkpatrick, Good & Dougherty and *John L. Riddell, contra.*

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

PAINE, J.

This is a suit at law to recover damages in the sum of $8,625, with interest. The trial court dismissed the action at plaintiffs' costs. Motion for new trial being overruled, plaintiffs appealed.

The plaintiffs are the executor and heirs of James M. Cox, deceased, and the defendants named in the petition are five men and the executor of a sixth, who were the six parties of the first part in the contract sued on, dated December 4, 1924, in which contract the late James M. Cox, of Hampton, Nebraska, was the second party, and a copy of the contract was attached to the petition as exhibit A.

The last paragraph of said contract reads as follows: "And whereas, the said M. T. McEvoy has given the first parties notice that he now desires to dispose of said

stock; and whereas, J. M. Cox has expressed his willingness to take over from the said M. T. McEvoy the above described stock and will carry it for one year from this date on condition that parties of the first part will agree to protect him against any possible loss that may come from his said ownership, and will guarantee him seven per cent. interest on his said investment; and whereas we, the parties of the first part, not knowing at this time any one to whom said stock can be sold, in continuance of our loyalty to the corporations above described, do hereby enter into the foregoing outlined agreement with the said J. M. Cox, and do hereby personally agree to protect him against loss on the investment and hereby guarantee that it shall net him seven per cent. annual interest. We also agree to take over the said stock within one year from this date or as soon thereafter as we may receive notice from the said J. M. Cox that such is his desire. The said J. M. Cox in consideration of these agreements agrees that he will turn over the said stock to the first parties at any time he may receive notice from them that they have found a purchaser who will pay the same price paid by the said J. M. Cox."

The prayer of the petition prays judgment against the defendants and each of them for the sum of $8,625 and interest, being the exact amount James M. Cox advanced.

To this petition the defendants filed answer, in which they admitted that Frank H. Cox was the executor of the estate of James M. Cox, and that the defendants had never repurchased or taken back the shares of stock, and denying each and every other allegation in the petition. A jury being waived, trial was had to the court. There was no dispute in regard to the making of the contract, but the defendants contend that an issue was tried, which was not set out in the pleadings, as to whether any tender was made, as required by law, of the stock involved in the contract of indemnity.

It is clear from the contract, set out in the petition in this case, that James M. Cox did not desire to buy this

McEvoy stock at all, and that, if he assisted by furnishing the money for taking it up from McEvoy, he would only do so on the personal written guaranty of the six men who were parties of the first part, and that, upon such written guaranty being signed, the $8,625 was charged against his account December 4, 1924, in the American State Bank, on their promise therein to protect him against loss, and, in addition, to pay him 7 per cent. interest on the $8,625.

It appears that the first parties to the contract paid James M. Cox the 7 per cent. interest promptly, as provided in the contract, as long as he lived, for if the dividends from the shares of bank stock involved were not sufficient, they made up the difference between them.

The district court, in finding for the appellees, found specifically that at no time prior to the commencement of the action had any tender been made of the stock described in the contract. The contract also covered stock in the American Bank Building Association and in the American Trust Company, but there is no question but what the stock in these small subsidiary companies was duly tendered, but the main contention is as to the stock in the American State Bank. It appears that, upon the failure of the American State Bank, upon November 19, 1929, a proposition was made that all of the stockholders therein should surrender their stock, and in that way avoid the double liability thereon, and that this reorganization wiped out all of the old stock, and a new bank, under a new name, issued new stock, and had entirely new officers and new stockholders. This amounted to a dissolution, so far as these old stockholders were concerned. The certificate, No. 84, dated December 4, 1924, for 20 shares of stock involved in this contract, was surrendered by the executor February 22, 1930, at the same time that the shares of stock owned by the appellees in the same bank were surrendered up for cancelation, and it was all a part of the same transaction, and it was to the advantage of all the stockholders, including all of

the signers to this contract, that every certificate of this stock be turned in and canceled, so that all of them might avoid being held for the stockholders' double liability. No allegation was set up in the answer setting out a failure to tender back the stock certificate. The reorganization of the American State Bank of York was, to all intents and purposes, a dissolution of the old bank, as even the name thereof was changed.

1. It is insisted by the appellee that the plaintiff was required to plead and prove a tender of this stock before he could sue for the loss thereon. The appellants insist that, of the six signers of the indemnity contract, one has died, and some of them live in separate towns, and that the only purpose of a tender is to keep a man from recovering for the value of property and at the same time keeping the property. They insist that the appellants are suing on a contract which the appellees are attempting to repudiate under their general denial.

In *Heywood v. Hartshorn,* 55 N. H. 476, a debtor offered to pay notes only on condition that they would be surrendered to him, but he was aware that the payee had taken the notes to another state and after his death they could not be found, and so the administrator was unable to tender the notes, but was willing to give a receipt for the amount due. It was held that the maker should pay the notes but no interest thereon after maturity, at which time he was ready to pay them. Ann. 14 A. L. R. 1120.

"Acts insufficient in themselves to make a complete tender may operate as proof of readiness to perform, so as to protect the rights of a party under a contract, where a proper tender is made impossible by reason of circumstances not due to the fault of the debtor." 26 R. C. L. 623, sec. 2.

"The act or omission relied upon as dispensing with the necessity of a tender must have occurred prior to the time fixed for performance on the part of the party alleging the default." Hunt on Tender, p. 49.

There is authority holding that a formal tender of shares is not necessary to fix liability on a purchaser for the breach of his contract, where the contract provides that the seller is to hold the stock and deliver it when called upon, or where the buyer declares his intention not to perform, or refuses to perform, his contract, and that in such cases it is sufficient that the seller is ready, willing and able to deliver the stock, and that this is especially true where a proper tender is made impossible by reason of circumstances not due to the fault of the holder thereof. It has also been held that a tender is waived if the contract has been repudiated. It is insisted that, if the appellee desired to take advantage of a failure to tender back the bank stock which had been surrendered up for cancelation, such issue should have been tendered by appropriate pleadings in the answer, and it is insisted that the appellees are estopped from insisting upon tender in the absence of pleading, and by permitting the appellants to turn in this bank stock for cancelation without objection, and further, by their own acts in turning in their own bank stock for cancelation. 26 R. C. L. 623-625; 38 Cyc. 134, 135; 14 C. J. 701; *Graham v. Frazier,* 49 Neb. 90; *Prime v. Squier,* 113 Neb. 507; *School District v. Shoemaker,* 5 Neb. 36; *Strasbourger v. Leerburger,* 233 N. Y. 55; *Rupard v. Rees,* 94 Okla. 49; *McLeod v. Hendry,* 126 Ga. 167; *Galt v. Hildreth,* 100 Neb. 15.

"Where the parties entered into an oral contract to repurchase the stock so issued and in pursuance of this contract did repurchase three hundred dollars worth of the same, such action by the parties places their own construction upon the meaning of the contract, and the meaning the parties so give to their own contract will be followed by the court." *Griffin v. Bankers Realty Investment Co.,* 105 Neb. 419.

"A contract with a corporation by which it sells certain of its shares of stock and agrees to repurchase the same upon the happening of a certain specified event,

is not *ultra vires;* and for a breach thereof the purchaser may recover of the corporation the amount agreed upon as the price of such repurchase." *Fremont Carriage Mfg. Co. v. Thomsen,* 65 Neb. 370.

Acts which, in themselves, are insufficient to make a complete tender may constitute proof of readiness to perform, so as to protect the rights of a party under a contract, where a proper tender is rendered impossible by circumstances not due to the fault of the tenderer. *Schaeffer v. Coldren,* 237 Pa. St. 77, Ann. Cas. 1914B, 175.

2. If the property is entirely worthless to both parties, it need not be returned. *Perley v. Balch,* 23 Pick. (Mass.) 283, 34 Am. Dec. 56. For instance, it has been held that worthless evidence of title need not be returned. *Reddington v. Henry,* 48 N. H. 273.

We have found a New York case which is quite similar to the case at bar. In a law action which had been brought to recover moneys advanced on an agreement to obtain street railway bonds or the money was to be returned at any time the plaintiff felt dissatisfied, the bonds were duly executed and delivered to a trust company, which issued a certificate that it held the bonds. However, the franchise was not obtained for the railway, and plaintiff demanded the return of his money. The trial court charged the jury that, if the certificate had no value, it was sufficient to tender it at the trial. The jury returned a verdict for the plaintiff. The appeal was based upon the refusal of the trial court to instruct the jury that, if the certificate had not been tendered to the defendant before suit, their verdict should be for the defendant. Judge Bradley, of the court of appeals, held that the refusal to so charge was correct; that, if the certificate had no value, it is sufficient to surrender it at the trial, for the action was not founded upon a rescission of the contract, but upon a contract to recover money which the plaintiff claimed the defendant had promised to pay upon demand. *Lewis v. Andrews,* 127 N. Y. 673.

Several other errors are set out in the brief of appellants, but as a reversal is necessary on the question of tender, it will not be necessary to consider the other assignments.

For the error of the trial court in finding that the plaintiffs, in order to maintain this action at law, must plead and prove a delivery or tender of the bank stock involved herein before bringing suit, the judgment of dismissal at plaintiffs' costs is hereby set aside and reversed, and the cause remanded for a new trial.

REVERSED.

JAMES FADDEN ET AL., APPELLEES, V. SUN INSURANCE OFFICE, LTD., APPELLANT: HOME SAVINGS & LOAN ASSOCIATION, APPELLEE.

FILED APRIL 14, 1933. No. 28490.

1. **Principal and Agent.** Cases sometimes arise where the same person is acting as agent of both parties. The rule that the same person may not act for both parties does not apply unless the dual agency thus created requires the agent to assume incompatible duties. When the facts are undisputed, the question whether the agent had requisite authority to bind the principal is a question for the court.
2. **Insurance: POLICY: REFORMATION.** In a suit to reform an insurance policy for mistake, evidence of intention is competent and admissible to show how the writing should be corrected to conform to the intention of the parties.
3. ———: ———: ———. If the mistake of the parties is in the identity of the property itself, reformation cannot be had, for there has been no meeting of the minds of the parties, but if there is no mistake as to the identity of the property insured, equity will ordinarily grant reformation.

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

Hall, Cline & Williams, for appellant.

Walter G. Badham, Edgar B. Zabriskie and *Barton & Barton, contra.*

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

PAINE, J.

This is an action to reform two policies of fire insurance, which were written in the name of the former owner of the property, for the reason that neither the mortgagee, taking out the insurance, nor the insurance company's agent, writing the policies, knew of a recent change in record ownership.

The plaintiffs, James Fadden and Emma Thompson, in their substituted and amended petition, allege in their first cause of action that the Home Savings & Loan Association, of Beatrice, Nebraska, hereafter called the Loan Association, was the holder of a first mortgage against the Lincoln Hotel property at Table Rock, Nebraska, of $5,000. M. F. Eickmann was the secretary and manager of the said Loan Association. He was also a member of the firm of insurance agents, which conducted its business in the name of Busboom-Larsen Agency, which was a partnership, the said M. F. Eickmann being one of the partners, and its office being in the room in the basement directly below the office of the said Loan Association.

An insurance policy, deposited with the mortgage papers, was about to expire, and the mortgagee, by the terms of the mortgage, was expressly authorized to procure insurance to protect said mortgage for the benefit of the mortgagor and its assigns. Therefore, the said M. F. Eickmann decided to purchase a policy, in its place, of the agency in which he was a partner, and having heard rumors that M. L. Henning was endeavoring to sell out her interest in this property, he called the office of the county clerk of Pawnee county by long distance from Beatrice, and inquired for the name of the record owner of the Lincoln Hotel property at Table Rock, and the answer was to the effect that M. L. Henning was still record owner. This occurred a week or more prior to November 29, 1930, the date he desired the policy to

take effect. He then went downstairs to the insurance office and directed Miss Dobbs, the office assistant, to issue a policy for $5,000, title in the name of M. L. Henning, doing business as Lincoln Hotel, Table Rock, Nebraska, with mortgage clause to said Loan Association, the same being issued on a policy in the Sun Insurance Office, Ltd., of London, England, by the said Busboom-Larsen Agency in Beatrice, Nebraska.

The premiums of $70 upon the $5,000 policy on the building and of $24.75 upon the policy of $1,500 on the contents were paid to the Busboom-Larsen Agency by M. F. Eickmann, and charged against the loan on the books of the said Loan Association, and have never been returned by the defendant insurance company.

A fire occurred in said Lincoln Hotel at 3:30 a. m., August 23, 1931, which was caused by defective wiring, and no suspicion attached in any way to the owners. After the fire it was discovered that, on November 20, 1930, a deed had been recorded, passing the title from M. L. Henning to Thompson and Fadden, who were the record owners on November 29, 1930, the date the policy took effect, which fact was unknown to said M. F. Eickmann.

The adjusters of the loss included these two policies in apportioning the loss between three insurance companies, the total loss of the building being $11,566.75, of which defendant company was apportioned $3,304.79 as its share, and the total loss on contents being $2,536.20, of which $585.28 was apportioned to the defendant company, making a total of $3,890.07 due. In the decree of the trial court in the case at bar, awarding reformation of the policies, an attorney fee of $225 was added, making total judgment entered March 31, 1932, of $4,115.07, with 7 per cent. interest.

The said Loan Association foreclosed the mortgage it held on the Lincoln Hotel property at Table Rock, and on February 20, 1931, received a decree in the amount of the balance due, of $4,591.66, which decree was sold and

assigned, and the said Loan Association has received all money due it, including the premiums on these two policies, charged up against the loan.

The motion for a new trial set out, as ground of reversal, errors of law occurring during the trial, and that the decree is not sustained by the evidence, and is contrary to the evidence, and, further, that the court erred in permitting the witness, M. F. Eickmann, to testify that it was his sole and only intention, in contracting for the insurance policies in question, to insure the true owners of the property, he having testified that, if he had known that Thompson and Fadden were the record owners, he would have had the policy written in their names. There is no question as to the amount of the loss, if the plaintiffs are entitled to recover. The sole question is whether the plaintiffs are entitled to have this policy reformed. There is practically no dispute about the facts. The defendant in its argument claims there is no mutual mistake whatever; that the only mistake is a one-sided mistake, due entirely to the carelessness or negligence of the plaintiffs in this case in failing to place their deed on record, and in failing to notify the said Loan Association, and requesting that they be treated as the owner of the property.

1. It is insisted by the plaintiffs that the evidence shows that Mr. Eickmann was, under the law, acting as agent for both parties, in a manner repugnant to the rights of neither, and that a dual agency is proper under these circumstances. Such cases often arise where the cashier of a bank is agent of an insurance company, and where, acting as such agent, he issues insurance upon certain property, often making a mortgage clause in favor of the bank, and it has been held that, even in such cases, he is acting as agent for the insurance company, and the rule that the same person may not act as agent for both the insurer and the insured does not apply unless the dual agency thus created requires the agent to assume incompatible duties, and it has been

often held that, when the facts are undisputed, the question whether the agent had requisite authority to bind the principal is a question of law for the court. *Federal Ins. Co. v. Sydeman,* 82 N. H. 482; *Michelsen v. North American Nat. Ins. Co.,* 53 N. Dak. 391; Comp. St. 1929, secs. 44-307, 44-213; *Roth v. Employers Fire Ins. Co.,* 123 Neb. 300.

2. In a suit to reform a policy of insurance, the evidence of intention is competent and admissible to establish the fact of fraud or mistake, and in what it consisted, and to show how the writing should be corrected in order to conform to the agreement or the intention which the parties actually made or had. 23 R. C. L. 366, sec. 66; *Stout v. City Fire Ins. Co.,* 12 Ia. 371, 79 Am. Dec. 539; *Fremont Beverage Co. v. Maryland Ins. Co.,* 123 Neb. 192; *Cook v. Westchester Fire Ins. Co.,* 60 Neb. 127. In this last case Judge Sullivan said that a reasonable deduction, and one creditable to the company, is that it was acting in good faith and intended to give a consideration for the premium it received, and that its primary purpose was not to insure O. V. Palmer Company, but rather to indemnify the holder of the title, that is, the person having an insurable interest in the property.

Connecticut Fire Ins. Co. v. McNeil, 35 Fed. (2d) 675, holds that courts of equity cannot make a new or substantially different contract for the parties to a fire insurance policy, but a fire insurance policy which fails to properly express the manifest intention of both the insurer and the insured may be reformed so as to conform to their actual intent.

3. To warrant the reformation of an insurance policy, the evidence of mutual mistake must be clear, persuasive, and convincing. *Fischer v. Bockenstedt,* 245 N. W. (Ia.) 352; *Hartigan v. Norwich Union Indemnity Co.,* 246 N. W. (Minn.) 477. The want of conformity to the agreement of the parties must be occasioned by a mistake which is mutual and common to both parties to the in-

strument. *Fidelity Phenix Fire Ins. Co. v. Hilliard,* 65 Fla. 443; *Paine-Fishburn Granite Co. v. Reynoldson,* 115 Neb. 520.

It is the general rule that, if the mistake of the parties is in the identity of the property itself, reformation cannot be had, for there has been no meeting of the minds of the parties, but where there is no mistake as to the identity of the property, then reformation will ordinarily be allowed, and equity will grant this after a loss has occurred, as well as before, if it is presented in due season shorter than the period of limitations. It has been held that equity should withhold its aid in such cases where the mistake is not made out by the clearest evidence.

There is little doubt in this case that the purpose was to insure the identical property, to wit, the Lincoln Hotel, Table Rock, Nebraska, whoever might be the owner thereof. Under such circumstances it might well be that the policy should be reformed to conform it to the intention of the parties, for it did not, through accident or mutual mistake, express their true intention.

There being no error in the decree of the trial court, the same is hereby

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. CITIZENS BANK OF STUART, APPELLEE: MARY PAYN UTTLEY ET AL., INTERVENERS, APPELLANTS.

FILED APRIL 14, 1933. No. 28508.

Banks and Banking: INSOLVENCY: TRUST FUNDS. Before money in an insolvent bank may be recovered on the trust fund theory, claimant must show facts to prove that it was not simply a general deposit.

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

H. M. Uttley and *M. S. McDuffee,* for appellants.

F. C. Radke, I. J. Dunn, Frank Warner and *Barlow Nye, contra.*

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

PAINE, J.

This is a claim by the heirs for payment in full of the balance of a deposit made in a bank by the executor of the estate, which bank has since become insolvent.

James C. Flannigan was the vice-president and one of the managing officers of the Citizens Bank of Stuart. While such officer, he was appointed by the county court of Keya Paha county as executor of the estate of John Thomas Payn. A public sale was held of the property of said Payn on July 25, 1928, being the date of his death, and the said Flannigan deposited more than $10,000 in said bank as the proceeds of said sale. This deposit was made in the name, "The Estate of John Thomas Payn, deceased, James C. Flannigan, executor." Checks were drawn on said fund by the executor until the balance of the deposit amounted to $4,020.95, at which time the bank went into the hands of a receiver. After the bank failed, the county court assigned the funds in the bank to the heirs, who filed their petition of intervention in the district court for Holt county against the receiver of said bank, alleging that they were entitled to payment in full. The receiver denied the liability, and upon appeal to the district court it was held that the funds so deposited were but a general claim, and not a trust fund.

Among the propositions of law advanced for the reversal of this order of the district court by the appellants are these: The right to follow trust funds is a property right, and includes all situations where there is a fiduciary position, or where one person has the legal title or possession of property, but its beneficial ownership is in another; trust funds do not lose their character by

being deposited in a bank, so long as such funds can be distinguished in the hands of the trustee.

The general rule that a deposit of funds, rightfully made by an executor, cannot be impressed with a trust after the bank in which it is placed becomes insolvent is set out in *Gray v. Elliott,* 36 Wyo. 361, 53 A. L. R. 554, in which case it is pointed out that when the bank fails it virtually disappears as a responsible party, and the rights and equities of the general depositors must be considered.

Section 8-1,102, Comp. St. 1929, provides generally that the claims of depositors shall, at the time of the closing of a bank, be a first lien on all of the assets of such bank; but it was held in *State v. Farmers State Bank,* 121 Neb. 532, 82 A. L. R. 7 (notes, pp. 46-288) that this did not apply to a fund unlawfully converted by the bank as trustee to its own use.

This court has held that, where the trust property can be specifically identified, and so found in the hands of the insolvent bank's receiver, the beneficial owner may recover the same. *Higgins v. Hayden,* 53 Neb. 61. Many courts have held that, where specific money is earmarked and kept separate and intact, unmingled with the money of the bank, the owner is entitled to the full recovery thereof. *St. Augustine Paint Co. v. McNair,* 59 Fed. (2d) 755.

A deposit in a bank in the ordinary course of its business is presumed to be a general deposit, even if made by an executor. *Leach v. Beazley,* 201 Ia. 337.

The executor in the case at bar had a legal right, under section 30-406, Comp. St. 1929, to make this deposit, and when it was made the relation of debtor and creditor existed between the bank and the executor, and while the relation which existed between the heirs and the executor was that of a *cestui que trust* and trustee, yet the bank did not become a trustee because of any special deposit, nor can it be found that any trust resulted from wrongful acts of the bank or its officers, as has been

found in many cases before this court. The money had been on deposit for several years before the bank failed, with no objection on the part of the heirs, and the executor, in the usual course of his business, had already checked out the greater part of these funds.

In a very similar case this court has recently held, in an action brought by an administrator against the receiver of this same bank, that the funds had not become trust funds, but were only a general deposit. *State v. Citizens Bank, ante,* p. 575.

If this court should hold that every general deposit made in a bank by a trustee was a special fund, and must be paid in full upon the failure of the bank, many depositors in banks in Nebraska would at once withdraw their funds and have the same deposited in the name of some trustee, and when that was done it would destroy the regular banking business, for no such funds could be loaned out for the benefit of the community, but would have to be held *in toto* by the bank so long as they were so left there.

The heirs have, in our opinion, failed to establish a trust fund, and the judgment of the district court is

AFFIRMED.

GERTRUDE GOERES, ADMINISTRATRIX, APPELLEE, V. RAY GOERES, APPELLANT.

FILED APRIL 14, 1933. No. 28519.

1. **Death**: ACTION FOR DAMAGES: PARTIES. An action for damages for the death of an employee must be brought by the personal representative under the Lord Campbell's Act, and the compensation act merely relates to the distribution of the proceeds.
2. **Trial**: EVIDENCE AS TO INDEMNITY INSURANCE. It is a rule of this court that the interest of insurance carriers may be shown on cross-examination, as well as whether the attorneys have been employed by an insurance company, but the trial court should limit the inquiry within the boundaries heretofore fixed.

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

Ziegler & Dunn and *E. D. Beech,* for appellant.

Chambers & Holland and *Deutsch & Stevens, contra.*

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

PAINE, J.

This is an action under the "Lord Campbell's Act" by an administratrix to recover damages for the death of her husband. The first issue was that, as the plaintiff was not the real party in interest, she did not have the right to bring the action. The trial court held that she had that right, and the jury returned a verdict for $5,000.

The fire whistle blew at about 6:30 p. m. on July 17, 1931, in the town of Osmond, Nebraska, and two brothers, who were volunteer members of the fire department, started for the fire, each going in his own car. They went in different directions, and shortly thereafter collided at right angles in the middle of a street intersection, which collision resulted in the death of one of these brothers, Nicholas Goeres, aged 33 years. The defendant, Ray Goeres, admitted he was driving his model A Ford at 35 to 40 miles an hour at the time. He testified that his brother (meaning the deceased) was driving his model T Ford fast, probably 35 miles an hour. The village of Osmond carried insurance on its employees, and the widow is being paid $15 a week compensation by the insurance carrier.

After the death of her husband, a written contract was entered into between the widow, who was afterwards appointed administratrix of his estate, and the General Indemnity Corporation of America, which is paying the compensation for 350 weeks, and the city of Osmond, which in specific terms provided that the widow, as administratrix, should begin this suit, and, for so doing, the others agreed to pay her 10 per cent. of whatever amount

should be recovered in the suit. They also agreed, probably at her request, that, as Ray Goeres was her brother-in-law, and only carried indemnity insurance on his automobile for liability up to $5,000, the judgment that they recovered against him should not exceed the sum of $5,000. This written contract was set out in full in the answer.

One of the questions raised is whether or not Mrs. Goeres, the widow of the deceased, as administratrix, was the real party in interest. She contracted that none of the proceeds of the judgment, if one should be obtained, would go to her except the mere sum of 10 per cent., and the city of Osmond and the General Indemnity Corporation of America should receive all the rest of the judgment. The question is raised here that, while it is true that the workmen's compensation law does not prevent the widow from bringing suit, it is contended by appellant that a contract of this kind is not proper practice in Nebraska. Upon motion of the plaintiff, this written contract was stricken out of the defendant's answer, and this is one of the errors charged.

Appellant insists that this violates section 20-301, Comp. St. 1929, which provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section twenty-six."

In *O'Donnell v. Baker Ice Machine Co.*, 114 Neb. 9, it is held that the employee must plead and prove the employer's neglect or refusal to sue the third party, in order for the employee to maintain such an action, and the statute then in force, being section 3041, Comp. St. 1922, was later amended to avoid this ruling, and is now found as section 48-118, Comp. St. 1929, being a part of the workmen's compensation law, and provides generally that reimbursement from a third person, whose negligence caused the death of the employee, for the full amount of compensation paid by employer to employee's dependent, together with the expenses thereof, is the measure of the

employer's statutory right of subrogation. Comp. St. 1929, sec. 48-118; *Bronder v. Otis Elevator Co.*, 121 Neb. 581.

It is said that only a few other states, among which are Alabama, Minnesota and Wisconsin, have statutes similar to this section 48-118, Comp. St. 1929, providing specifically for subrogation of the employer to the right of the employee to the amount of compensation payable or to be paid.

These subrogation statutes, in whatever form they appear, doubtless came from a provision of the English act, 6 Edw. VII, ch. 58, sec. 6, which subrogates the employer to the injured employee's right of action against a negligent third party.

Several of the various types of statutes in relation to this matter might be set out briefly as follows: (1) Statutes which require the employee at his option to take compensation or to sue the tort-feasor; (2) those providing that the employee shall receive any amount recovered by the employer in excess of the compensation allowed; (3) statutes which limit the employer's recovery to the amount for which he is held under the compensation law; (4) statutes allowing the employee to proceed against either the employer or the tort-feasor, but not against both; (5) statutes which allow the employee to recover compensation from the employer and also to sue the tort-feasor, but, in case his recovery from the tort-feasor is greater than the amount paid in compensation, the employer is subrogated to that extent, which is the rule in Nebraska. The rights of the employee or his personal representative are not two separate remedies for the same wrong, for the right against the tort-feasor is a common-law remedy calculated to give damages for an injury caused by a wrong-doer. The right for compensation against the employer who is guilty of no wrong is not intended to make whole the injury to the employee, for compensation depends upon the fact that one was injured while in employment, and is measured, not by the extent of the injury suffered, but by the amount of the employee's weekly wages.

When the accident occurs, the employee is sometimes forced by financial circumstances to take immediate compensation, and this does not, under the Nebraska law, deprive him, because of this necessity, of recovering from the tort-feasor his larger common-law liability. See 40 Yale Law Journal, 1108; 26 Harvard Law Review, 377; 10 Neb. Law Bulletin, 489; Ann. 67 A. L. R. 249.

The action in the case at bar is founded upon Lord Campbell's Act of 1846, 9-10 Vict. ch. 93, which is the model of nearly all American legislation upon this subject. Cooley, Torts (4th ed.) sec. 211. It was first enacted in our Nebraska law in sections 1 and 2, ch. 15, General Statutes of Nebraska 1873, and now appears as sections 30-809, 30-810, Comp. St. 1929.

The question raised has been before this court several times in various forms. It has been held that the workmen's compensation law does not create a cause of action against a wrong-doer for negligently causing the death of another person, and that an action against a wrong-doer for causing such death must be brought in the name of the personal representative. *Luckey v. Union P. R. Co.*, 117 Neb. 85.

In the case at bar, the law of Nebraska required this action to be brought by the administratrix under the Lord Campbell's Act, while the provisions of the compensation act, relating to the interest of the employer therein, merely related to the distribution of the proceeds. The ruling of the trial court that she had a right to bring the action was correct.

We will next consider the question whether the court erred in sustaining plaintiff's objection to the defendant's question, on the cross-examination of Mrs. Gertrude Goeres, pertaining to a written contract with the General Indemnity Corporation of America, relative to bringing this action.

This contract was set out at length in the answer, and then stricken out on motion before trial. The appellant insists that if he could have shown the jury that she was

to receive but 10 per cent. of the verdict, it might have changed that verdict materially. We do not think so, for the contract was nothing more than a recitation of the statutory rights of the parties.

The bill of exceptions discloses the following examination: "Now, Mrs. Goeres, have you been paid any money since the time of your husband's death on account of that accident? A. Yes. Q. Who pays it? A. Well, the workmen's compensation. I get a check from Lincoln. Q. You get a check from there every week? A. About every two weeks. Q. How much are those checks for? A. I get a check usually for $30. I get $15 a week." And in regard to the fact of the attorneys representing her: "Q. Now, did you hire Mr. Holland and Mr. Deutsch to bring this action, or did somebody else? A. I did. Q. And do you know who is paying them? A. No; I don't. * * * Q. You haven't agreed to, have you? A. No; I haven't." Statement by Mr. Deutsch: "I think the jury recognizes that Holland and I represent the compensation company and we also represent her." "Q. For the purpose of the record I will ask you whether or not you had a written contract with the General Indemnity Corporation of America relative to bringing this action?" "Objected to for the reason that it is incompetent, irrelevant, immaterial, and not proper cross-examination. Sustained." The appellant argues the exception taken to this ruling at length.

This rule, adopted by this court in *Jessup v. Davis,* 115 Neb. 1, allowing the interest of an insurance company to be inquired into upon cross-examination, is not a right to be abused, as shown by a reversal in *Lewis v. Beckard,* 118 Neb. 533, and any attempts to enlarge upon this very limited field of inquiry should be discouraged by the trial court. *Jennings v. Biurvall,* 122 Neb. 551. A careful examination fails to disclose that the appellant was prejudiced in any way by the ruling of the court.

Objection is taken to instruction No. 9, given by the court on its own motion. This instruction is as follows:

"It is a rule of the road that, where two persons approach an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. This of itself does not necessarily constitute negligence but is a circumstance that you may consider along with other evidence in the case in determining the question of negligence."

The court, in instruction No. 8, told the jury that both of the brothers were members of the fire department, and that it was their duty to proceed to a fire with speed and dispatch, and that conduct which would be considered negligent and reckless in a private citizen may not be improvident on the part of a fireman. He may take greater risks than a private citizen, and yet be regarded as within the rule of ordinary care.

It is argued that the better rule of law is that speeding ordinances and other such regulations do not apply to public servants such as a fireman, or to police officers. Would it not be absurd if a policeman was attempting to catch a criminal who was escaping, and the policeman would have to stop at every stop-light he came to, and thus let the criminal escape?

Ordinary speed regulations, and other regulations as to the use of public streets, do not apply to fire apparatus responding to a fire alarm and hastening to reach a fire. Such a situation presents an emergency, which should not be held to come within a road regulation. *Ring v. Minneapolis Street R. Co.*, 173 Minn. 265; *Hubert v. Granzow*, 131 Minn. 361, Ann. Cas. 1917D, 563.

Yet, in this case the giving of instruction No. 9 was not prejudicial in any way, for the drivers of the two cars involved were each firemen; and it is needless to say that, when these two speeding firemen met, by observance of the rules a life might have been spared.

We have examined all of the other errors set out, but finding no reversible error in the judgment of the district court, the same is

AFFIRMED.

JAMES F. MCDERMOTT, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED APRIL 14, 1933. No. 28359.

1. **Master and Servant:** INJURY TO SERVANT: LIABILITY UNDER FEDERAL EMPLOYERS' LIABILITY ACT. In an action by an employee of a railroad company under the federal employers' liability act to recover damages for an injury, the plaintiff at the time of the injury must have been engaged in interstate transportation, or work so closely related to it as to be practically a part of it.
2. ———: ———: ———: BURDEN OF PROOF. The burden is on one suing under the federal employers' liability act to show that he and the carrier were engaged in interstate transportation within the meaning of such act at the time he was injured.

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

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

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

Heard before ROSE, DEAN, GOOD, EBERLY and PAINE, JJ., and RAPER, District Judge.

RAPER, District Judge.

The plaintiff, who is appellee, was injured while in the employ of the defendant railway company, appellant, an interstate carrier. He brought suit in Douglas county under the federal employers' liability act, and recovered judgment, from which defendant appeals.

The evidence relating to the issue as to whether the plaintiff was engaged in interstate transportation at the time of his injury is not in dispute. It was all offered by plaintiff and consists of the testimony of plaintiff and members of the switching crew and clerk of the defendant company.

Plaintiff for many years had been employed as a member of a local switching crew at Missouri Valley, Iowa, (a junction point) whose duty it was to break up and

make up trains and other incidental work of switching in said yards. The crew on the day of the injury went on their regular eight-hour shift at 4 o'clock p. m. and worked until midnight. The yards at that place are quite extensive, some of the side-tracks are north and some south of the main double track. During that day and evening several freight trains entered the yards, each of which contained both interstate and intrastate cars. On arrival of these various trains, the engine was detached, and the switching crew took the way car or caboose and placed it on a side-track provided for that purpose, then the switching crew broke up the train and placed the cars where designated by the yard clerk. When a train arrived in the yards a clerk went over the train and marked each car with some symbol in chalk, which showed what disposition was to be made of each car, and the switching crew followed those directions in breaking up the train and placing the cars where they were to be placed. Some of the cars were placed on side-track in train formation to be later moved out of the yards. The car on which the accident occurred was an empty C. & N. W. flat-car, billed from Dunlap, Iowa, to Missouri Valley, Iowa, came in on train No. 47, which contained both interstate and intrastate cars. This car was marked to be placed on the material track for use in loading material; the kind or purpose or time of loading is not disclosed. About 11:25 p. m., and after the switching operations on most of the trains had been completed, the flat-car mentioned and an empty C. & A. box-car, billed from Sioux City, Iowa, to Grand Junction, Iowa, in care of M. & St. L., were in a string of cars, some interstate cars, and were shoved into side-track to where they were wanted and the engine left them there. Plaintiff was on that string and made a coupling of those cars, and started back to rejoin the crew, where they had gone after spotting the string of cars. Plaintiff crossed over to the north yard toward the engine, which was going over a highway crossing, to go to the north-side tracks. The engine had two cars on it, the flat

and the C. & A. box-car. While plaintiff was walking back from where he had last made the coupling on the string of cars on track 3, the crew spotted the C. & A. empty box-car on the house track about 200 feet from where the accident occurred. This left only the flat-car attached to the front of the engine. The rest of the crew backed the engine and the flat-car over the Ninth street crossing, and no other switching was done, until the accident happened. The plaintiff walked from where he had made the coupling of that string of cars that had been shoved and left on track 3, about 1,500 feet, to where the engine and flat-car were stationed, preparatory to making a flying switch to place the flat-car on the lard track which was used as a storage track. The engine and flat-car had just started to back up when plaintiff climbed upon the flat-car to manage the brake, and after gaining a speed of 10 or 12 miles an hour the flat-car was uncoupled from the engine, which accelerated its speed so as to cross the switch before the flat-car reached it, and thus throw the switch to shunt the flat-car onto the lard track. The engine, through some misunderstanding of signs, stopped on the switch and the flat-car collided with the engine and plaintiff sustained an injury. He was able to go on with his work and the flat-car was placed on the lard track. The next movement of the crew was to go to the stock-yards, get an intrastate car of cattle and leave it on the main line in front of the depot. They then went to train 306, which had arrived at 11:15 p. m., and moved it back up the main line in front of the depot. At that time the crew went off duty. It does not appear that the movement of the empty C. & A. box-car to the house track or the setting of the flat-car on the lard track was necessary to clear tracks for the movement of interstate cars or to place interstate cars so as to facilitate interstate transportation, nor was any interstate haul interrupted or affected.

At the close of plaintiff's testimony, the defendant asked the court to direct a verdict for it, or to discharge the jury and dismiss plaintiff's action, for the reason that the evidence was insufficient to prove that plaintiff was engaged in interstate transportation when injured. The court denied the motion and a like one at the close of all the evidence. The court instructed the jury as a matter of law that the plaintiff at the time of the injury was engaged in interstate commerce. The denial of defendant's motion for nonsuit and that instruction of the court are alleged as error.

The appellee claims that so long as plaintiff, as a switchman, was engaged in the business of breaking up and reclassifying the freight cars in trains 46, 47 and 48 he was employed in interstate commerce and entitled to the benefits of the federal employers' liability act. The defendant contends that plaintiff was not engaged in interstate transportation at the time of his injury, nor in work so closely connected therewith as to be practically a part of it, and further that defendant was not engaged at that time in interstate transportation.

"The test of whether an employee of a railway company is subject to the federal employers' liability act is: Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?" *Hensley v. Chicago, St. P., M. & O. R. Co.*, 118 Neb. 690. The state courts are bound by the interpretation of the federal act given by the federal courts. In the opinion it is said: "Those railway employees who are engaged in working upon any instrumentality that is not, at the time, engaged or being used in interstate traffic are generally without the statute."

The United States supreme court in *Illinois Central R. Co. v. Behrens*, 233 U. S. 473, decided that congress in enacting the federal employers' liability act has confined the liability imposed by that act to injuries occurring to employees when the particular service in which they

were employed at the time of the injury is a part of interstate commerce. In *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, that court laid down the rule that it is essential the employee at the time of the injury is engaged in interstate transportation, or in work so closely related to it as to be practically a part of it, to bring a case within the statute. That court in *Chicago & Eastern Illinois R. Co. v. Industrial Commission*, 248 U. S. 296, affirmed the principle announced in the *Shanks* case. In the *Behrens* case, a fireman, member of a switching crew, was killed while at his post of duty. The crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once, and at times turning directly from one to another. At the time of the injury, the crew was moving several cars loaded with freight which was wholly intrastate, and upon completion of that movement was to have gathered up and taken to other points several cars as a skip or link in their transportation to destinations within and without the state. The opinion states: "At the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

The case of *Rogers v. Canadian Nat. R. Co.*, 246 Mich. 399, arose where an employee was engaged in moving to a railroad yard empty freight cars which had finished their interstate service and had not entered on any other movement and were awaiting routing. Such cars, the court held, were not engaged in interstate commerce during switching operations. While the facts in that case are not parallel with this case, the court announced the rule that the character of these cars as instruments of

commerce, interstate or intrastate, depended upon the purpose of their movement at the time of the accident. Also, it is therein stated: "The cars were engaged in interstate commerce until they reached the destination to which they were consigned, and then ceased to bear such character until billed or designated for return."

In *Phillips v. Union Terminal R. Co.*, 328 Mo. 240, the plaintiff, a switching foreman, was engaged in switching cars containing both state and interstate commerce. He had been directed to deliver certain interstate cars to the Great Western yards, and in order to facilitate the movement of those cars he cut off three empty coal cars and left them on another switching track. He and the crew then returned to the three empty cars for the purpose of spotting them at a place to be loaded with sand. The court held he was not engaged in interstate commerce.

In *Mayor v. Central Vermont R. Co.*, 26 Fed. (2d) 905, the court announced: "Injury to employee during switching operations, by which car in intrastate commerce was moved by engine disconnected from interstate train, for purpose of shifting the intrastate car to a siding of its consignee, held not within federal employers' liability act (45 U. S. C. A. secs. 51-59, Comp. St. secs. 8657-8665), because not occurring in interstate commerce, though engine and car were subsequently joined to interstate train and proceeded together for some distance, and switching movement was interrupted by placing entire train on siding, so as to permit the passage of another interstate train." See, also, *Wise v. Lehigh Valley R. Co.*, 43 Fed. (2d) 692; *Illinois Central R. Co. v. Peery*, 242 U. S. 292; *Grigsby v. Southern R. Co.*, 3 Fed. (2d) 988; *Chicago & Eastern Illinois R. Co. v. Industrial Commission*, 284 U. S. 296.

Applying the principle decided in those cases, it follows that plaintiff was not, at the time of his injury, engaged in interstate transportation, nor in work so closely related to it as to be practically a part of it, nor was the defendant so engaged.

Plaintiff contends the distinction in this case is that, as the flat-car had come in on train 47, and the crew was engaged in breaking up trains 46, 47 and 48, and the flat-car which was a part of this movement had not been completely delivered and could not be completely delivered as a part of that movement until it reached its place on the lard track in the yards, for which it was marked at the time the movement to break up the interstate train was initiated, and until the flat-car reached such place the crew was still engaged in interstate commerce.

It has been repeatedly held that a car loses its interstate character as soon as it reaches its destination. The car here involved can only be designated as interstate while it was a part of the train that conveyed it into the yards at Missouri Valley, to which place it was billed. As soon as it reached there, it no longer had any interstate character. It was switched back and forth as a matter of convenience in handling while breaking up train 47, and other trains, and if the injury had occurred while it was so attached to interstate cars probably that would bring the plaintiff within the act. But the breaking up of those trains was completed. The last act of plaintiff before the injury was to set the coupling on a string of interstate cars. He then walked a distance from that place to where the rest of the crew were ready to switch the flat-car. When he began his duties again at the flat-car there was no further work, either proximate or remote, to be done by the crew with interstate cars before the flat-car was to be switched. Appellee cites many cases, among them *Stewart v. Wabash R. Co.*, 105 Neb. 812, where a switching crew took some cars to a Y in order to clear a main track for a passing interstate train. This court held that fact, in connection with other circumstances, brought the injured employee within the act; so, too, in *New York Central & H. R. R. Co. v. Carr*, 238 U. S. 260, where a brakeman was injured while setting brake on an intrastate car, which had been

cut out of an interstate train, where the setting of the brake was necessary in order that the engine to which the car was attached might, when uncoupled, return to the train and proceed on its journey; and in *Youngstown & Ohio R. R. Co. v. Halverstodt*, 12 Fed. (2d) 995, a condition existed similar to the *Carr* case; and a similar state of facts was applied in *Healy v. Chicago, M. & St. P. R. Co.*, 164 Minn. 353, where injury to an employee happened when a crew left interstate cars and went a few miles to pick up intrastate cars which were intended to join and move on with the interstate cars. Other cases are cited, but in each instance the injured employee was engaged in doing some act which assisted or facilitated the movement of interstate transportation, or as has been stated of such cases: "It was not a matter of indifference to the prompt and economical movement of interstate cars."

There are several other errors alleged by appellant, but it is unnecessary to advert to them, inasmuch as the case must be reversed and dismissed because plaintiff did not bring himself within the federal employers' liability act.

The judgment is reversed, with direction to dismiss plaintiff's action.

REVERSED.

JAMES E. NOEL, APPELLEE, V. NATIONAL UNION FIRE INSURANCE COMPANY, APPELLANT.

FILED APRIL 21, 1933. No. 28435.

1. Insurance: CONTRACT: LAW GOVERNING. Generally, a contract of insurance is to be governed by the laws of the state in which it was made. *Antes v. State Ins. Co.*, 61 Neb. 55.
2. ———. Facts examined, and *held* that sections 8980 and 8981, Code of Iowa, do not prevent recovery on the policy of insurance involved here.
3. ———: ADDITIONAL INSURANCE: FORFEITURE. Additional insurance taken out on property without the consent or knowledge of the insured is not a violation of a clause in his

insurance policy making other insurance a ground of forfeiture of the policy.

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

Crofoot, Fraser, Connolly & Stryker and *James T. English*, for appellant.

John A. McKenzie, contra.

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

GOSS, C. J.

This and a companion case, *Noel v. National Union Fire Ins. Co.*, p. 740, *post*, were argued at the same time. They were almost identical. They had the same parties and issues. They involved damages to trucks insured in the same companies, on the same dates, and damaged in the same fire. Counsel wrote their briefs before the respective transcripts and bills of exceptions were bound together. When these were so bound, the bills of exceptions were exchanged and each bound with the wrong transcript. They were thus when the cases were argued and submitted, but the court was not advised of this and had no way of discovering it save by comparison of the district court docket numbers. There was no apparent call for that detailed examination. The writer, to whom the court assigned the cases for opinions, noted small discrepancies between the allegations and the proofs and called attention to them in opinions written and released. These opinions have been published unofficially. Appellants on their motions for rehearings called attention to the exchange of the bills of exceptions. The court decided to withdraw the former opinions and to substitute others so as to cover the situation disclosed in the above recital.

Defendant fire insurance company appeals from a judgment for plaintiff. There was no service on the other defendant, Securities Investment Corporation.

March 7, 1931, National Union Fire Insurance Company issued its fire policy to plaintiff, a resident of Macedonia, Iowa, insuring his truck for one year, for an amount not exceeding $3,000, the loss payable to Securities Investment Corporation of Omaha as its interest may appear. It was damaged by fire March 16, 1931. Plaintiff claimed $2,990. The jury allowed salvage and returned a net verdict of $2,135.20 for plaintiff.

Plaintiff alleged in his petition that, after the loss occurred, he was informed for the first time that the party holding a mortgage upon the truck had taken out other insurance indemnifying said mortgagee against loss by fire. In that respect defendant set out a provision of the policy prohibiting recovery if at the time of the loss there be other insurance covering such loss, which would attach if this insurance had not been effected; and then pleaded that on November 5, 1930, the "plaintiff through his authorized agent, the Securities Investment Corporation," procured a $2,000 policy in Globe & Rutgers Fire Insurance Company, insuring the truck against loss by fire, the loss, if any, payable to plaintiff and to the Securities Investment Corporation as their interests may appear. Defendant further alleged that such action prevented recovery by plaintiff under the laws and decisions of Iowa, which were pleaded as governing the contract between plaintiff and defendant alleged to have been made in Iowa. Defendant also alleged that, prior to March 7, 1931, plaintiff had executed a chattel mortgage on the truck, which mortgage was assigned to Securities Investment Corporation, by the terms of which mortgage plaintiff authorized the mortgagee or assigns to procure insurance on the truck to cover any unpaid part of the indebtedness on said mortgage.

Plaintiff resided in Iowa, purchased the truck in Iowa, executed and delivered the chattel mortgage in Iowa, made application for the fire insurance policy, and it was delivered, in Iowa. There is nothing in the contract or in the dealings of the parties indicating any intent other

than that the insurance contract should be governed by the laws of Iowa. Generally, a contract of insurance is to be governed by the laws of the state in which it was made. *Antes v. State Ins. Co.*, 61 Neb. 55. The contract evidenced by the policy in suit is to be construed by the laws of Iowa, so far as they apply.

The evidence shows that the policy in suit contained the provision against other insurance, as pleaded by plaintiff, and that at the time of the loss the other insurance policy, in favor of the Securities Investment Corporation, was in existence. This other policy was for $2,000 limit of liability as alleged by defendant. It showed a representation that $591 was unpaid on the truck. Loss, if any, was made payable to J. E. Noel and Securities Investment Corporation as their interests may appear. Defendant proved the applicable Iowa statutes, and now further cites Iowa decisions holding that, where other or additional insurance is obtained covering the property insured, there can be no recovery by plaintiff on the policy. Section 8980, Code of Iowa, provides: "Any condition or stipulation in an application, policy, or contract of insurance, making the policy void before the loss occurs, shall not prevent recovery thereon by the insured, if it shall be shown by the plaintiff that the failure to observe such provision or the violation thereof did not contribute to the loss." But section 8981 provides: "Any condition or stipulation referring: 1. To any other insurance * * * shall not be changed or affected by the provision of the preceding section." Construing these sections, the Iowa courts seem to hold uniformly that other insurance obtained by the insured voids the policy. So, if the additional or other insurance in the Globe & Rutgers Fire Insurance Company was procured by the insured "through his authorized agent, the Securities Corporation," as alleged by defendant, plaintiff cannot recover.

However, the evidence in the record before us shows that, until after the loss, plaintiff had no knowledge this

policy had been written. He so testified and the manager of the insurance department of the Securities Investment Corporation corroborated him by stating that his company procured the policy and never notified plaintiff that it had done so. The circumstances appear in evidence to be as follows: The corporation, as assignee of chattel mortgages, held insurance policies covering this and other trucks of plaintiff. For some reason the policies were canceled. The Securities Investment Corporation notified plaintiff by letter that its insurance companies had ordered it to cancel his policies, intimated that it could not obtain policies, and demanded that he immediately procure policies, with loss clauses in favor of the mortgagee, and forward them. Later the company notified plaintiff by letter that he had not yet furnished insurance policies covering the trucks and unless he did so within ten days it would "tie up these trucks until such protection is obtained." Plaintiff testified that, upon receipt of the last letter from Securities Investment Corporation, he ordered insurance of a local agency of defendant and later received the policy in suit. He testified that he never was advised from any source, or had any knowledge, that the Globe & Rutgers Fire Insurance Company had written any insurance on the truck.

Over against this showing there is no testimony and no evidence, save the provision in the chattel mortgage requiring plaintiff to keep the property insured for not less than the mortgage and authorizing the mortgagee to procure such insurance, but the same provision requires the mortgagor "to procure such insurance himself when dealer or assigns are unable to do so." The mortgage does not require the mortgagor to deposit the insurance policy with the mortgagee. That the mortgagee held mortgages upon other trucks of plaintiff may have caused confusion resulting in the Globe & Rutgers policy for $2,000 limit of liability when the balance due on this particular mortgage was recited as only $591 at the time the policy was written.

On the facts before us this makes quite a different situation from any in the Iowa cases cited to us and we find none in that jurisdiction similar to this. We deduce from the evidence the conclusion of fact that plaintiff did not know of any other insurance on the truck when it was damaged by fire. He thought all preexisting insurance was canceled and that the mortgagee had declined to procure any further insurance. Its letter to him indicates such intention, stating it would "tie up" the trucks if he did not procure the insurance. He therefore obtained the insurance policy in suit and it protected the mortgagee by its loss clause. He acted in apparent good faith throughout. There is not even a suspicion that the fire was incendiary. The facts show it was accidental. Whatever agency the Securities Investment Corporation may have had from plaintiff to procure any insurance for plaintiff beyond its own interest was ended by its letter heretofore referred to. Its act in obtaining the Globe & Rutgers Fire Insurance Company policy was its act, unauthorized by plaintiff. That it procured the policy in favor of plaintiff with a liability in excess of the amount due on its mortgage was its own act and a matter between it and its insurance company. The Securities Investment Corporation, alleged by plaintiff and admitted by defendant to be a Nebraska corporation, was not served nor brought into court by either party. Plaintiff did not procure any "other insurance."

As a matter of law we are of the opinion that the sections of the Iowa Code are not applicable to the facts here found and that the stipulation in the policy against other insurance does not prevent the plaintiff from recovering on the policy.

Additional insurance taken out on property without the consent or knowledge of the insured is not a violation of a clause in his insurance policy making other insurance a ground of forfeiture of the policy. 14 R. C. L. 1137, sec. 318; 26 C. J. 260; *Harvey v. Pawtucket Mutual Fire*

Ins. Co., 250 Mass. 164; *Glens Falls Ins. Co. v. Jacobs*, 227 Ky. 741.

It follows from what we have already stated that the court did not err in not sustaining defendant's motion to direct a verdict for defendant, made at the close of all the evidence. The evidence would not have supported a verdict for defendant. So there was no error in submitting to the jury the amount of plaintiff's loss occasioned by the partial destruction of his truck.

In its brief appellant assigns error on the ground of misconduct of plaintiff's counsel in the argument to the jury. Counsel for plaintiff was embellishing his argument to the jury with an illustration to the effect that, if one insured a house for a definite sum and it is completely destroyed, the insurer must pay the whole amount. Defendant objected. The court thereupon remarked to the jury, in substance, that counsel for plaintiff was referring to the valued policy law, which would not apply in this case. We think this fully counteracted the effect, if any, of the argument, and that the incident was not prejudicial to defendant. If defendant desired the jury to be further instructed on this subject, it should have requested an instruction. This it failed to do.

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

AFFIRMED.

JAMES E. NOEL, APPELLEE, V. NATIONAL UNION FIRE INSURANCE COMPANY, APPELLANT.

FILED APRIL 21, 1933. No. 28436.

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

Crofoot, Fraser, Connolly & Stryker and *James T. English*, for appellant.

John A. McKenzie, contra.

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

GOSS, C. J.

Defendant fire insurance company appeals from a judgment for plaintiff. This suit is almost identical with *Noel v. National Union Fire Ins. Co., ante,* p. 734. The parties and the insurance companies are the same. The policy sued on was for $2,000 on another truck damaged by the same fire. The "other insurance" was for a $1,200 limit of liability with a representation of $640 unpaid on the truck. The case was tried before a different judge and jury. The judgment was for the net loss found by the jury, with interest, making a total of $1,044.70. There are separate records. The cases were briefed separately but were argued orally before this court at the same time. The place of contract, the dates, the questions of fact and of law are almost identical in the two cases. Except as otherwise indicated, we find the facts and the law covered by our discussion in the preceding opinion. No service will be rendered the parties or profession by repetition.

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

AFFIRMED.

VERNA HALL, APPELLEE, V. CLARA VAKINER, APPELLANT.

FILED APRIL 21, 1933. No. 28500.

1. **Libel and Slander.** Evidence outlined in opinion *held* sufficient to sustain a verdict that defendant uttered and published the slander pleaded in the petition.
2. ———: TRIAL. After plaintiff rests and defendant moves for a nonsuit in an action for slander, it is within the discretion of the trial court to permit a witness to be recalled and to testify that the slander was uttered in English, the language in which it was pleaded.

3. ———: ———: INSTRUCTIONS. In an action for slander, an instruction containing directions to the effect that plaintiff was not bound to prove the speaking of all words charged in the petition, if the jury believed from the evidence that defendant used words fairly importing the alleged slander, *held* not prejudicially erroneous, where there was no material difference between the petition and the affirmative proof as to the defamatory language used.
4. ———: DAMAGES. In an action for slander, the amount of damages recoverable is largely in the discretion of the jury.
5. ———: ———. Unless the amount of a verdict for slander appears to be clearly wrong, or the result of passion or prejudice, or of an abuse of discretion, or of a serious mistake or gross error, or of an extravagant or unconscionable estimate of damages, it will not ordinarily be set aside on appeal as excessive or reduced by remittitur.
6. ———: ———. A verdict of $1,750 against defendant for uttering and publishing the slander that plaintiff is a whore *held* not excessive.

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

J. F. Rohn and *C. M. Heine*, for appellant.

Cook & Cook, contra.

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

ROSE, J.

It is charged in the petition that defendant uttered and published in the store of Carl Schneider in the village of Snyder, Nebraska, September 1, 1931, of and concerning plaintiff, an unmarried woman 22 years of age, the following false and defamatory words:

"The Henry Hall and Schweitzer girls are whores. The girls go to Fremont and mix with the same bunch. These kind of people should be run out of town."

Plaintiff pleaded also that those words were spoken in the presence and hearing of Carl Schneider and Fred Jahrmarkt and that by reason of the slander plaintiff has suffered mental anguish and damage to her former good

name and reputation in the sum of $10,000.

In an answer, defendant admitted that plaintiff is a daughter of Henry Hall, that she is 22 years of age and that her parents live in Snyder. Other allegations of the petition are denied.

Upon a trial of the cause, the jury rendered a verdict in favor of plaintiff for $1,750. From a judgment therefor defendant appealed.

It is urged as a ground for reversal that the evidence is insufficient to sustain the verdict. Defendant testified in her own behalf that she did not utter at any time or place the defamatory words charged, but admitted her participation in the conversation to which the alleged slander applied, saying the names of the Hall girls were not mentioned. On cross-examination, however, she admitted they were mentioned, but in a different connection. On the other hand, Fred Jahrmarkt, father of six children, a farmer who had resided 56 years on his 245-acre farm near Snyder, testified that, in a conversation in which he was a participant, defendant made the statement pleaded, repeating it in language almost identical with the slanderous words alleged in the petition; that Carl Schneider, who was also present, cautioned defendant at the time she was "going too far;" that the defamatory words applied to plaintiff. The conversation and surrounding circumstances were given in detail. The jury were the judges of the credibility of the witnesses and of the weight of the conflicting testimony. The evidence on behalf of plaintiff was reasonable and proper and was sufficient to prove her case and, having been believed by the jury as shown by their verdict, settled the issue as to the utterance and publication of the slander pleaded. *Pendrock v. Woolworth Co.*, 123 Neb. 477.

Complaint is made because the district court, after plaintiff had rested and defendant had moved for a nonsuit, permitted Jarhmarkt to be recalled and reexamined as a witness. He had previousy testified that part of the conversation containing the alleged slander was in

German and part in English. Upon further examination, he said the slanderous words were uttered in English—the language of the petition. The record shows that in his testimony in chief he stated the defamatory matter in his own English. After he was recalled, he said it was spoken by defendant in English. This testimony harmonized the petition and the proof as to defendant's use of English in the slander pleaded. The power of the district court, in conducting the trial impartially in the interests of justice, included the discretion to permit the recalling of the witness for the purpose of explaining or supplementing his own testimony on a material issue. This discretion was exercised and the record does not show it was abused.

Instructions were criticized for containing statements to the effect that plaintiff was not bound to prove the speaking of all words charged in the petition, if the jury believed from the evidence that defendant used words fairly importing the slander pleaded. An instruction of a similar nature was formerly held not erroneous in *Boldt v. Budwig*, 19 Neb. 739. In any event the instructions were not prejudicial, for the reason that the slander to which the witness for plaintiff testified was in language identical with the charge in the petition. The defamatory words were the same in both pleading and evidence on behalf of plaintiff. There was nothing in either to mislead or confuse the jury as to what was alleged in the petition and stated by the witness. No error has been found in the rulings giving or refusing instructions.

It is further insisted that the judgment is excessive and should be reversed or a substantial remittitur required. In determining questions of this nature reviewing courts recognize the following rules:

"In an action for libel or slander, the amount of damages recoverable is peculiarly a matter for the jury. It is almost entirely within their discretion, because there can be no fixed or mathematical rule on the subject." 17 R. C. L. 444, sec. 205.

Unless a verdict for slander appears to be clearly wrong, or the result of passion or prejudice, or of an abuse of discretion, or of a serious mistake or a gross error, or of an extravagant or unconscionable estimate of damages, it will not ordinarily be set aside on appeal as excessive or reduced by remittitur. 17 R. C. L. 444, sec. 205.

Plaintiff had graduated from a high school while living with her parents. For two years or more she had been constantly in legitimate work on her own account. At different times she had been an employee in a printing shop, in a physician's office, in a home caring for children, in a café as a waitress, and in a store. The evidence tends to show that the utterance and publication of the slander caused mental anguish in addition to other elements of damage. The defamatory charge ranked plaintiff with women unfit for any honorable place in life. A successful attack on a good name and the resulting injury were subjects of a familiar classic:

"Good name in man or woman, dear my lord,
Is the immediate jewel of their souls;
Who steals my purse, steals trash;
'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name,
Robs me of that which not enriches him,
And makes me poor indeed."

Shakespeare.

In a former opinion a verdict of $3,500 for a false charge of unchastity was affirmed, though assailed on appeal as excessive. *Bloomfield v. Pinn*, 84 Neb. 472. In the present instance there does not seem to be a substantial ground for a reversal or a remittitur or for otherwise interfering with the verdict.

AFFIRMED.

L. CLYDE FRAZIER, APPELLEE, V. LELAND S. BROWN ET AL., APPELLANTS.

FILED APRIL 21, 1933. No. 28313.

Appeal: REFUSAL OF INSTRUCTIONS. It is error for the court to refuse to give an instruction to the jury which fairly reflects a defense that has been made an issue by the pleadings and the evidence adduced and where such theory has not been covered by other instructions given by the court of its own volition.

APPEAL from the district court for Webster county: J. W. JAMES, JUDGE. *Reversed.*

Frank J. Munday and *Denney & Denney*, for appellants.

McNeny, Gilham & Sprague, contra.

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

DEAN, J.

Defendants appeal from a judgment against them in favor of plaintiff. The action was in Webster county. Plaintiff sued to recover $1,250 which he alleged he loaned, on or about January 17, 1931, to Leland S. Brown, Ralph E. Cressey and the Cressey Nu-Wae Shoe Company, hereinafter called the company.

All defendants are nonresidents of Webster county. Defendant Brown was served while in that county and the other defendants were served in Jefferson county where they reside.

Cressey and the company entered separate special appearances and objections to the jurisdiction over their persons on the ground that there was no joint liability against them and Brown; that Brown was not properly joined; that he was made a party, not in good faith, but for the sole purpose of alleging a cause of action against him in Webster county; and that said Brown cannot be held connected with the cause of action.

The district court overruled the special appearances and gave the defendants time to answer. Cressey and

the company severally answered, setting up, among other things, that the plaintiff purchased stock in the company with the $1,250, and that there was no promise on their part to repay the money. Each also preserved in the answer the objections to the jurisdiction on account of the misjoinder with defendant Brown. This was proper. *Gaines v. Warrick*, 113 Neb. 235. This lack of jurisdiction was one of the issues in the trial of this case.

The evidence was in conflict on all the issues. There was ample testimony from which the jury might have found that there was no joint liability of Cressey and the company with Brown, and that there was no promise of Brown to repay the money to the plaintiff. The court did not in his general instructions to the jury submit the issue raised by the special appearances of Cressey and the company and pleaded over in their answers. These two defendants specifically tendered instructions submitting that issue to the jury, but the instructions were refused. It is true that defendant Brown tendered on his own behalf and the court gave at his request two special interrogatories. One of these asked whether Brown jointly with the other defendants borrowed the money, and the other asked whether Brown promised to pay the sum for money borrowed. The jury answered both questions in the affirmative. There was no reference in the general instructions to these interrogatories. Neither in the questions themselves, nor connected with them in any way, did the court instruct the jury that their findings thereon must be based upon the preponderance of the evidence. With such a qualification as to *quantum* the jury might have answered these questions in the negative. This lack of qualification as to the special interrogatories may have induced the general verdict for the plaintiff by destroying the *quantum* of a preponderance of evidence set forth in the general instructions.

The special interrogatories were not asked by the defendants Cressey and the company. They had their

theory of defense, a part of which was based on their objections to the jurisdiction. It should have been submitted to the jury. It is fundamental that: "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. Conversely, it is error for the court to refuse to give an instruction to the jury which fairly reflects a defense that has been made an issue by the pleadings and the evidence adduced and where such theory has not been covered by other instructions given by the court of its own volition.

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

REVERSED.

A. E. FLANNIGAN V. STATE OF NEBRASKA.

FILED APRIL 21, 1933. No. 28503.

1. **Banks and Banking**: CRIMINAL LAW: FALSE STATEMENTS. In a prosecution under section 8-133, Comp. St. 1929, for making a false statement, with intent to deceive any person authorized to examine into the affairs of a state bank, it is not essential to the commission of the offense that the statement be made in the presence of two directors of the bank.
2. ———: ———: ———. Where a state bank is undergoing an examination by a state bank examiner, and the cashier of the bank makes and subscribes a statement of the assets of the bank, he may be liable to prosecution if the statement is knowingly false and made with intent to deceive the examiner, regardless of the fact that such examination is not made in the presence of two of the bank's directors.
3. **Jury**: INCOMPETENCY OF JUROR: WAIVER. Incompetency of a person to serve as a juror will be held waived by the failure to interrogate the juror on his *voir dire* as to his competency, and to challenge for that cause.
4. **Criminal Law**: WITNESSES: EXAMINATION. Defendant in a criminal action has a right to inquire of a state witness whether he is biased and prejudiced against the defendant, and if the witness answers in the negative defendant has a

further right to inquire into specific acts of the witness, tending to disclose such bias and prejudice.

5. ———: NEW TRIAL. One convicted of a criminal offense is entitled to a new trial if it appears that he has been denied a fair and impartial trial, as guaranteed by the Constitution.

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

J. J. Harrington, J. C. Cook and *H. D. Curtiss,* for plaintiff in error.

C. A. Sorensen, Attorney General, Irvin A. Stalmaster and *L. G. Nelson, contra.*

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

GOOD, J.

A. E. Flannigan, hereinafter called defendant, cashier of the Bassett State Bank, was convicted of subscribing to a false statement concerning the assets of said bank, with intent to deceive persons authorized by law to examine into the affairs of the bank. He was sentenced to imprisonment in the penitentiary for a term of not less than one nor more than ten years. He brings to this court for review the record of his conviction.

The particular false statement charged is that, in a statement made by him as cashier, defendant represented that the bank owned a promissory note of one M. J. Lipman for $3,000, when, in fact, at the time the statement was made the bank did not own or possess any note on which Lipman was liable for $3,000, or for any other amount. The evidence discloses beyond dispute that some time prior to the making of the statement the bank had in its possession as an asset a promissory note for $3,600, purporting to have been signed by M. J. Lipman; that previous to the examination a charge-off had been made on this note of $600, so that it was being carried as an asset to the extent of $3,000. The payee named in this note was the First National Bank, and that bank indorsed

and delivered the note to the Bassett State Bank. The Bassett State Bank was organized by officers of the First National Bank and took over the assets and business of the latter bank, after which the First National Bank ceased operations as a banking institution. Lipman claimed the note to be a forgery, and there appears to have been considerable litigation between Lipman, the First National Bank and the Bassett State Bank and other banks, of which defendant and his brothers were officers. On the 10th of April, 1929, these several banks and their officers and Lipman entered into an agreement whereby they settled all controversies between them, including all notes or liabilities of any kind owing by Lipman to any one of the several banks, including the Bassett State Bank. The contract of settlement was executed in triplicate. Lipman and other witnesses for the state testified that the note in question at that time was surrendered to Lipman. Defendant and other witnesses in his behalf testified that the note was not at that time surrendered to Lipman, but was in the hands of the bank's attorney at O'Neill, Nebraska, for collection, and defendant contends that, while Lipman was released from liability, the First National Bank was liable thereon as indorser to the Bassett State Bank, and the note was carried as an asset because of the liability of the indorser.

July 11, 1929, a state bank examiner examined into the affairs of the Bassett State Bank, and at that time defendant, as cashier of the bank, subscribed to a statement showing the list of assets owned by the bank. In that list appears note of M. J. Lipman, $3,000. The bank's record of bills receivable showed note of M. J. Lipman, but did not disclose that the First National Bank was liable thereon as indorser. When the bank examiner inquired for this note, he was informed that it was in the hands of the bank's attorney for collection. Defendant insists that at the time of the examination he disclosed to the examiner that Lipman was not liable on the note, but that it was being held as a liability against the First

National Bank because of its indorsement, and insists that the copy of the contract of settlement, above referred to, was in the note case of the bank, together with a memorandum that the note in question was in the hands of an attorney for collection, and that the examiner saw and examined the contract and memorandum. The bank examiner testified that no such contract was there, nor was it shown to him, nor did he have any knowledge thereof, or any knowledge or information that Lipman had been released from liability on the note.

Defendant contends that he did not have a fair trial, and assigns numerous errors, which will not require discussion. We shall confine our discussion of errors to those which seem to be proper for the disposition of the case.

It is contended that the evidence is insufficient to sustain the verdict, because the examination made of the Bassett State Bank by the examiner did not occur in the presence of two of the bank's directors, as required by law. The statute, making it an offense for an officer of a bank to make a false statement to a person authorized to examine the bank, is not confined to statements made when the bank is undergoing a regular examination by a bank examiner. If a material false statement is made by an officer of the bank to any person authorized to examine into its affairs, with an intent to deceive such examiner, it constitutes an offense, regardless of whether such examination or statement was made in the presence of two directors.

Complaint is made that a member of the jury was incompetent to act as a juror because he was a deputy sheriff. The statute, defining those who are competent to sit as jurors, excludes therefrom sheriffs, but does not specifically mention deputy sheriffs. It has been held by the United States circuit court of appeals in the case of *Robinson v. Territory of Oklahoma*, 78 C. C. A. 520, that a statute which disqualifies sheriffs from performing jury service applies as well to deputies as to principal

sheriffs. Certainly, every reason that would exclude a sheriff from jury service would apply to the sheriff's deputy. In the instant case, however, the question of the competency of the jury was not raised until after verdict and in affidavits in support of a motion for a new trial. Defendant was accorded an opportunity to examine the jury as to their qualifications before they were sworn to try the cause. Evidently, he failed to question the juror with respect to his official capacity. In this defendant was negligent. Had he at that time examined the juror, developed the fact that he was a deputy sheriff, and challenged him on that ground, we think the court should, and no doubt would, have sustained the challenge. However, the objection in this case is unavailing.

It is a general rule that incompetency of a person to serve as a juror will be held waived by the failure to interrogate the juror on his *voir dire* as to his competency, and to challenge for that cause. The proposition is supported by the following decisions: *Marino v. State*, 111 Neb. 623; *Reed v. State*, 75 Neb. 509; *Turley v. State*, 74 Neb. 471; *Coil v. State*, 62 Neb. 15; *Hickey v. State*, 12 Neb. 490.

Defendant complains that the trial court failed to submit his defense to the jury in any of the instructions given. What defendant terms his defense was that the asset, appearing under the name of the Lipman note, was carried in that name for convenience only, and that it represented a liability of the First National Bank on its indorsement on the back of the note. We think the real question is whether, in the making of the statement, there was an intent to deceive the bank examiner or the banking department. That question was fairly and fully submitted to the jury. We find no prejudicial error in the instructions given by the court, or in the court's refusal to give those requested by defendant.

Defendant complains because the trial court limited his cross-examination of the witness Lipman, in that he was not permitted to show on cross-examination that Lipman

was unfriendly to, biased and prejudiced against the defendant. The witness stated that he had nothing against the defendant, but, inferentially, that he was prejudiced against defendant's brothers. Then followed a series of questions, wherein it was sought to show that the witness had taken an active part in instigating the prosecution of defendant and working against him in various ways, and in employing others to work and testify against defendant. This evidence was excluded. Counsel for defendant stated that the only purpose of the evidence was to show the bias and prejudice of the witness, but he was not permitted so to do.

The Constitution guarantees to defendant in a criminal action the right to a fair and impartial trial. Whether he be innocent or guilty, this right must be accorded him. Lipman was a very material witness in the case for the prosecution. While he testified: "I haven't got nothing against Bert (meaning defendant)," questions propounded by counsel for defendant sought to elicit a series of acts, unfriendly and hostile to the defendant. Defendant was entitled to have disclosed to the jury the fact, if it existed, that the witness was biased and prejudiced against the defendant. Had it been so disclosed, a different verdict might have been reached. The defendant was denied the right to prove specific acts, tending to establish the bias and prejudice of the witness.

Under the facts disclosed by the record, we think it fairly appears that defendant's constitutional right to a fair and impartial trial was not accorded him.

It follows that the judgment should be and is reversed and the cause remanded for further proceedings.

REVERSED.

JOHN MORRIS, APPELLEE, V. OLIVER D. ERSKINE, APPELLANT.

FILED APRIL 21, 1933. No. 28521.

1. **Gross Negligence.** 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.
2. ———: PROOF. The existence of gross negligence must be determined from the facts and circumstances in each case.
3. ———: QUESTION FOR JURY. 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.
4. **Harmless error** is not ground for the reversal of a judgment.

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

Chambers & Holland, for appellant.

Frederick J. Patz, contra.

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

GOOD, J.

This is a personal injury action in which plaintiff had judgment, and defendant has appealed.

The injuries of which plaintiff complains resulted from an automobile accident while riding as an invited guest in defendant's car.

The defendant contends that the evidence is insufficient to sustain the verdict, in that it does not warrant a finding that plaintiff's injuries were caused by gross negligence of the defendant.

In this case plaintiff's right to recover damages is limited by section 39-1129, Comp. St. Supp. 1931, which, in so far as applicable to the present case, in effect provides that the operator of a motor vehicle shall not be liable for any damage to any person riding in said motor vehicle as a guest and not for hire, unless such damage is caused

by the gross negligence of the operator. This is the first case presented in this court to which said section is applicable. A correct decision depends on the meaning of the term "gross negligence."

The term "gross negligence" has received the attention of many courts, with conflicting views as to its proper definition. The courts of some of the states appear to hold that, to constitute gross negligence, there must have been an intentional failure to perform a manifest duty, or the injury must have been inflicted intentionally, or in wanton disregard of the rights of others. Other courts have defined it less drastically.

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.

What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. 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. Where a question of fact has been submitted to a jury upon conflicting evidence, this court, ordinarily, will assume the truth of the evidence tending to sustain the finding of the jury. In the light of these principles, we will now consider the evidence in this case.

Defendant invited plaintiff to ride with him in his car from Prairie Home, Nebraska, to Fremont, Nebraska. For the greater part of the way they traveled over state highway No. 77, which is a graveled highway. At a

point a mile or so east of Cedar Bluffs, defendant discovered on the highway, a considerable distance in front of him, a person on a motorcycle, traveling in the same direction as defendant, who was traveling about 45 miles an hour. Defendant increased his speed to overtake and pass the motorcycle. When about to pass the motorcycle, its operator speeded up and apparently there was something in the nature of racing between them. Plaintiff admonished the defendant to drive more slowly; that he was driving too fast, but, disregarding the admonition, defendant increased his speed and finally succeeded in passing the motorcycle at a point perhaps 400 feet from an intersecting highway. In so doing, he had, to some extent, lost control of his car. It was skidding from one side to the other of the highway. Again plaintiff requested defendant to slow down, to stop and let him out, but, disregarding the request, he did not slacken his speed, and, when 200 or 300 feet from the intersection, he observed another car entering the intersection from his right. Still he did not slacken his speed, and, although the driver of the car entering the intersection turned in the same direction in which defendant was driving and kept near the right-hand side of the road, leaving a space wide enough for two cars to pass to the left, defendant, not decreasing his speed, lost control of his car, ran into an embankment on the left side of the road, the car was overturned, and plaintiff suffered severe injury. The evidence indicates that, at or immediately prior to the time defendant's car ran into the embankment and upset, he was driving at from 60 to 65 miles an hour and over an intersecting highway.

We think the facts as delineated are sufficient to require the submission to the jury of the question as to whether defendant was, under the circumstances, guilty of gross negligence, and their finding upon that question, based on conflicting evidence, will not be disturbed.

Defendant complains of the exclusion and admission of evidence, and also of certain instructions given by the

court. All of the evidence of which complaint is made related only to the amount of plaintiff's recovery, and likewise the instructions of which complaint is made went only to the question of the amount of plaintiff's recovery and not to the question of defendant's liability. On the oral argument it was freely conceded that the verdict in this case was not excessive, but that the question was solely whether or not plaintiff was entitled to recover at all. Under these circumstances, the instructions and rulings on admission of evidence, whether erroneous or not, were not prejudicial to defendant. It is a familiar rule that harmless error is not ground for the reversal of a judgment.

No error prejudicial to defendant has been found.

AFFIRMED.

HOWARD K. HULTMAN, APPELLEE, V. JAMES H. HANLEY, APPELLANT.

FILED APRIL 25, 1933. No. 28483.

1. **Attorney and Client.** The equitable owner of a judgment is liable for reasonable attorney's fees in procuring a judgment thereon in another state, where the judgment debtor owns property, and in obtaining a compromise settlement of the latter judgment, even though the action in the other state is prosecuted in the name of the legal holder of the judgment, when the equitable owner has knowledge of such proceeding, acquiesces therein, and consents to and accepts the avails of the compromise settlement.
2. **Record** examined, and *held* to sustain the findings and judgment of the trial court.

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

Andrew M. Morrissey, James H. Hanley and *Paul P. Massey,* for appellant.

Patrick & Smith, contra.

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

GOOD, J.

This is an action in equity for an accounting. Decree was entered for plaintiff; defendant has appealed, and plaintiff has filed a cross-appeal.

The trial court made elaborate findings, covering every material issue raised by the pleadings and supported by evidence. These findings we here reproduce:

"The court, being fully advised in the premises, finds generally in favor of plaintiff and against defendant; finds that on June (July) 17, 1923, defendant received for collection from the Farmers and Merchants Bank, of Gretna, Nebraska, a note for $3,000, payable to plaintiff, signed by one C. J. Lee, and indorsed by plaintiff in blank; finds that said note had been pledged by plaintiff to said bank on June 11, 1923, as collateral security to a loan, of which transaction defendant was advised by plaintiff some time in the summer of 1923; finds that on September 1, 1923, defendant recovered judgment for the bank on said note in the sum of $3,040 and costs.

"The court further finds that on April 10, 1925, plaintiff's indebtedness to the bank, which the note was pledged to secure, was fully paid by the exchange of 1,600 acres of land then owned by one Corkin for said account and $7,500 in cash, in which transaction defendant assisted said bank and had knowledge thereof; that, on said last mentioned date, plaintiff became the absolute owner of said note and judgment from Corkin; finds that, immediately thereafter, plaintiff demanded said Lee note from William A. Snare, president and managing officer of said bank, who referred him to defendant; finds that plaintiff immediately consulted defendant in reference thereto and demanded said note; finds that following April, 1925, upon several occasions during the year, plaintiff requested defendant to secure an assignment of said judgment; the court further finds that said judgment became dormant on September 1, 1928; that thereafter,

defendant learned that the judgment debtor had inherited some property in Chicago and about February 3, 1929, sent a transcript of the dormant judgment, which was afterwards revived, to one Gately, an attorney in Chicago, who commenced an action thereon in the municipal court of said city, which was later dismissed for want of jurisdiction and another action begun in the circuit court of Cook county, Illinois, both actions being brought in the name of the Farmers and Merchants Bank, although said bank had been, as defendant knew, in charge of Receiver Brownell, since 1928.

"The court further finds that judgment was later recovered for $4,118.40 in said circuit court in favor of said receiver, who had been substituted as plaintiff, and on March 14, 1931, a settlement was made for $3,700 by Gately, after authorization by defendant to settle for $3,200, and the judgment discharged of record; finds that defendant received of the proceeds of said settlement the sum of $2,466.66; finds that plaintiff had knowledge of the proceedings in Chicago in 1929, and permitted the action to proceed thereafter and had such information in regard thereto as he desired; finds that on June 19, 1931, plaintiff availed himself of the sum of $739.65 of said last mentioned sum, which defendant had paid into this court; finds that William A. Schall was plaintiff's attorney at the time said settlement was made and he and plaintiff approved same; the court further finds that defendant knew, or should have known, at and prior to February 3, 1929, that plaintiff was the equitable owner of said judgment, but as late as April 23, 1931, failed to recognize plaintiff's ownership thereof; finds that plaintiff's knowledge of the retention of attorney Gately in Chicago and his availing himself of the latter's services makes the fund liable for the charge made for his services, which the court finds are reasonable; finds that Mr. Gately was justified in making the settlement.

"The court further finds that all of the services rendered by defendant prior to April, 1925, was for said bank, and

defendant could look only to it for his compensation, and when plaintiff settled his account with that bank, he also settled any claim for fees; finds that for expenses and services in procuring the assignment of the judgment by the receiver of said bank, defendant is not entitled to charge plaintiff anything.

"The court further finds that defendant should account fully to plaintiff for $1,850, less the said sum of $739.65, paid into this court by defendant on June 19, 1931, together with interest at the rate of seven per cent. per annum on the sum of $1,850 from March 21, 1931, to June 19, 1931, and interest at said rate on the sum of $1,142.36 from the 19th day of June, 1931, until this date, together with the costs of this action."

We have read all the evidence contained in the bill of exceptions and do not find it necessary to here review the evidence further than to say that each and every of the findings of the trial court is sustained by the evidence, with one slight correction. The findings state that defendant received of the proceeds of the settlement of the Chicago judgment $2,466.66, whereas the evidence shows that the amount actually received by defendant was $2,500.

Defendant contends that the trial court erred in not allowing him to recover for services in procuring the default judgment for the bank and in not allowing him a recovery for his services in procuring an assignment of the judgment from the banking department to plaintiff, as well as for a number of other items of expense which he claims to have incurred. From an examination of the record, we are convinced that the court properly disallowed these items. We cheerfully admit the contention of the defendant that "the laborer is worthy of his hire," but we are satisfied in this instance that the trial court fairly compensated the laborer for all work done or performed for the plaintiff.

The plaintiff in his cross-appeal argues that defendant employed counsel in Chicago without the consent or au-

thority of plaintiff, and that he had no authority, therefore, to bind plaintiff to pay for the services rendered by those attorneys. I think that the evidence fairly establishes that, while plaintiff may not have known of the proceedings at the time, he was advised thereof afterwards, and not only did not object or protest, but consented to prosecution of that action and to the settlement of the judgment which was obtained by the Chicago attorneys. He cannot, therefore, justly complain that they should not be reasonably compensated for the services which they rendered.

Plaintiff further contends that defendant has been guilty of such misconduct in the premises as would deprive him of the right to any compensation whatsoever. The contention is not well founded. Some of his acts may have been irregular, but he and his Chicago associates performed a valuable service for plaintiff, and plaintiff has reaped the benefit of those services.

We are satisfied that the decree entered by the trial court is just and founded on equitable principles.

AFFIRMED.

HERMAN KUHTNICK, ADMINISTRATOR, APPELLANT, V. PETER CAREY ET AL., APPELLEES.

FILED APRIL 25, 1933. No. 28693.

APPEAL from the district court for Dodge county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Robins & Yost, for appellant.

R. A. Robinson and *Cook & Cook, contra.*

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

EBERLY, J.

This is a companion case to *Kuhtnick v. Carey*, p. 762,

post. It involves the same facts and is controlled by the opinion in that case.

AFFIRMED.

EMMA KUHTNICK, APPELLEE, V. PETER CAREY ET AL., APPELLANTS.

FILED APRIL 25, 1933. No. 28716.

1. **Master and Servant: INJURY TO EMPLOYEE: BURDEN OF PROOF.** "The burden of proof is on the employee to prove by a preponderance of the evidence that personal injury was caused to the employee by an accident arising out of and in the course of his employment." *Bartlett v. Eaton*, 123 Neb. 599.
2. ———: ———: COMPENSATION. "Awards for compensation cannot be based upon possibilities or probabilities, but must be based on sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment." *Bartlett v. Eaton*, 123 Neb. 599.
3. **Evidence** examined, and *held* insufficient to support the judgment of the trial court.

APPEAL from the district court for Dodge county: LOUIS LIGHTNER, JUDGE. *Reversed, with directions.*

R. A. Robinson and *Cook & Cook*, for appellants.

Robins & Yost, contra.

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

EBERLY, J.

This is an action under the terms of the workmen's compensation law of this state. The appellee, Emma Kuhtnick, as plaintiff, secured a judgment in the district court for Dodge county against the appellants. From the order of that court overruling their motion for a new trial the appellants, who will hereinafter be referred to as defendants, have appealed.

Plaintiff is the mother of Hugo Kuhtnick. This son died on March 3, 1932. At the time of his death there

was pending, undetermined, in the district court for Dodge county, an action under the Nebraska workmen's compensation law against the defendants, in which it was alleged that, due to injuries received which arose out of, and in the course of, his employment by them, Hugo Kuhtnick, as plaintiff, was entitled to certain benefits provided by our compensation law, and for the total of which judgment was prayed.

Section 48-123, Comp. St. 1929, provides in part: "The death of an injured employee prior to the expiration of the period within which he would receive such disability payment, shall be deemed to end such disability, and all liability for the remainder of such payment which he would have received in case he had lived shall be terminated; but the employer shall thereupon be liable for the following death benefit in lieu of any further disability indemnity: If the injury so received by such employee was the cause of his death and such deceased employee leaves dependents as hereinbefore specified wholly or partially dependent on him for support, the death benefit shall be a sum sufficient, when added to the indemnity which shall at the time of death have been paid or become payable under the provisions of this article to such deceased employee, to make the total compensation for the injury and death equal to the full amount which such dependents would have been entitled to receive under the provisions of the next preceding section, in case the accident had resulted in immediate death."

Upon the death of Hugo Kuhtnick, the plaintiff as a "partial dependent" commenced this proceeding first before the "commissioner," where, after an adverse decision, the action was appealed to the district court for Dodge county, in which a trial resulted in a judgment in her favor.

It also appears that the duly appointed administrator of the estate of Hugo Kuhtnick caused the pending action in which the deceased was plaintiff to be revived; that a

trial therein resulted in a judgment adverse to the administrator, who also appealed to this court.

The defendants present at the bar of this court but a single controlling contention, viz.: "That the injury causing the death of Hugo Kuhtnick, through which the plaintiff as a 'partial dependent' claims, did not arise out of and in the course of his employment by the defendants." By statute this court is required to consider this appeal *de novo,* and enter final judgment determining all questions of law and fact in accordance with the provisions of our workmen's compensation law.

The burden of proof is on the plaintiff in this case to prove by a preponderance of the evidence that the injury to the deceased, which is the basis of her cause of action, was caused to him by an accident arising out of, and in the course of, his employment by the defendants. *Bartlett v. Eaton,* 123 Neb. 599.

The evidence of the plaintiff is to the effect that at the time of the accident involved herein defendant Peter Carey was the owner of a building in North Bend, Nebraska, then undergoing repair. Defendant Eskildsen was employed in this work. At the direction of Carey, Eskildsen hired Hugo Kuhtnick to perform carpenter work on this job. Carey failed to require Eskildsen to procure liability insurance. Plaintiff's claim is that on or about March 27, 1930, while Hugo Kuhtnick was thus engaged on the Carey job, he hit the ring finger on his left hand with a hammer while toe-nailing studding, and that this accident caused the injury from which his death resulted. From a careful consideration of all the evidence, we arrive at the conclusion that plaintiff's contention is not established by the preponderance of the evidence.

The proof is that Hugo Kuhtnick worked on the Carey job three days only, viz., March 24, 25, and 26, ten hours each day, and received pay for that time. But the week previous he had been working as carpenter on the Acom job, and at this place a sliver had become embedded in the little finger of the right hand. It was quite painful

and later blood poisoning developed in the wound. On March 21, 1930, he was treated for it at the office of a regular physician and surgeon of good standing at North Bend, whose qualifications are not questioned. In reply to questions relative to the nature of the injury, this doctor says: "Well (it was) a dangerous infection, due to the anatomical nature of the hand, the tendon of the little finger going up into the arm and also the tendon of the thumb, they both make dangerous infections because of the connection with the tendon sheath of the thumb." Further, that though "it was localized" there was "no telling how far it might travel." In reply to a hypothetical question the doctor also stated that Kuhtnick's death might have been caused by "metastatic infection through his system" tracing from the original infection he had treated. When Hugo appeared to go to work on March 24, it is clear that he still wore bandages on his hands. In his testimony before the compensation commissioner his evidence is that while on the Carey job he hit the ring finger on his left hand with a hammer while toe-nailing studding; that it did not break the finger bone, but made a sore place, a big bruise. The testimony as an entirety indicates that the incident he speaks of occurred, if at all, on March 24; that he worked two days thereafter, quitting the job on the 26th, and first sought medical attention on March 28. He claims to have mentioned the fact of his injury to a number of persons present at the time it occurred. None of these corroborate this statement, however. Their evidence is to the effect that Kuhtnick said nothing about his injury while working at Carey's to any person present, and none knew that an accident had happened.

The evidence of Hugo Kuhtnick, taken before the compensation commissioner, is that he commenced medical treatment for the injury to the middle finger of his left hand on March 28, 1930; that due to developments in other parts of his body medical treatment was continued by different physicians with no substantial interruption

to the date of his testimony in December, 1931. During this period his physical condition, though occasionally evidencing real and substantial improvement, and during much of the time permitting him "to be up and around," was such that from March 28, 1930, to December 3, 1931, he was wholly and continuously disabled from performing his work as a carpenter or engaging in any other gainful occupation. It also appears that the infection in the middle finger of the left hand, for which medical treatment was sought on March 28, culminated in the amputation of that member on April 30, 1930. This was diagnosed by the attending surgeon as due to osteomyelitis. On June 11, 1930, there was a further recurrence of the infection in his right arm, "red runners" appeared, and on July 4 he entered the local hospital at Fremont, where we infer this "flare-up" apparently yielded to treatment.

On October 10, 1930, the deceased went to Omaha and consulted a specialist. Under the advice of the specialist five teeth were extracted. Trouble ensued. In November following he consulted his doctor concerning a swelling on the left side of his face. By December 5, 1930, osteomyelitis had developed and an operation was necessary to remove "sequestra" from the right side of the lower jaw. Thirty days later it was found necessary to perform a similar operation on the left side of the jaw. From March 19 to April 18, 1931, the deceased was under observation and treatment at the Mayo clinics at Rochester, Minnesota. During this time it appears that a jaw operation was performed. It is also shown that infection had found a lodgement in the tissues of his lungs, and in May following his return from the Rochester hospitals an operation was performed to remove the accumulated pus in his lungs. In September, 1931, a painless "swelling with fluctuation" had developed on the posterior portion of his head. An X-ray examination showed an osteomyelitis of the occipital bone. But there was such a further development that on February 18, 1932, another operation was necessary for osteomyelitis of the parietal and frontal

bones, and the lung abscess was again drained. The patient apparently was on the road to recovery, but suffered a relapse, "and died on March 3, 1932, of general infection." The immediate cause of death is also stated in the record as "erysipelas."

The course of events just outlined was by one of the plaintiff's physicians said to be due to a "miostatic condition caused by a dissemination of organisms he had in his finger due to infection" developed therein. "It was just a flare-up in each instance of the same old condition." In short, however they may differ as to the original or initial source of the trouble, all experts testifying express, to a degree at least, the opinion that the condition presented in the instant case was essentially a blood stream infection as opposed to a localized inflammation of bone, so that it did not remain localized but was metastasized to various parts of the body where were thus created centers of infection.

On this basis plaintiff's experts, testifying in reply to hypothetical questions excluding all reference to the development of blood poisoning in the right hand of deceased, and which assumed that on March 28 the left finger was "crushed" or "mashed" at the Carey house, answered that this accident was the initial injury and responsible for the train of events that followed. On cross-examination, when required to answer hypothetical questions which embraced the events of March 20 and 21, 1930, their answers were neither positive nor persuasive.

The experts on behalf of the defendants, also responding to hypothetical questions, expressed the opinion that the initial injury causing the developments was the injury received whereby the splinter was embedded in the little finger of the right hand of deceased.

On the subject before us, Kessler on Accidental Injuries, pp. 505, 506, says:

"The R. V. A. (German state insurance office) has taken a definite stand on the relation between injury and osteomyelitis in a decision handed down on November 23,

1921, in which it is stated that the traumatic origin of a case of osteomyelitis can be conceded only when a severe mechanical trauma has taken place upon those parts of the body where the osteomyelitis later appears.

"Liniger sets up the following postulates:

"1. An accident must be proved beyond a doubt.

"2. The injury must have been sufficiently severe to have caused immediate cessation from work.

"3. The disease must make its appearance immediately after the accident, or at least within a few days after the accident. The later it appears, the more unlikely is there a connection.

"Everyone is familiar with the chronic course of osteomyelitis. The treatment of the condition taxes the ability and ingenuity of the ablest surgeons. Conditions that have been healed for years suddenly break down without any apparent reason. Examination of the bone discloses a small abcess with a sequestrum due to the inevitable effect of a few organisms that have been left behind despite extensive and radical excision. In the hematogenous type the original source of the infection may for various reasons become active and precipitate a fresh attack at any one of the old bone sites or may precipitate a new lesion. These considerations are important because of the frequent claims made that trauma is the causative agent of these renewed breakdowns. In the absence of severe injury the claims should be disregarded. Severe injury brings with it the attention of fellow workers, who can corroborate the claim of accident. Most of the claimants come in with a draining sinus and say, 'I think I bumped it against a lathe.' Such evidence should be given no weight."

In this jurisdiction we are committed to the view that, "Awards for compensation cannot be based upon possibilities or probabilities, but must be based on sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment." *Bartlett v. Eaton,* 123 Neb. 599.

Further, the fact that the condition of Hugo Kuhtnick might have reasonably resulted from the injury suffered as claimed by him, or that it is conceivable that such results might have followed the same, is not sufficient to justify the conclusion, in the face of the entire record, that such condition was causally related to the claimed injury. Mere conjecture or surmise is not proof. There must be evidence to support the judgment, and the burden was upon the plaintiff to prove her case. *Green's Case,* 266 Mass. 355.

In view of the burden of proof imposed upon the plaintiff, we are of the opinion that the judgment entered in the district court is not supported by sufficient evidence.

The judgment of the district court is, therefore, reversed and the cause remanded, with directions to enter a finding and judgment for the defendants.

REVERSED.

LOUIS STUNGIS, APPELLANT, V. WAVECREST REALTY COMPANY, APPELLEE.

FILED APRIL 25, 1933. No. 28545.

1. Dismissal. When a motion to discharge the jury, at the close of the plaintiff's evidence, has been argued, and the court has announced that he will sustain such motion, it is not an abuse of discretion for the court to thereupon refuse to allow the plaintiff to dismiss his case without prejudice.
2. Negligence: PUBLIC BATHING RESORT: DUTY OF OWNER. It is the duty of the owner of a public bathing resort to maintain every part of said place in a reasonably safe condition for use.

APPEAL from the district court for Douglas county: FRED A. WRIGHT, JUDGE. *Affirmed.*

John P. Breen and *A. Zaleski,* for appellant.

Kennedy, Holland & De Lacy and *George Tunison, contra.*

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

PAINE, J.

The plaintiff brought an action to recover damages for personal injuries sustained while using the facilities of a bathing resort owned by the defendant. At the conclusion of the plaintiff's case in chief, the court sustained a motion of defendant, and discharged the jury and dismissed the action. Errors were assigned for a new trial, and overruled by the court, bond given, and plaintiff appealed to this court.

A brief summary of the evidence will be given before attempting to determine the law relating to the subject or the soundness of the court's ruling in taking the case away from the jury.

The defendant owns and operates a bathing resort, which is a part of Carter lake, in the northeast part of Omaha. The defendant had a bathhouse on the south side of the lake, with a children's play-yard down at the edge of the water, and with a large diving float, some 32 feet by 14 feet, about 125 feet out from the shore line. On this diving float, there was a springboard at one end, with the water about six feet deep, and a high diving tower at the other end, with the water from seven to eight feet deep. About 60 feet away from this diving platform, and only 85 feet out from the shore, there was a small platform, about six feet square, and about four feet above the water, having at its rear side, towards the shore, a ladder, up which swimmers could climb to get on the platform. At the front end of this platform, and projecting outward, there was a wheel, about eight feet in diameter and about two feet broad, on which swimmers could sit down, or lie down, and when the wheel was turned it would throw them out into the water, which was about four and a half feet deep on that side.

The plaintiff, who was about 30 years of age, with his wife and Joe Uhlarik, a brother-in-law, and his wife, went out to this beach about 8 o'clock in the evening

on July 19, 1931, and paid 25 cents apiece for the use of the facilities of the beach. The men got out into the water first, and went out to the high diving tower, and plaintiff, who was a good swimmer and an excellent diver, dived off from the tower once or twice, while his brother-in-law dived off the springboard at the other end of the float. Later their wives came out of the bathhouse, and the men went back to the shore and walked out with their wives, who were somewhat timid, to the small platform, in which the large wheel was located. Plaintiff twice climbed up the ladder at the rear of this platform, and got on the water wheel, the flat top of which was one foot above the platform, and laid down on this wheel, and it rolled him out into the water, and he swam back to the east side, where the women were standing in water about to their armpits, but he did not let his feet down to find out how deep the water was on the front side of this platform. There were no signs, telling the depth of the water around this wheel platform, and the light was furnished by one flood-light from the top of the bathhouse on the shore, as it was now about 9 o'clock. He then mounted the ladder to the platform, and said to his wife, "I will show you how to dive," and went to the northwest corner of the platform, held his hands straight down to his side, and made what is called a sailor dive, going straight down, head first. He hit the bottom and broke his neck, and recovered consciousness in St. Catherine's hospital the next day. They put a harness, or halter, on his neck and head, with a weight of ten pounds, which kept a constant tension on his neck, and then placed a plaster of Paris cast on him, running from his hips upward, which remained on for about eight or ten weeks, and then followed a neck-brace, which was worn for six weeks. Plaintiff, at the time of trial, was unable to hold his head straight, and had restricted movement of the neck. According to the testimony of the physician, the X-ray pictures disclose that plaintiff has a fracture of the fifth and sixth cervical

vertebræ, with dislocation and a fracture of the posterior lateral processes. In the treatment, every effort was made to avoid any manipulation of the broken vertebræ, which might be fatal, and to hold them so that they would grow together, which they have done, making a stiff neck. There has been some formation of new bone, called ankylosis, and this gives a fairly stable union, depending upon the amount of lime salts laid down. The neck is stiff, and held in an unnatural position, and is more subject to any future injury which might occur.

1. When the plaintiff rested, the defendant moved the court that the jury be discharged and cause dismissed, or to direct the jury to return a verdict in favor of the defendant, for the reason that the evidence was not sufficient to constitute a cause of action in favor of the plaintiff and against the defendant, and for the further reason that the evidence did not show any negligence on the part of the defendant, but affirmatively showed that the plaintiff knew the situation, and, in making the dive at the place he did, was guilty of gross negligence. This motion was argued at length by both counsel, and the court made a statement of what he thought the law to be, and indicated that he was going to sustain the defendant's motion, and asked the bailiff to bring in the jury, at which time the plaintiff attempted to dismiss his action, as follows: "The plaintiff moves, at this time, before the case is submitted to the jury, for a motion to withdraw this case from further consideration, without prejudice;" whereupon Judge Wright ruled that the court felt that he had indicated and already sustained the motion, and that the plaintiff would not be permitted to dismiss at that time, and such motion was overruled, and this action of the court is assigned as one of the errors, in that the court had not definitely and expressly announced his decision, and that the plaintiff made the motion to dismiss without prejudice before the jury were so informed. Plaintiff also assigns as error that the dismissal was not sustained by sufficient evidence, and that

the court invaded the province of the jury in deciding, as a question of law, facts which should have been submitted to the jury for determination.

Section 20-601, Comp. St. 1929, provides that any action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court, and plaintiff insists that there was no final submission of the case to the jury at the time plaintiff moved to dismiss the case without prejudice. The bill of exceptions discloses that the plaintiff had formally rested his case at the close of the introduction of his evidence in chief, and thereupon the defendant moved the court to discharge the jury and dismiss the case, which was argued at length by both counsel. The court then indicated what his ruling would be, viz., that he would discharge the jury, and had sent the bailiff to bring in the jury. Plaintiff insists that there had been no final submission of the case to the jury, as set out under the section of the statute quoted above, and, therefore, he had the right to dismiss his case without prejudice. This is determined, not alone by the statute, but by the practice. In the case at bar, the court had listened to the arguments upon the defendant's motion to dismiss the jury, and, having decided that it was well founded, had stated to counsel that he would sustain the motion. That being the case, the merits of the controversy were not to be submitted to the jury, for, when the court announced the action it would take, the jury were, to all intents, discharged by that statement. Directing the bailiff to recall the jurors to the courtroom and there be discharged by the court was, to all intents and purposes, a mere formality, founded upon courtesy to the jurors, so that they might understand that their services in that case were at an end, for the court could as easily have instructed the bailiff to go to their room and tell them they were now discharged and need not return to the courtroom. We do not believe that the denial of the trial judge to allow the case to

be dismissed without prejudice was an abuse of his discretionary power. *Deneen v. Houghton County Street R. Co.*, 150 Mich. 235, 13 Ann. Cas. 134; 9 R. C. L. 193, sec. 4; *Bee Building Co. v. Dalton*, 68 Neb. 38, 4 Ann. Cas. 508; *Nelson v. Omaha & C. B. Street R. Co.*, 93 Neb. 154.

2. The plaintiff insists that the law is that the duty of the owner of a public bathing resort is to exercise all proper precaution to maintain every part of said place in a reasonably safe condition for use, and should exclude the public from any portion thereof that becomes unsuitable or unsafe, citing *Turlington v. Tampa Electric Co.*, 62 Fla. 398, 38 L. R. A. n. s. 72, Ann. Cas. 1913D, 1213; *Blanchette v. Union Street R. Co.*, 248 Mass. 407; Ann. 38 A. L. R. 359; *Johnson v. Hot Springs Land & Improvement Co.*, 76 Or. 333, L. R. A. 1915F, 689.

In the first case cited, the plaintiff's husband dived off the springboard into three and a half feet of water and broke his neck, and it was held that the defendant had failed to furnish a reasonably safe place for diving, and that the patron did not know the depth of the water and could not be charged with knowledge of the depth of the water.

In the second case cited above, a person used a chute and was injured by striking the bottom, the water being less than three feet deep. It is insisted by the defendant that in each of these cases the person injured was using the appliance, which in one case was the chute and in the other the springboard, for the identical purpose for which it was designed, while, in the case at bar, the plaintiff was not injured by rolling over the eight-foot wheel into the water, but was injured by using the wheel platform for a deep dive, for which purpose it was not designed.

In *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 563, Commissioner Irvine reversed an instructed verdict for the defendant, and held that the evidence required that the case be submitted to the jury. In this

case a boy, about 17 years of age, disappeared while swimming at Lake Manawa, and his body, lying at the bottom of the lake, was not discovered until late that night. In this case, after the company was notified that the boy was missing, it refused to make any effort to find him for some time, advising his companion to look for him in a saloon on the shore, where his companion knew that he would not be. It is clear, from a casual reading of this case, that the trial judge was in error in instructing the jury to return a verdict in favor of the defendant, for there was abundant evidence to show that the defendant should have kept someone on duty to watch the bathers, especially those in deep water.

Plaintiff also cites the case of *Lyman v. Hall,* 117 Neb. 140, in which a boy was drowned at Riverview Park, a bathing resort near Stratton, Nebraska. In this opinion a large number of cases are reviewed, and while it was stated that the record cannot be read without emotion, yet the sufficiency of the evidence to sustain the verdict must be determined independently of sentiment or pity, and it was held that the duty to exercise ordinary care to protect the patrons of a public bathing resort, conducted for private gain, does not make the proprietor an insurer of their safety. It was further held that evidence of negligence does not of itself establish a cause of action, but, in addition, the plaintiff must show that the negligence pleaded by him was the proximate cause of the alleged injury, and that the evidence, as set out in detail in the opinion, was insufficient to sustain a verdict for the plaintiff.

That an accident occurs is not conclusive proof of negligence on the part of the owners of a bathing resort. *Flora v. Bimini Water Co.,* 161 Cal. 495. Where a bather slipped upon concrete steps in entering a swimming tank, the proprietor was held not guilty of negligence, where it was shown that the steps were constructed in accordance with universal custom. *Anderson v. Seattle Park Co.,* 79 Wash. 575. One who dives into a swimming pool

which is only half full, when he can see the depth by other persons standing therein, is negligent, and the proprietor is not liable for the death, although no special warning was given. *Johnson v. Hot Springs Land & Improvement Co., supra.*

In the case at bar, the plaintiff had walked out from the shore with his wife for over 80 feet to the water-wheel platform; he knew that the depth had gradually increased from the shore to that point; his wife was standing on one side of this six-foot platform, and he could see the depth at that point. It was quite evident that the water-wheel platform was not designed for diving purposes, as the tall diving tower had just been used by him for that purpose. Plaintiff made a deep sailor dive into comparatively shallow water. It is clear that the plaintiff could not recover in this case unless he had proved the negligence of the defendant, which had not been shown. The plaintiff was bound to use all of the senses with which nature had endowed him, as well as to exercise his reasoning faculties for his own protection. His failure to do this contributed directly to his injury, and the ruling of the trial court was right, and the judgment of dismissal is

AFFIRMED.

JACOB KURTZ, APPELLEE, V. SUNDERLAND BROTHERS COMPANY, APPELLANT.

FILED APRIL 25, 1933. No. 28737.

Master and Servant: ACTION FOR COMPENSATION: LIMITATIONS. If one's eyes are so injured by a flash-burn on September 6, 1928, that cataracts slowly form in both eyes, as definitely diagnosed by an oculist in 1929, and one lens is successfully removed in 1930, and glasses fitted, and if compensation stops October 7, 1930, an action for additional compensation, filed February 29, 1932, is barred by lapse of time under section 48-138, Comp. St. 1929.

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

Brown, Fitch & West, for appellant.

Wear, Garrotto & Boland, contra.

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

PAINE, J.

This is an appeal from a judgment of the district court for Douglas county, wherein the plaintiff was awarded compensation for loss of sight.

The facts involved may be briefly stated as follows: Jacob Kurtz, the plaintiff, was born in 1865, and for many years was janitor in the Sunderland building, Omaha, Nebraska. On September 6, 1928, the electric elevator in said building stopped running, and the plaintiff went to the basement and put in a new fuse, and, in inserting the fuse, a light flashed right in front of, and close to, his eyes. He was able to continue his work in spite of the pain in his eyes. On about the fifth day after he was injured, the manager of the building noticed his sore eyes, and sent him to Dr. Maxwell, who treated him for about a week, and opened two or three blisters, which had formed from the burn, and, while his eyes continued to pain him, he was able to keep on with his work. A short time after this he laid off from work for one week, and with his daughter went to see a doctor up in South Dakota, from which trip he received no benefit, and he began slowly to lose the sight of both eyes. In June, 1929, he was first attended by Dr. Wherry, who told the plaintiff there was a cataract developing in both eyes, and the trouble had advanced further in the left eye. Dr. Wherry also told the plaintiff at that time that eventually he would have to be operated on, and that his trouble would gradually increase. Dr. Wherry finally operated upon the left eye in two stages, by doing a preliminary

operation in April of 1930, and in June of 1930 extracting the cataract lens in the left eye, which had become entirely opaque. This had healed, and in September of 1930 Dr. Wherry fitted glasses to the eye, and after that, as the adjustment process continued, he was compelled to alter the glasses, and gave him his last change of glasses in July of 1931.

Dr. Wherry testified that he last examined the plaintiff's eyes in March, 1932; that his left eye at that time was in very good shape, and that the cataract lens in his right eye was thoroughly thick, and that it was ready to have an operation whenever the plaintiff would make up his mind to have it performed. He further testified that, without the adjusting lens, the plaintiff has little sight, although he was then able to count fingers at four feet away without glasses. With the adjusting lens, he has fairly good sight in his left eye, and, if an operation to remove his right lens would be as successful, it would greatly assist in his breadth of vision, and with both eyes operated on successfully there would be about a 10 per cent. loss of vision, after proper correction with glasses.

From March of 1930 until October of 1930, the plaintiff was unable to do any work, and compensation was paid to him. Exhibit No. 1 is the final report and settlement receipt, which has near the top, in large type, these words: "Do not sign this receipt unless you intend to end payments of compensation and close the case." This exhibit shows: Date of injury, 9-6-'28; disability began 3-12-'30; compensation began 3-12-'30; compensation stopped 10-7-'30; weekly compensation of $13.85 paid to the total amount of $362.08; that the hospital and medical services paid out for plaintiff were $326.70, making a total amount of compensation paid in the case of $688.78, which final settlement was signed by the plaintiff upon October 17, 1930.

After this settlement he resumed his work as janitor, and continued working until in February of 1932, at which time his employment was terminated. Plaintiff com-

menced this action on February 29, 1932, three years, five months and 23 days after the date of the accident, and two years, eight months and 25 days after Dr. Wherry had told him he had cataracts in both eyes, which would develop slowly, exactly as they did.

Upon trial in the district court, it was ordered that plaintiff be paid compensation for 273 6/7 weeks, at $13.85 per week, commencing February 1, 1932, and that thereafter compensation be paid to him at the rate of $9.34 a week for the remainder of his life, together with attorney's fee of $150.

In the assignment of errors, the principal reliance is placed upon the contention that the plaintiff's cause of action is barred by the statute of limitations, and, also, that it is barred by the release signed by the plaintiff on October 17, 1930.

"It has been held many times by this court that failure to file claim, or bring suit within the specified time, does not defeat the right to compensation where the injury is latent, provided the notice is given and the action commenced within the statutory period after the employee has knowledge that compensable injury has resulted." *Astuto v. V. Ray Gould Co.*, 123 Neb. 138. Rosario Astuto had consulted a number of doctors before he found one who discovered what his trouble was, and that it was all a result of the original injury.

In the case of *Collins v. Casualty Reciprocal Exchange*, 123 Neb. 227, there was no indication that the finger would become permanently stiff, and months afterward an infection develop, and it was thought then that the finger would soon return to the normal condition, and neither the plaintiff nor the physician knew, when compensation was paid, that the injury was latent, and that it would later culminate in permanent disability.

In *Selders v. Cornhusker Oil Co.*, 111 Neb. 300, the claim was filed nine months after the accident occurred, and physicians were unable to discover the nature of his disorder until it was finally disclosed by X-rays that a

lumbar vertebra had been fractured, and promptly thereafter the plaintiff applied for compensation.

Considerable discussion is given in the briefs as to whether the removal of a lens of the eye, and its correction with glasses, is the same as if the eye has been entirely taken out. Such an eye is certainly not useless, and a discussion of this point will be found in *Cline v. Studebaker Corporation,* 189 Mich. 514; *Gigleo v. Dorfman & Kimiavsky,* 106 Conn. 401; *McNamara v. McHarg, Barton Co.,* 192 N. Y. Supp. 743; *Globe Cotton Oil Mills v. Industrial Accident Commission,* 64 Cal. App. 307.

In *Clary v. Proudfit Co., ante,* p. 582, it was held that, in the case of a latent accidental injury, which appeared to be trifling at first and noncompensatory, there was not sufficient proof that plaintiff had knowedge of a compensable injury six months before he filed his claim, or that the proceeding was barred by lapse of time, as the plaintiff did not know the cause of his injury until months after it occurred, and he presented his claim within six months thereafter.

In *Montgomery v. Milldale Farm & Live Stock Improvement Co., ante,* p. 347, the accident occurred August 23, 1930, and not until X-ray pictures were taken on August 12, 1931, was the true nature of the injury discovered.

The word "latent" is defined as the time within which a disease is supposed to be in existence without manifesting itself, that is, during which time it lies dormant. In the case at bar, Dr. Wherry knew, and explained to the plaintiff, in June, 1929, the exact situation, in that he told him his eyes had both been injured by the accidental flash close to them on September 6, 1928; that he had a progressive cataract forming in the lenses of both eyes, and that the one in the left eye would be ready for operation first, after which he could be fitted with glasses to restore his vision; that this opacity of the lens was a matter of slow change, and would take months to entirely ripen. Nothing has occurred since that time which

was not clearly diagnosed as the usual and probable course of his trouble by the specialist, Dr. Wherry. It can scarcely be contended that, during all of these years, this trouble was latent, or dormant, in the sense that it had not manifested itself, or had not been discovered; nor can it be claimed that the plaintiff was in entire ignorance of his disability, for all these facts were well known to both Dr. Wherry and the plaintiff.

The law in reference to compensation provides, in section 48-133, Comp. St. 1929, that the notice of injury therein required shall be given within six months after the occurrence of the accident, and section 48-138, Comp. St. 1929, provides that all claim for compensation shall be forever barred unless within one year after the accident a petition shall be filed therefor, and it is further provided that, if payments of compensation have been made in any case, said limitation shall not expire until one year after the time of making the last payment, and, in the case at bar, the last payment was made for the week ending October 7, 1930, after which a final receipt to close the compensation was signed, and this action was not filed until February 29, 1932. *Samland v. Ford Motor Co.*, 123 Neb. 819, discusses these provisions.

We have reached the conclusion, very regretfully, that plaintiff's cause of action was barred by the statute of limitations. The trial court was, therefore, in error in allowing plaintiff compensation in addition to the $688.78 heretofore paid, and it is directed that the judgment be reversed and the case dismissed.

REVERSED.

JOHN SMOLINSKI, APPELLEE, V. DAVID MARKEL ET AL., APPELLANTS.

FILED APRIL 29, 1933. No. 28507.

Evidence examined, and *held* sufficient to support the verdict and judgment.

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

Crossman, Munger & Barton and *Story & Thomas,* for appellants.

Wear, Moriarty, Garrotto & Boland, contra.

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

EBERLY, J.

This is an action for personal injuries resulting from an automobile accident which happened near the east end of the Bancroft street viaduct in the city of Omaha at 2:45 p. m. on September 30, 1931. The occurrence of the accident, due to defendants' negligence substantially as alleged by plaintiff, is not controverted by the defendants. No objections to the instructions of the district court to the jury in the submission of the cause for their determination is now urged on appeal. The sole substantial complaint now presented is that the verdict in favor of the plaintiff is excessive.

As to the injuries suffered by the plaintiff, his petition alleges, in part:

"That as the direct and proximate result of the negligence of the defendants * * * plaintiff was thrown to the hard surface of the pavement and received a compound comminuted fracture of the left arm between the shoulder and elbow, multiple bruises, contusions and lacerations about the entire body, and a severe shock to his general mental, physical and nervous system, all of which injuries caused plaintiff to suffer great and excruciating pain and suffering and will continue to cause plaintiff great pain and suffering in the future."

These allegations were denied generally by the defendants. A trial to a jury resulted in a verdict and judgment of $10,000 against the defendants. From the order overruling their motion for a new trial, defendants appeal.

That plaintiff's injuries were severe in nature, included a compound comminuted fracture of the left arm, and resulted in intense suffering, especially during the early days of their treatment, must be conceded. It seems that for the thirty days after the accident he was confined to the hospital for treatment. At the time of the trial in the district court, which took place on March 21, 1932, he was still under his surgeon's care, and was being treated from two to three times a week. There is evidence in the record that these treatments will have to be continued for "six months to eighteen months more." It stands uncontroverted that he was physically incapable of performing any of his usual work from the date of the accident to the date of trial. His physicians testify that he will never be able to follow his usual occupation again because his injured arm will be incapable of performing it. It also appears that prior to the accident his life work had been the performance of unskilled heavy physical labor; that he was 51 years of age, had an expectancy of 20.20 years, had been earning from $15 to $18 a week, and during the previous year had worked three-fourths of the time. It must be conceded that on the subject of plaintiff's actual physical condition at the time of the trial, and his ability to labor, the experts testifying for the defendants take issue with plaintiff and his witnesses. But it is to be noted that the evidence of the expert witnesses on both sides of this litigation is based on X-ray photographs taken of the injured arm at various times after the occurrence of the accident. These pictures, indefinite in number, were produced in court, identified, and the results of the examinations thereof by the several witnesses detailed to the jury, both on direct and cross-examination. These photographs were used in the presence of the trial judge and the trial jury, but were not formally introduced in evidence, and were not preserved in the bill of exceptions. In this situation we are called upon by defendants to reduce a verdict as excessive.

The language employed by Good, J., in *Maryland Casualty Co. v. Geary*, 123 Neb. 851, is quite enlightening on the point here presented, viz.: "The trial court saw and observed the physical condition of defendant, the character and extent of his injuries, as he appeared in court. During the course of the trial, several X-ray photographs of defendant's cervical vertebræ were used and exhibited to the trial court, and witnesses pointed out thereon the various matters that were supposed to be disclosed thereby. Colloquies were had between the witnesses and the trial judge with reference to these photographs and the condition therein disclosed. None of these, save one, is in the record presented to this court. These photographs undoubtedly were of great help to the trial court in determining the weight to be given to the testimony of the medical witnesses. The opportunity to see and observe the defendant, the extent and character of his injuries and what these X-ray photographs disclosed is denied to this court. It clearly appears that the trial court was in a vastly better position, than is this court, to determine the weight to be given to the testimony of the medical witnesses, and to ascertain the true condition of defendant's injuries and resulting disability." It is quite apparent that if the term "left arm" be substituted for "cervical vertebræ" the conclusion stated is controlling here, particularly in view of the fact that, while one photograph was preserved in the record in the case quoted from, none of those employed appear in the present case.

From an examination of the record presented in this court, and bearing in mind the superior opportunity of the trial judge and trial jury to truly ascertain the facts, we are unable to say as a matter of law that the verdict returned by the jury and approved by the district court is excessive, or that error affirmatively appears.

It follows that the judgment of the trial court may not be deemed excessive, and the same is

AFFIRMED.

WILLIAM HERZOFF, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

FILED MAY 5, 1933. No. 28613.

Cases Followed. This case is controlled by *State v. Somberg*, 113 Neb. 761, *Stewart Motor Co. v. City of Omaha*, 120 Neb. 776, and *State v. Abbott*, 59 Neb. 106.

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

Votava & McGroarty, for appellant.

Fred A. Wright, Harry B. Fleharty, Thomas J. O'Brien, Bernard J. Boyle and *Fradenburg, Stalmaster & Beber, contra.*

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

PER CURIAM.

This is an action in equity to enjoin the enforcement of ordinance No. 13992 of the City of Omaha—a Sunday closing ordinance. The plaintiff, Herzoff, challenges this ordinance on the grounds, viz., (1) that the provisions thereof were violative of specified provisions of the Constitution of the state and also of the Constitution of the United States; (2) that the same had not been enacted in the manner provided by law.

After trial, the district court determined the issues adversely to the plaintiff, who thereupon appealed.

It appears that this case is ruled by the principles announced in *State v. Somberg*, 113 Neb. 761, and *Stewart Motor Co. v. City of Omaha*, 120 Neb. 776, which support the judgment entered in the trial court.

As to the due enactment of the ordinance, which plaintiff questions, it may be said that it was in effect stipulated at the trial that the records of the city show affirmatively the due passage of this ordinance, upon which the trial court in effect refused to permit the introduction of parol evidence to contradict the express recitals of the written

records. This ruling was unquestionably correct. *State v. Abbott*, 59 Neb. 106.

It follows that reversible error not appearing in this record, the judgment of the district court is

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. FIRST STATE BANK OF PAWNEE CITY, APPELLANT: D. W. OSBORN, GUARDIAN, APPELLEE.

FILED MAY 5, 1923. No. 28345.

Banks and Banking: INSOLVENCY: TRUST FUND: INTEREST. An adjudication of a claim as a trust fund payable in full out of assets in the hands of the receiver of an insolvent state bank, in preference to claims of depositors, is in effect a judgment, which bears interest likewise payable at the rate of 7 per cent. per annum from the date rendered until paid. *Hall v. Citizens State Bank*, 122 Neb. 636, adhered to.

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

F. C. Radke, Barlow Nye and *G. E. Price*, for appellant.

Dort & Witte and *Eric D. Naslund, contra.*

Heard before ROSE, DEAN, GOOD, EBERLY, DAY and PAINE, JJ.

DEAN, J.

This is an appeal by the receiver of the First State Bank of Pawnee City from a judgment of the district court for Pawnee county allowing the sum of $871.70, as accrued interest on a judgment rendered against the bank in favor of D. W. Osborn, intervener and guardian of Frank M. Tannyhill, an incompetent person, and declaring such sum to be a superior lien entitled to priority as against the claims of other creditors of the bank.

The record discloses that, on or about November 17, 1927, the above bank was adjudged insolvent and a re-

ceiver was appointed to take charge of its affairs. On March 7, 1928, the district court allowed the claim of the intervener in the sum of $9.90 for money in the checking account of Frank M. Tannyhill, and $8,972.57 for money in a savings account, together with interest in the sum of $119.07, or a total sum of $9,101.54, which was adjudged to be a lien as against the assets of the failed bank.

On February 27, 1930, the court, upon a petition of intervention filed by the guardian, found that the above funds were not government funds, as contended by the intervener, and were not entitled to any priority over claims of other depositors and dismissed the petition. Upon appeal to this court, however, the judgment was reversed and the cause remanded, with directions that an order be entered finding that the funds in question were government funds and entitled to priority over other claims. *State v. First State Bank,* 121 Neb. 515.

It was stipulated between the parties that the sum of $9,101.54, allowed by the court against the assets of the bank, with the exception of $500, was money derived from the United States government and payable to Frank M. Tannyhill as insurance and compensation money; that on April 28, 1928, a 10 per cent. dividend in the sum of $860.15 was paid to the guardian by the receiver; and that on August 13, 1930, a 5 per cent. dividend in the sum of $430.08 was paid to him.

The intervener contends that the allowance by the district court, under date of March 7, 1928, of the claim in question here was in fact a judgment against the failed bank upon which he is entitled to interest at the rate of 7 per cent. per annum from March 7, 1928, until paid, and that such interest constitutes a prior and superior lien against the assets of the bank. The court allowed the intervener interest on the sum of $7,741.39 from February 27, 1930, that being the date when his petition was dismissed, or the sum of $871.70. As above noted, the receiver has appealed from such finding of the court.

The court, however, refused to allow the intervener interest on the funds from March 7, 1928, the date when his claim was originally allowed in the district court, to February 27, 1930, when his petition was dismissed, and the intervener has filed a cross-appeal excepting to that part of the judgment.

Two issues appear to be presented for determination in the brief of the receiver, namely, (1) whether the intervener is entitled to interest on the funds in suit, and (2) if he is so entitled thereto, from what funds such interest shall be paid.

In a recent decision this court, in *Hall v. Citizens State Bank,* 122 Neb. 636, held: "An order of court establishing a trust fund in a sum certain, entitled to priority of payment from the assets of a failed bank before the claims of depositors and creditors are paid, bears interest at 7 per cent. from the date of the decree until paid. Comp. St. 1929, sec. 45-103." We also held therein: "The interest thus accrued is payable in full from the assets of the bank in preference over the claims of depositors and creditors."

These rulings were announced after a full consideration of the important questions presented. In the case at bar the same questions were reargued at great length and reexamined by the entire membership of the court in the light of exhaustive briefs. There are contrary decisions in other jurisdictions, but our own precedent is abundantly sustained by reason and authority, as shown in the opinion in *Hall v. Citizens State Bank, supra.* Different rules cannot be adopted in Nebraska without departing from the statute which declares that judgments shall bear interest at the rate of 7 per cent. per annum from date until paid. The change of position demanded by appellant would also require us to disregard the line of cases holding that the allowance of a claim for a trust fund payable in full out of assets in the hands of a receiver of an insolvent state bank is in effect a judgment for the payment of money. We adhere to the former

rulings on the questions now at issue and this conclusion necessarily results in the affirmance of the judgment from which the appeal herein is taken.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, PLAINTIFF, V. GEORGE S. KENNEDY, DEFENDANT.

FILED MAY 5, 1933. No. 28226.

Attorney and Client: DISBARMENT. Facts disclosed in the opinion *held* sufficient to warrant disbarment of defendant from the practice of law.

Original proceeding by the state to disbar defendant. *Judgment of disbarment.*

Paul F. Good, Attorney General, and *William C. Ramsey,* for plaintiff.

George S. Kennedy, pro se.

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

GOOD, J.

This proceeding was instituted by the attorney general in the name of the state for the disbarment of the defendant as a practicing attorney. The Honorable Frank Barton was appointed referee to take the evidence and report findings of fact and conclusions of law. He has performed that duty, and the cause is now before us on a motion for confirmation of the report of the referee.

The referee found that defendant, in the course of his employment as an attorney, had collected money for his client in the sum of $881.30, for which he had failed, neglected and refused to account, and that the client had sued and obtained judgment against defendant for the amount so withheld; that said judgment is now final, and that defendant has failed to satisfy such judgment; found that the defendant violated his oath, and has failed to

faithfully discharge his duties as a licensed attorney and has betrayed the trust reposed in him by his client; and recommended that the defendant be disciplined.

Defendant has failed to file any brief or assign any errors in the report. The evidence sustains the findings of the referee. Defendant has been derelict in the performance of the duties which he owed to his client.

The findings and conclusions of the referee are approved and confirmed. It is ordered that the defendant, George S. Kennedy, be disbarred from the practice of law in the courts of this state; that his license to practice be canceled, and that his name be stricken from the roll of attorneys and counselors at law.

JUDGMENT OF DISBARMENT.

ARNOLD VANDENBURG, APPELLANT, V. CENTER TOWNSHIP, APPELLEE.

FILED MAY 5, 1933. No. 28305.

1. **Contracts.** An express contract requires the mutual meeting of the minds and an intention to contract and is established by proof of the intention.
2. **Master and Servant: WORKMEN'S COMPENSATION ACT: CONTRACT.** Contract of employment necessary to recover under workmen's compensation act, either express or implied, does not exist where evidence establishes positive intention not to so contract.

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

Coufal & Shaw and *Ray E. Sabata,* for appellant.

A. V. Thomas and *Thomas & Vail, contra.*

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

DAY, J.

This is a compensation case which has received much attention from this court. An opinion was filed July 12,

1932, which affirmed the judgment of the district court. See *Vandenburg v. Center Township,* 123 Neb. 544, for the nature of the controversy. Upon rehearing, this court reversed its previous decision and awarded compensation to plaintiff (opinion withdrawn). The case is now before the court upon a motion for rehearing. After three oral arguments, this court recognizes that it is a close question, difficult to decide satisfactorily.

Many questions have been discussed orally before the court and in the briefs, but the sole determining factor in this case is the existence of a contract of employment between the plaintiff and the defendant, Center Township, at the time of plaintiff's injury. Directing our attention to this controlling issue, we conclude that there was no contract of employment between the parties at the time of the accident. The plaintiff was a member of the township board. He relies upon a conversation which he testifies took place between the members of the board as they left the building in which a board meeting was held. According to his testimony, he was asked who would blast stumps necessary to permit road work, and he replied he would if the other members would help him. Mr. Zegers, another member of the board, testified that he was not present at that conversation, did not take part in it, and did not hear it, although he stated that the three of them gathered on the doorstep after the meeting. Another member of the board, named Semin, admitted that there was at this time and place some conversation relative to the work. But, considered in the light of the surrounding circumstances, this evidence is not sufficient to establish a contract of employment. There is no doubt that the members of this township board thought that the blasting of stumps, the moving of fences, the cutting down of trees, surveying and maintenance of roads were duties devolving upon them as officers of the township. They had glorified in their own minds menial acts of labor as official acts and duties. It is true that this was a mistaken notion and that their idea did not change the

law relating to official duties of township officers. But an express contract requires the mutual meeting of the minds and an intention to contract and is established by proof of the intention. *Wojahn v. National Union Bank*, 144 Wis. 646; *Thompson Yards v. Haakinson & Beaty Co.*, 209 Ia. 985. It is argued that the fact that plaintiff did blast stumps thereafter corroborates the facts by which it is sought to establish a contract of employment. But every such contention is met by uncontradicted proof that there was no intention on the part of any member of the board and especially on the part of Vandenburg to contract as an employee. It was his intention to perform these services as an official and not as an employee. He was not subject to the direction of any one representing the township. He was the supervising power, and he performed these services when and where and how, according to his official determination. The only conclusion to be drawn from the evidence is that the members divided these duties among themselves and that they did not contract with the plaintiff as an employee.

The judgment of the trial court is

AFFIRMED.

ROSE and GOOD, JJ., dissent.

NELLIE N. PETERSON, APPELLEE, V. COSMOPOLITAN OLD LINE LIFE INSURANCE COMPANY, APPELLANT.

FILED MAY 5, 1933. No. 28532.

1. **Insurance: FORFEITURE: WAIVER.** A forfeiture of a life insurance policy is waived if the company, with knowledge of the facts, collects premiums and retains them without objection until after the death of the insured.
2. ———: ———: ———. Provision of life insurance policy for forfeiture in case premiums are not paid on day due may be waived by company by a course of dealings, by which insured paid premiums later, which induced insured to believe that payment on due date would not be required and forfeiture would not be enforced if paid within a reasonable time.

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

Finlayson, Burke & McKie, Sterling F. Mutz and *Robert S. Stauffer,* for appellant.

Fred N. Hellner, contra.

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

DAY, J.

This is an action brought by the beneficiary upon a policy of insurance issued by the defendant company to recover the sum of $360 upon the death of the insured. The defendant is a mutual insurance company, operating upon a so-called thrift plan. The premium charged the insured by the company was $6 a month, or $72 a year, and, at the time of the death, the policy had a cash surrender value of $154.38. The company defended on the theory that, at the time of the death, the policy had been forfeited for nonpayment of premiums which, it alleges, were five months in default. The trial court found in favor of the plaintiff for the amount of the insurance.

The amount involved in this action is comparatively small, and we are not impressed with the importance of the principle involved, either to the defendant or other mutual companies doing business in Nebraska. We are of the opinion that, at the time of the death of the insured, the policy had not lapsed and that there is no question of reinstatement or extended insurance involved in this case. This policy was issued December 6, 1927, and the premiums paid until the death of the insured, July 13, 1931, were as follows:

December 15th, 1927	$ 6.00	April 24th, 1929	$12.00
June 18th, 1928	6.00	May 24th, 1929	12.00
July 16th, 1928	6.00	July 3rd, 1929	12.00
August 27th, 1928	12.00	Janary 8th	6.00
September 10th, 1928	12.00	March 13th, 1930	12.00
October 13th, 1928	12.00	June 5th, 1930	12.00

November 14th, 1928	12.00	September 27th, 1930	12.00
December 10th, 1928	18.00	May 14th, 1931	12.00
January 17th, 1929	12.00	June 15th, 1931	12.00
February 13th, 1929	12.00	July 9th, 1931	12.00
March 14th, 1929	12.00		

It will be noted that from the date of the issuance of the policy the insurance company had not insisted upon the payments being made when due. If the defendant's contention is adopted in this case, there never was a time during the life of the policy when the beneficiary could have recovered upon the death of the insured. For what purpose then did this company collect during three and one-half years $80 more than the cash value of the policy if not to insure the life of insured for $360?

A forfeiture of a life insurance policy is waived if the company, with knowledge of the facts, collects premiums and retains them without objection until after the death of the insured. *Modern Woodmen of America v. Colman,* 68 Neb. 660; *Modern Woodmen of America v. Berry,* 100 Neb. 820; *Cunningham v. Modern Brotherhood of America,* 96 Neb. 827; *Phoenix Ins. Co. v. Lansing,* 15 Neb. 494; *Farmers Union Ins. Co. v. Wilder,* 35 Neb. 572; *Phenix Ins. Co. v. Dungan,* 37 Neb. 468; *Warren v. Grand Lodge, A. O. U. W.,* 104 Neb. 810; *Smith v. Liberty Life Ins. Co.,* 118 Neb. 557.

It will be noted that four days before the death of the insured he paid $12 on the policy, which was accepted and retained by the company, as were all other payments, without complaint until the beneficiary sought to recover. The company, by its course of dealing, induced the insured to believe that prompt payment would not be required and that any provision for forfeiture would not be enforced if payments were made in a reasonable time. This case presents a similar situation to that in *Owens v. Travelers Ins. Co.,* 99 Neb. 560, cited with approval in *Cook v. National Fidelity & Casualty Co.,* 100 Neb. 641, and *Smith v. Liberty Life Ins. Co.,* 118 Neb. 557. The opinion in the *Owens* case announces a sound doctrine,

supported by reason and authority. Paraphrasing its language, under the evidence it was at least a question of fact to be determined by the court, a jury being waived, whether the company in its dealings had induced a belief that the part of the contract providing for forfeiture if the premium was not paid on the day it was due would not be enforced if paid within a reasonable time. Provision of life insurance policy for forfeiture in case premiums are not paid on day due may be waived by company by a course of dealings, by which insured paid premiums later, which induced insured to believe that payment on due date would not be enforced if paid within a reasonable time.

The judgment of the trial court is

AFFIRMED.

CLARENCE E. ANDERSON, APPELLEE, V. MORRIS LOTMAN, APPELLANT.

FILED MAY 5, 1933. No. 28547.

1. **Appeal.** Verdict based on conflicting evidence will not be disturbed on appeal, unless clearly wrong.
2. ———. Where a verdict is based on conflicting evidence, it will not be disturbed as against weight of evidence, unless clearly wrong.
3. ———: ISSUES. Where the issue was tried without objection as to sufficiency of pleadings, appellate court will consider them sufficient to raise particular issue, and rule requiring agreement between pleadings and proof is inapplicable.

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

Chambers & Holland and *Fred C. Foster,* for appellant.

Burkett, Wilson, Brown, Wilson & Van Kirk, contra.

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

DAY, J.

This is an action for personal injuries sustained by plaintiff in a collision between his motorcycle and an automobile driven by defendant. The defendant appeals from a judgment for $12,500.

The defendant attacks this judgment on the theory that the evidence is not sufficient to sustain the verdict and that the verdict is contrary to the weight of the evidence. The plaintiff's petition alleges that, at the time of the accident, he was riding a motorcycle north on the right-hand side of Eleventh street in Lincoln, and that defendant was driving his car in the same direction on the same street and, in attempting to pass plaintiff, swung his car to the left and then to the right, cutting in toward the curb directly in front of plaintiff. It is further charged that in doing so, without warning, he ran into plaintiff's motorcycle. The alleged negligence of the defendant is set out specifically. There is sufficient evidence in the record, if believed by the jury, to support its verdict. The plaintiff's testimony is corroborated. There is testimony in conflict, but the jury have resolved disputed questions of fact in favor of plaintiff. The books are filled already with authorities to the effect that a verdict based on conflicting evidence will not be disturbed on appeal.

This case is not within the rule, as claimed by appellant, of *Trute v. Holden,* 118 Neb. 449, in which it was held, quoting with approval from *Garfield v. Hodges & Baldwin,* 90 Neb. 122, that "A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded." Other cases cited by appellant are not applicable, for it does not appear that the verdict herein is either clearly against the weight and reasonableness of the evidence (*Bentley v. Hoagland,* 94 Neb. 442), or that material testimony has been disregarded, which if considered would require a different verdict (*Exchange Bank v. Gifford,* 102 Neb.

324; *Urban v. Novotny*, 107 Neb. 384), or contrary to physical facts or laws (*Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692), or that it cannot be sustained on any principle of right or justice (*Ellis v. Omaha Cold Storage Co.*, 122 Neb. 567; *Clark v. Gell*, 17 Neb. 284). The rule applicable to this case is that, where a verdict is based on conflicting evidence, it will not be disturbed as against the weight of evidence unless clearly wrong. *Reams v. Clopine*, 121 Neb. 86.

The appellant assigns as error the giving of certain instructions to the jury by the court. This action was originally brought against defendant and his wife. We infer that in the beginning plaintiff was in doubt as to which was driving the car. The evidence disclosed that Lotman was driving, and the case was dismissed as to his wife. Some allegations of negligence were charged to the wife which were proved against the husband. The court submitted this issue to the jury. There was some question as to the amendment of the petition and the substitution of Morris Lotman for Rose Lotman, his wife, but the amendment was not actually made. The condition of the record is not to be commended, but where the issue was tried without objection as to sufficiency of pleadings, appellate court will consider them sufficient to raise particular issue, and rule requiring agreement between pleadings and proof is inapplicable. *Hensley v. Chicago, St. P., M. & O. R. Co.*, 118 Neb. 690.

The instructions as to the violation of city ordinances as evidence of negligence is challenged, because it is claimed that the petition does not allege such violation. The petition alleges the unlawful operation of the car, the method of such operation, and then pleads the ordinances of the city of Lincoln making such operation unlawful. Surely this complaint is without merit. All the other instructions, against which complaint has been made, have been examined, and we find no prejudicial reversible error. It is not argued that the amount of the verdict is excessive. The judgment of the trial court is

AFFIRMED.

CHARLES P. HALL, APPELLANT, V. LYMAN S. HALL ET AL., APPELLEES.

FILED MAY 5, 1933. No. 28610.

1. **Insane Persons: COMPETENCY: QUESTION FOR JURY.** "The incapacity of an individual, which, within the statute, will authorize the appointment of a guardian, is a question of fact in each case for the trial court, whose finding thereon will not ordinarily be disturbed." *Keiser v. Keiser*, 113 Neb. 645.
2. ———: APPOINTMENT OF GUARDIAN. Where a person has insufficient mental capacity to protect his property and he is guided by others, a guardian should be appointed.
3. ———: ———. Where one is by reason of old age, disease, weakness of mind, or from any cause unable or incapable, unassisted, to properly manage his property, he is incompetent, and a guardian should be appointed.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Crossman, Munger & Barton, for appellant.

Sanden, Anderson & Gradwohl, John J. Ledwith and *Charles E. Matson, contra.*

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

DAY, J.

This is a suit in equity commenced in the county court of Lancaster county, January 30, 1930, invoking its equitable jurisdiction to vacate a decree of April 17, 1928, finding Charles P. Hall mentally incompetent and appointing a guardian. The allegations which form the basis of this suit are that, in the original guardianship proceedings, the court was without jurisdiction, and that the decree was the result of fraud, and, in addition thereto, it is also alleged that, at all times involved in this case, the plaintiff was and now is mentally competent to exercise control and management of his property. In the former trial of this case in the district court, evidence was introduced only as to the issues of jurisdiction and

fraud. From an adverse finding upon these questions, the plaintiff appealed to this court, whereupon this court sustained the finding of the district court that there was jurisdiction, but that there was constructive fraud, and the judgment of the trial court was reversed and the case remanded, with directions to try and determine the question of the competency of the plaintiff. For the former opinions in this case, see *Hall v. Hall,* 122 Neb. 228, and 123 Neb. 280. Upon a trial of this issue by the district court, the plaintiff was found to be incompetent at all times between April 17, 1928, up to and including the time of this trial, July, 1932. Therefore, the sole issue now presented to this court is the mental competency of Charles P. Hall at the time of the original guardianship proceedings, up to and at the time of the last trial.

"The incapacity of an individual, which, within the statute, will authorize the appointment of a guardian, is a question of fact in each case for the trial court, whose finding thereon will not ordinarily be disturbed." *Keiser v. Keiser,* 113 Neb. 645.

Mr. Hall is a man 83 years of age who lived many years on a farm near Elmwood, Nebraska. By hard work and careful management, he had raised a family of nine children and acquired considerable land and money. At the beginning of this controversy, he owned 560 acres of land near Elmwood, 1,053 acres in Hitchcock county, Nebraska, and securities of the approximate value of $90,000. For a man who came to the state at the age of nine, in 1858, and started for himself in 1869 by taking a homestead, which is a part of his present property near Elmwood, to accumulate so much property indicates industry, thrift, and business ability. The wife he brought, as a bride, to his homestead in 1876, who was the mother of his nine children, died in April, 1926. The record speaks eloquently of the great part she played in his success. It is apparent that she also contributed more than her share toward the management of the business affairs of the family. She advised her husband, kept books, and

was in his full confidence until after 1922. At this time, he had a bad injury to his head, after which, if the uncontradicted testimony is true, he relied upon her less and followed the advice of one outside the family. One, John Fowler, who sold mortgages and bonds, became and continued to be for a period of several years his trusted confidential business adviser, investing practically all of his funds. In January, 1928, about two years after the death of his first wife, he married Mrs. Estella Fowler, now 69 years of age, mother of John Fowler.

Subsequent to this marriage, the guardianship proceeding was commenced in February, 1928, in the county court. While the case was being tried, the hearing was interrupted and a guardian was appointed at the suggestion and upon the nomination of Hall himself. This guardianship was not offensive to Mr. Hall, who cooperated with and assisted the guardian in the management of the estate for a time, but in January, 1930, Mr. Hall commenced this suit in equity to vacate the judgment of the county court of April, 1928, as hereinbefore outlined.

After a careful reading and consideration of the extremely large record, consisting of six large volumes, it leaves us with an abiding conviction that the plaintiff in this case has insufficient mental capacity for the management of his property and that his mental condition is such that he is dependent upon and guided by others in its management. Such a condition requires the appointment of a guardian. *Keiser v. Keiser,* 113 Neb. 645; *Caltrider v. Sharon,* 164 Ia. 287; *In re Northcutt,* 81 Or. 646. In *Lang v. Lang,* 157 Ia. 300, it was held that, where a person has insufficient mental capacity to protect his property and he is guided by others, a guardian should be appointed.

The evidence in this case establishes that Hall is incapable of the management of his property. He claims to have certain conservative standards of judging an investment. For about ten years, Fowler, a son of his present

wife, has handled his investments, and these investments do not conform to said standards, and Hall did not know, even at the time of the trial, that they did not. This is not to pass upon the soundness of those investments, but it is evident that they represent the judgment of Fowler and not that of Hall. Where one is by reason of old age, disease, weakness of mind, or from any cause unable or incapable, unassisted, to properly manage his property, he is incompetent, and a guardian should be appointed. *Guardianship of Farr,* 169 Wis. 451; *Burke v. McClure,* 211 Mo. App. 446. Where one is incompetent to manage his affairs and is dependent upon a stranger, a responsible guardian should be appointed. The opportunity for an unauthorized adviser of such a person to take advantage of such an incompetent is too great a risk to the incompetent.

The testimony of Hall discloses that he is incompetent to manage even such a small matter as the allowance to him by his guardian. It is not a case of poor bookkeeping, as contended by his attorneys, but amounts to a total lack of any definite notion as to his income and his expenses. In his testimony in this case, he could not remember important items relative to his business affairs from question to question. He demonstrated his lack of capacity to manage his property and that he was acting under the influence of others.

Medical experts were called by both plaintiff and defendants. As is usual in such cases, they differed in their conclusions as to the competency of Hall. However, when we consider this testimony, together with all the other evidence in the case, and especially consider the reasons given for conclusions, as well as noting that many things established by the evidence were unknown to them, some of which they admit would change their opinion, if true, we conclude the expert testimony supports the finding of the trial court that Hall was and is incompetent to manage his property.

The judgment of the trial court is

AFFIRMED.

ROSE, J., did not sit or take part in the consideration or decision of this case.

GEORGE W. OLSON ET AL., APPELLANTS, V. CITY OF WAHOO, APPELLEE.

FILED MAY 5, 1933. No. 28533.

1. Waters: PUBLIC USE. The furnishing of water to the inhabitants of a city for the purpose of health, convenience, and comfort is a public use of such water.
2. ———. The law in relation to underground waters flowing in known and well-defined channels is not applicable to percolating waters, the source and channel of which are undefined and unknown.
3. ———: APPROPRIATION. The owner of land is entitled to appropriate subterranean waters found under his land, but his use thereof must be reasonable, and not injurious to others who have substantial rights in such waters.

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

Good, Good & Kirkpatrick and *E. S. Schiefelbein,* for appellants.

Hendricks & Kokjer, contra.

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

PAINE, J.

This is an action in equity, brought against the city of Wahoo, upon the charge that the city's new pumping plant has exhausted the water at the bottom of plaintiffs' gravel pit and made it worthless. Plaintiffs pray that the city be restrained from operating its pumps to a greater capacity than 300 gallons a minute, and that plaintiffs have judgment for damages in the sum of $39,271.50. The trial court determined that the plaintiffs had failed to make out a case, and dismissed the action.

As the trial court determined the controversy largely as a question of fact, it is necessary to make a rather full statement of the case. The petition sets out that the plaintiffs are the owners of a tract of land containing 13.56 acres. A portion of this tract is on a small hill, and is underlaid with a valuable bed of gravel. Deep excavations have been made in said gravel pit, reaching to the water line, and pumping machinery, installed upon a raft or float, with a sluicing device, washes the gravel and separates it into grades for commercial purposes. This gravel pit is located upon a part of a large geological formation, known as Todd Valley, which in previous geologic eras constituted a former bed and channel of the Platte river from the village of Morse Bluff to a point near Ashland, Nebraska. The said Todd Valley consists of a great gravel bed, filled with water, which comes to an average depth of 12 feet below the surface of the ground, the gravel bed reaching to a depth of from 70 to 100 feet below the surface of the ground. The excavation in plaintiffs' gravel pit reached below the water level of Todd Valley. The city pumping plant, installed in 1910 by the city of Wahoo, was not of sufficient capacity, and in April, 1930, the city of Wahoo constructed a new well, approximately 80 feet deep and 10 feet in diameter, and installed a steam turbine engine generator and condenser, with a capacity of 900 gallons a minute, half of said water pumped being used to cool the turbine engine generator and condenser, and, as a result of said operation, the water has been greatly lowered in said city wells. The lowering of the water table extends for a distance of more than a mile in every direction from said well, and has lowered the water level in the gravel pit of plaintiffs by more than four feet, thereby practically ruining it, to the great and irreparable injury of the plaintiffs. There is a bed of clay, about 17 feet thick, lying between the bottom of the present excavation and the lower gravel, and it would require large expenditures to reach gravel at a lower point. That the acts of

the city of Wahoo are wholly unlawful, and constitute an unreasonable use of the underground water, and plaintiffs are entitled to an injunction restraining the defendant from taking said water in such unreasonable quantities, to the damage of the plaintiffs. That the acts of the city of Wahoo constitute a deprivation of the plaintiffs of their property without due process of law, in violation of the Constitution of the United States, and of section 3, art. I of the Constitution of the state of Nebraska, and constitute the taking and damaging of plaintiffs' property without just compensation, as forbidden by section 21, art. I of the Constitution of Nebraska. That the damage to the real estate of the plaintiffs is $30,000, loss of production $5,000, which, with additional items, make the total amount set out above.

The defendant in its answer admits certain facts of the petition, and alleges that it has been the owner of the land from which the water is taken for more than 20 years; that it has established said pumping plant at large expense; that all of the water taken therefrom is used by the defendant and its inhabitants; that, if the water level on the lands of plaintiffs had receded at the time the petition was filed, August 23, 1930, it is because of the extremely dry weather of the year 1930, and other causes, and is not due to any action of the defendant city; that, when the plaintiffs purchased the land on which the gravel pit is located, they knew the water plant of the city had been located where it is now for many years prior thereto, and was the exclusive source of the city's water supply, and defendant prays that the action of plaintiffs be dismissed.

Among the witnesses called to support the plaintiffs' allegations, the principal one was Professor A. L. Lugn, the holder of several degrees, assistant professor of geology at the University of Nebraska, who has been working for the past three years on ground-water hydrology, under the direction of Dr. George Condra, particularly with reference to the Platte river and its underflow, which

investigations he has conducted from southeast of Wahoo to the Wyoming line. He described Todd Valley as a channel through which the Platte river once flowed, and that it varies from five to eight miles in width, and is some 35 miles in length, and at several places is known to have beds of gravel and sand to the depth of 100 feet; that this gravel bed is covered with soil, and receives its water from local rainfall and from a leakage from the Platte river north of Cedar Bluffs, where the present Platte river is in direct contact with the sand and gravel of the old Todd Valley, making an underflow from the Platte river down through this valley. He testified that the plaintiffs' gravel pit, at the northeast corner of the city of Wahoo, was right on the border or edge of the Todd Valley, but he had not been able to determine whether it properly belongs to the Todd Valley sand and gravel, or to some older geological formation, but that the water level was such that it usually conformed to the water level in the Todd Valley. In June, 1929, he made observations of the elevation of water at many points in this vicinity. The water level in the Olson gravel pit was at that time 1,169 to 1,170 feet above the sea level, and in August, 1930, the water level at the city pumping plant was 1,151, and the water level at the Olson gravel pit on August 3, 1930, was 1,166, making a drop of three to four feet in the year intervening. Professor Lugn concluded that the fall in the water level at the gravel pit was not due to general conditions, but was due to local conditions; in other words, to the new city pumping plant. He is corroborated in this by the fact that the water level in other wells in the vicinity had also gone down, and by the time of trial in July, 1931, the water level in the Olson gravel pit had declined between six and seven feet from the first observation in June, 1929. The evidence of a number of residents was taken, which showed that the water had gradually failed in wells or pumps. The city sunk a number of test wells, test well No. 1 being 2,300 feet away from the turbine well in the

general direction of the Olson gravel pit, and in this well the water rose 2 inches between June 4 and June 6, when the large turbine was not in operation, and in test well No. 2, 1,500 feet away from the city turbine well, the water level at the same time rose 4 1/3 inches, but declined again when the pump began operation. Test well No. 3, 870 feet away from the city turbine well, rose 4 2/3 inches during the two days when the large pump was not in operation, and test wells located on the other side of the city pumping plant also exhibited similar changes. Several farmers were called as witnesses, and testified that water levels had gone down in the summer of 1930. When Professor Lugn was asked the reason for the lowering of the water levels in the plaintiffs' gravel pit, he made answer: "As far as there is any evidence the cause of the lowering in the sand pit is local, and there is no other local cause adequate to account for the lowering other than the pumping, so I would conclude that the pumping is responsible for that lowering of the water in the sand pit." His evidence was supported by exhibits introduced.

Clark E. Mickey, professor of civil engineering in the University of Nebraska, also testified in favor of the plaintiffs. The direct evidence of the plaintiffs makes up about 382 pages of the 810 pages of the bill of exceptions.

The defendant contested every allegation tending to show that the city pump was in the slightest degree the cause of the lowering of the water in the plaintiffs' gravel pit.

Mr. E. W. Bennison, a graduate of the engineering department of the University of Nebraska in 1904, and who studied geology under Dr. Barbour while at the university, was one of the technical experts who supported the contentions of the defendant. He was engaged in engineering for five years with the Burlington, three years with the Iowa state highway commission, for two years with the United States army, was three years city engineer of Grand Island, and for the last seven years has

been the engineer of the Kelly Well Company of Grand Island, during which time he has developed water supplies in all parts of the United States east of the Rocky Mountains. He has developed extensive water supplies for the Bayer Aspirin Company, the Seiberling Rubber Company, the Pittsburg Plate Glass Company, the Fleishmann Yeast Company, the American Tobacco Company, Libby, McNeill & Libby, and many other large industrial concerns. He has delivered lectures and contributed articles to various scientific magazines upon the subject of water supply. Many exhibits were introduced to support his evidence. It was shown that, while the turbine pump was in full operation, it would draw down the water line in the 80-foot well 9.3 feet from the static or normal water level, and that this lower end of the cone rose sharply in the test well 50 feet away; and other test wells at a greater distance, supervised by Mr. Bennison, showed decreasing effect upon the water level at greater distances from the well. Mr. Bennison, after a careful study of the entire situation, gave it as his opinion that there could be no possible influence on the water level in the Olson gravel pit by the pumping of the city well, 3,400 feet away.

Professor E. E. Brackett, of the University of Nebraska, also made actual experiments to determine the shape of the cone of the depression of the water line reaching out from the well, and explained specific tests at the Hugh Brown farm southwest of Gibbon, Nebraska, in a soil formation which tallied with that of the Todd Valley formation, and said that, when water was being pumped in this well at the rate of 1,020 gallons a minute, at the end of 14 hours' pumping there was only a lowering of about a foot in a test well 200 feet away, and he testified positively that the area of influence did not extend more than 1,000 feet away from the city pump at Wahoo, and that it could not extend a distance of 3,400 feet.

Mr. G. L. Weishaar, a well contractor, of 22 years' experience in eight states, who resides at Scott City, Kansas,

and who constructed this well for the city of Wahoo, testified there would be no influence upon the water level at a distance of 3,400 feet in any direction from this well, even though it was pumping 900 to 1,000 gallons a minute continuously.

Mr. A. C. Kirkwood, an engineer, who had graduated at the Stanford University and at the Massachusetts Institute of Technology, and who is an expert of the Burns & McDonnell Engineering Company, of Kansas City, Missouri, testified that the area of influence would not exceed 1,000 feet. He was asked to make a computation, by assuming that the great body of water in the gravel, of 33 1/3 per cent. porosity, was not replenished from any source, and that the center of this cone of water had a depression at the city pump, when it was drawing out 900 gallons a minute, of 9.3 feet below the water level, how much water would have to be pumped out to lower the level of water 3,400 feet away, at the Olson gravel pit, four feet. His answer was that, if there was no replenishment from any source, 115,300,000 cubic feet of water, or 865,000,000 gallons of water, would have to be pumped out, and that this would require a constant pumping, at full capacity, night and day, for one year and ten months. If this estimate is true, then it was impossible to lower the level at the gravel pit by the city pump, which was only installed April 12, 1930, a distance of four feet before the date the petition was filed, August 23, 1930; or, to put the converse of the proposition, that, to lower the level, as indicated, in the 134 days between those dates, the city pump would have had to pump out 4,480 gallons a minute every hour, according to Mr. H. S. Nixon, an Omaha engineer, and its capacity was but 900 gallons a minute.

The Olson gravel pit lies at the west edge of the Todd Valley, and Professor Lugn testified that he had not been able to determine whether it properly belongs to the Todd Valley sand and gravel, or to something older geologically. He said that part of this formation on the west edge of

Todd Valley consisted of sand, clay, and gravel, heterogeneously mixed together, so that in places it constituted a watertight material, and without making drillings it was impossible to tell whether these various beds of clay ran out into Todd Valley or not. He also testified that he had made no tests of the material between the Olson pit and the city pumping plant to determine the porosity of the materials between these two points. Testimony was given by others to show that the continual pumping in the gravel pit, during the years it has been used, and washing the gravel free of the clay, had put fine silt back into the bottom of the gravel pit, and might in places make an impervious bed, which in itself would interfere with the water reaching the same level as in the Todd Valley. There was evidence to show that the year 1930, when the petition was filed, was a dry year, and that wells of farms in that locality had gone dry, and that the pumps in city water plants in several towns in the Platte valley had had to be lowered that season because of the lower water level.

It is contended by the plaintiffs that the city has destroyed their gravel pit, but it is set out by the petition of the plaintiffs that it would cost the plaintiffs at least $1,000 to lower the bottom of their pit through a stratum of clay which is 10 to 17 feet thick. It is evident that below such clay there would be a bed of gravel which would be far under the present water line in Todd Valley, and could be worked successfully, although at some additional expense because of the greater depth.

The only grounds for a new trial presented were: That the judgment was contrary to the law and to the evidence, and was not sustained by sufficient evidence, and because of errors duly excepted to during the trial.

In *Meng v. Coffee,* 67 Neb. 500, Commissioner Pound, in a very long opinion, held that the common-law rules as to the rights and duties of riparian owners are in force in this state, except as modified by statute, but it has been held that the law in relation to surface waters

is not applicable to subterranean waters. *Beatrice Gas Co. v. Thomas,* 41 Neb. 662, 43 Am. St. Rep. 711. This case involved the pollution of underground water, and Commissioner Irvine, citing from a Kentucky case, said that one must so use his property as not to injure his neighbor, and because the owner had the right to make an appropriation of all the underground water, and thus prevent its use by another, he had no right to poison it, and was liable for damages thereby sustained. He also discusses in this case the fact that the injury might be lessened or avoided by putting down another well, which might be considered in mitigation of the damages.

It is a general rule that the furnishing of water to the inhabitants of a city, for the purpose of health, convenience, and comfort, is a public use. 27 R. C. L. 1402.

In the case at bar, the plaintiffs contend for the American rule on percolating waters, while the defendant insists upon the common-law rule, and it is admitted that this court has not yet adopted either view. A full discussion of these two rules, together with the citations from the states following each rule, will be found in the note of 181 pages in 55 A. L. R. beginning on page 1385. There is a distinction made between underground waters flowing in known and well-defined channels, such as the water flowing in the gravel bed in Todd Valley, and also underground waters, the channels of which are undefined and unknown, and it is held that the principles of law governing the former are not applicable to the latter. 55 A. L. R. 1444. The defendant in the case at bar, by its evidence, throws much doubt on the question whether the water under the plaintiffs' gravel pit is connected directly with the underground stream of water flowing in the Todd Valley. The question of the rights in percolating waters is comparatively modern. The first case arising in England, in 1840, *Hammond v. Hall,* 10 Sim. 551, 59 Eng. Reprint, 729, did not definitely decide the question, but, in 1843, Tindale, C. J., in *Acton v. Blundell,* 12 M.

& W. (Eng.) 324, established the English, or common-law, doctrine. This rule is that percolating waters are regarded as belonging to the owner of the freehold, like rocks, soil, minerals, and, in the absence of malice, the owner may appropriate such waters while they are upon his premises, regardless of the fact that such use cuts off the flow of such waters to adjoining land, and in the long note from A. L. R., *supra,* decisions are cited from 29 states, the District of Columbia, England, and Ireland, showing the adoption of this common-law rule.

The American rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is, in our opinion, supported by the better reasoning.

For further discussion of the two rules, we cite the following opinions: *Meeker v. City of East Orange,* 77 N. J. Law, 623, 25 L. R. A. n. s. 465; *Erickson v. Crookston Waterworks, P. & L. Co.,* 100 Minn. 481, 8 L. R. A. n. s. 1250, 10 Ann. Cas. 843; *Bassett v. Salisbury Mfg. Co.,* 43 N. H. 569, 82 Am. Dec. 179 (decided in June, 1862, in which decision the English rule was first questioned in the United States); *Rouse v. City of Kinston,* 188 N. Car. 1, 35 A. L. R. 1203; *Gagnon v. French Lick Springs Hotel Co.,* 163 Ind. 687, 68 L. R. A. 175; *Pure Springs Water Supply Co. v. Town of Olney Springs,* 87 Colo. 420; *Cohen v. La Canada Land and Water Co.,* 151 Cal. 680, 11 L. R. A. n. s. 752; *Clinchfield Coal Corporation v. Compton,* 148 Va. 437, 55 A. L. R. 1376.

In the trial of this case, Judge Landis made a personal examination of the city pumping plant, of some or all of the test wells, and of the gravel pit, and this court has held that, where the oral evidence on the material issues

is conflicting, this court will consider the personal examination made of the physical facts by the trial judge, as well as his observance of the witnesses, and that he must have accepted one version of the facts rather than the opposite. *City of Wilber v. Bednar,* 123 Neb. 324; *State v. Delaware-Hickman Ditch Co.,* 114 Neb. 806.

In the opinion filed by the trial judge in the case at bar, he states that the plaintiffs have proved that the water level in their gravel pit has been lowered, but that they have failed to prove that the defendant caused such lowering. After stating that he visited the gravel pit, he states that one of the important elements in determining the flow of the underground water in the Todd Valley is the porosity of the material through which it flows, and that no evidence was offered as to the porosity of the materials as it affects the water level in the gravel pit, and that the expert evidence offered by the plaintiffs is indefinite, in that it locates a probable cause only of the lowering of the water level in the gravel pit, and adds that, if the defendant had rested at the close of the plaintiffs' testimony, he would have dismissed the action because of failure of proof. The trial court then adds that the expert evidence offered by the defendant shows that there are many causes which might have caused the lowering of the water level in the gravel pit, and that it is quite improbable that the pumping done by the city, 3,400 feet away, was the proximate cause of plaintiffs' damage.

This court finds that the evidence indicates that a deepening of the bottom of the gravel pit through the clay bed now reached, of 10 to 17 feet in thickness, would secure an abundance of water for further operations in the gravel below the clay bed, if, as the plaintiffs contend, the water in the gravel pit is connected directly with the percolating water in Todd Valley, for this water is inexhaustible, and one of the experts estimated that the flow or volume of water passing through the gravel of the Todd Valley was more than 10,000,000 gallons a day,

as it has a direct connection with the present bed of the Platte river at one point.

Upon a consideration of all of the evidence, we find no error in the judgment entered by the trial court, and the same is hereby

AFFIRMED.

ARCH LACEY, APPELLEE, V. CITIZENS LUMBER & SUPPLY COMPANY ET AL., APPELLANTS.

FILED MAY 12, 1933. No. 28537.

1. Judgment: VACATION. In furtherance of justice, district courts may vacate or modify their own judgments at any time during the term at which they are rendered.
2. ———: ———. Ordinarily, a judgment entered by default should be set aside upon application promptly made at the same term, together with the tender of an answer disclosing a meritorious defense, but upon such reasonable terms as the court may impose.

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

Chambers & Holland and *Howard S. Foe,* for appellants.

Shelburn & Russell, contra.

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

PER CURIAM.

This is an appeal from an order of the district court, overruling defendants' motion to vacate a judgment entered against them by default, and for permission to file an answer.

The action was begun in October, 1931. On or before answer day, defendants filed a motion to require plaintiff to make his petition more definite and certain. November 30, 1931, this motion was sustained in part, the court directing plaintiff to amend the petition by interlineation.

On December 7 plaintiff complied with the order and amended his petition in the particulars required by the court's order. Thereafter there was correspondence between counsel for the respective parties regarding a possible compromise and settlement of the case. Offers and counter offers were made, but the parties were unable to agree upon a settlement of the controversy. This correspondence lasted until about December 23, 1931. In the meantime counsel for defendants, residing in Lincoln, wrote two or three letters to the clerk of the court at Alma, Nebraska, asking to be advised as to what time had been fixed for pleadings and when the next jury term of court would be held. The only response which he received to these letters was a copy of the bar docket for the next term, which opened on January 25, 1932.

Counsel for defendants evidently overlooked the necessity for having an answer on file. On January 25, 1932, being the first day of the new term of court, without notice to defendants or their counsel, plaintiff called up the case, took a default and procured the entry of judgment. Counsel for defendants did not ascertain this fact until about a week later. He then filed motion, supported by affidavit, setting forth the requests made upon the clerk of the court for information and the fact that negotiations for a compromise settlement had been pending, and that, through oversight of counsel, he had neglected to file an answer within the time required by law. After a hearing upon this motion, it was overruled, and defendants prosecute this appeal.

It thus appears that, through the neglect or oversight of their counsel, defendants have been deprived of an opportunity to make their defense. At the time of filing the motion to vacate the default judgment, an answer, stating a good defense, was tendered. The motion to vacate was made promptly and at the same term at which the default judgment was rendered.

In *Coates v. O'Connor*, 102 Neb. 602, this court held: "Where it is shown that there is a good defense, and that

failure to defend was due to the mistake or miscalculation of defendant's attorneys as to the time allowed to plead, an application to open the judgment made at the same term should be sustained."

It is a well-established rule that, in the furtherance of justice, district courts may vacate or modify their own judgments at any time during the term at which they are rendered. *Netusil v. Novak,* 120 Neb. 751; *Bradley v. Slater,* 55 Neb. 334. Ordinarily, where a judgment has been entered by default and a prompt application made at the same term to set it aside, with a tender of an answer disclosing a meritorious defense, the court should, on reasonable terms, sustain the motion and permit the cause to be heard upon the merits. 15 R. C. L. 720, sec. 174; *Citizens Nat. Bank v. Branden,* 19 N. Dak. 489.

In the instant case, it appears that defendants tendered a meritorious defense and have been deprived of a hearing upon the merits simply because through inadvertence their counsel failed to file answer within the proper time. The court, in the exercise of a sound discretion, we think, should have sustained the motion upon such terms as it deemed just. The courtesy that should prevail between opposing counsel to a cause ordinarily requires that counsel for one party should, before taking a default, give notice to counsel for the other side of his intention so to do.

The order of the district court denying the motion to vacate the default judgment is reversed, with directions to permit defendants to file an answer and to be heard upon the merits, and that the costs accruing to the date when the motion to vacate was passed upon should be taxed to defendants absolutely.

REVERSED.

E. H. LUIKART, RECEIVER, APPELLANT, V. HENRY MEIERJURGEN, APPELLEE.

FILED MAY 12, 1933. No. 28540.

1. Bills and Notes: ACCOMMODATION MAKER. An accommodation maker of a promissory note is one who has signed without receiving value therefor and for the purpose of lending his name to some other person. Comp. St. 1929, sec. 62-206.
2. Evidence. "In an action on a promissory note, the defense that the note is given for the accommodation of the plaintiff and without consideration may be established by parol evidence." *Bennington State Bank v. Petersen*, 114 Neb. 420.
3. Trial. Under the evidence, the court did not err in submitting to the jury the questions as to whether the plaintiff bank or another was the accommodated party.

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

F. C. Radke, Barlow Nye, W. A. Crossland and *James H. Hanley*, for appellant.

Dwyer & Dwyer, contra.

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

GOSS, C. J.

The receiver appeals from a judgment on the verdict in favor of defendant. Appellant claims the court erred in submitting the case to the jury, in refusing plaintiff a judgment notwithstanding the verdict, and that the verdict was contrary to the evidence and contrary to the law.

George C. Meierjurgen lived in Omaha and had long been a customer of the German Bank of Millard. He owed it upwards of $4,000 when he applied for $4,000 of fresh money on or about March 2, 1926. A. B. Detweiler, the president of the bank, refused a further loan to him, but granted a loan of that sum on a note in favor of the bank signed alone by his brother, Henry Meierjurgen, a farmer of Murdock in Cass county. The

note then made was renewed from time to time, the renewal note in suit having been executed March 2, 1931. The money was credited to the account of George, was used by him, and has not been repaid. The plaintiff also sued on another note for $480 of like date made by defendant to the bank, for the proceeds of which George's account was credited. It was understood and agreed at the time the indebtedness was created, of which these renewal notes are evidence, that the money was to be passed to the account of George in the bank, and this was done. Henry had no account there. George alone got the credit and used the money.

Henry answered, admitting the execution of the notes sued on and of the original notes of which they were renewals, but alleged as a defense that no consideration was paid to defendant therefor, and that the bank represented that, if he would sign the original notes as an accommodation to the bank, he would not have to pay them or interest thereon. The reply of the bank denied this defense.

The court submitted to the jury the questions whether the notes were given by defendant as accommodations to the bank or to George C. Meierjurgen, placing upon defendant the burden of proving by a preponderance of the evidence that the respective notes were given without consideration and as an accommodation to the German Bank of Millard, as a condition precedent to a verdict for defendant. Appellant assigns that the court erred in refusing to direct a verdict at the close of the testimony on behalf of plaintiff, in not sustaining plaintiff's motion for judgment notwithstanding the verdict, and because the verdict was contrary to the evidence and contrary to the law.

This requires a detailed examination of what occurred when the original notes were signed. When George applied for the $4,000 loan, he took Henry with him and left him in the front room of the bank while he interviewed Mr. Detweiler in the private office. He testified

that, after he was refused the loan on the ground stated by Mr. Detweiler, that he had already borrowed all that was permitted by the bank's capital and surplus, he told the banker his brother Henry was outside, and that Detweiler said, "Well, if your brother Henry will sign the note I will let you have the money and never call on him to pay it because I know you will pay it back again;" that when the witness expressed doubt as to whether his brother would sign, the banker said, "Well, I will go out and ask him;" they went out to the front room and Detweiler said to defendant, "George wants some money and I can't let him have it, but if you will sign the note I will let him have the money and never ask you to pay it. George will pay the money." Henry hesitated; he did not like to sign the note, he said; but Detweiler said, "That's all right, you sign it and you will never have to pay it."

Defendant testified that, when Mr. Detweiler and George came out of the back room, Detweiler explained he could not let George have any more money and if he could not get it he (George) would lose a lot of money; that "if I would sign a note that I would never be called upon to pay it; that George would have to pay it, * * * we was kind of arguing about me not wanting to sign it and he told me that, I expect, two or three times before I signed it."

Mr. Detweiler testified that the money was loaned to defendant, that there was no such conversation as related by the Meierjurgens to the effect that George was to pay the note or interest thereon. He admitted he had charged interest on the notes to George's account, and in 1927 he wrote a letter to defendant asking him to have George pay interest, because, he testified, Henry had told him George was going to pay it. Detweiler testified that defendant gave him a property statement at the time the original note was taken and usually gave a new one about once a year; the practice was for borrowers to take up former property statements upon giving new ones. There

is in evidence a very complete property statement from defendant, sworn to by him before Detweiler as a notary public on March 2, 1931, and identified as given at the time of the execution of the notes in suit. Detweiler testified that the fact that George some times paid the interest on defendant's note was a matter between themselves; defendant himself paid the interest at least three times as shown by the records.

The testimony as to the $480 note is not so complete as that relating to the larger one, but the effect of it is similar and raised the issue as to whether it was given by defendant as an accommodation, about as the issue was presented in relation to the other note.

An "accommodation party" is one who has signed an instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Comp. St. 1929, sec. 62-206. Henry Meierjurgen was the maker of the notes in suit. He received no value from either George C. Meierjurgen or the bank. He was therefore an "accommodation maker" either for George or for the bank. If he made it for the accommodation of his brother, the fact that the brother received the proceeds would be a good consideration for making the notes and the maker could be held by the bank. This is based on the principle that "The consideration of a contract need not move to the promisor. A disadvantage to the promisee is sufficient, although the promisor derives no benefit therefrom." *Faulkner v. Gilbert,* 57 Neb. 544. On the other hand, if the bank was the party accommodated, then the maker would not be liable at all if it can be shown by parol that the maker was legally assured on behalf of the bank that he would not be called on to pay the note. Ordinarily the terms of a written contract cannot be contradicted, altered or varied by evidence of a prior or contemporaneous oral agreement, but that rule has exceptions. In *Bennington State Bank v. Petersen,* 114 Neb. 420, defendant Markmann pleaded and was allowed

to prove that he signed the notes sued on as an accommodation to the bank, and that he did so at the "request of the cashier of the bank, upon the express promise that they were to be used to exhibit to the bank examiner; that the defendant (Markmann) was not to be liable thereon, and that he was to incur no liability by signing the notes." The opinion states: "As between the original parties to a promissory note, want of consideration, and that the note was given for the accommodation of the payee, may be established by parol evidence." The second point of the syllabus says: "In an action on a promissory note, the defense that the note is given for the accommodation of the plaintiff and without consideration may be established by parol evidence."

While the evidence in the instant case is not so plain as in the one we have just presented, yet there is sufficient from which the jury might find that Detweiler refused the loan direct to George for the reason that the latter had borrowed the legal limit, that the bank desired to have its funds drawing interest, and that the bank was the party accommodated. We regard *Bennington State Bank v. Petersen, supra,* as applicable. No consideration moved from the bank to Henry Meierjurgen, the maker of the notes, if the bank be considered the accommodated party. The district court did not err in submitting to the jury the questions as to whether the notes were given to accommodate the bank or to accommodate George C. Meierjurgen. The finding of the jury concluded the district court on the points raised in the other assignments of error.

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

AFFIRMED.

JOHN W. LARGE, APPELLEE, V. LEONARD JOHNSON, APPELLANT.

FILED MAY 12, 1933. No. 28549.

1. **Master and Servant:** ASSUMPTION OF RISKS. "An employee assumes only the risks arising from the appliances and materials to be used by him or from the manner in which the business in which he is to take part is conducted, when such risks are known to him or are apparent and obvious to persons of his experience and understanding." *New Omaha Thompson-Houston Electric Light Co. v. Dent*, 68 Neb. 674.
2. ———: ———. "A servant by his contract assumes the ordinary risks and dangers incident thereto, but does not assume the risk of dangers due to his master's negligence." *Grimm v. Omaha Electric Light & Power Co.*, 79 Neb. 387.
3. **Appeal:** ISSUES: INSTRUCTIONS. Where there is no specific allegation of contributory negligence, the character of the plea will be determined by its effect; and if the parties by their introduction of evidence have assumed that such a defense was in issue, it is not reversible error for the court to instruct thereon. *Grover v. Aaron Ferer & Sons*, 122 Neb. 755.
4. **Trial:** VIEW OF PREMISES. Under section 20-1108, Comp. St. 1929, a refusal to allow the jury to view the place where a material fact occurred is not reversible error in absence of an abuse of discretion.
5. ———: REFUSAL OF INSTRUCTION: FAILURE TO CALL WITNESS. It does not constitute error for the trial court to refuse an instruction requested by defendant that failure of plaintiff to call a witness raises a presumption that the evidence of such a witness would be adverse to plaintiff, when there is no showing that the witness is available, or that he is not as accessible to defendant as to plaintiff.

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

Benjamin S. Baker and *Edward Shafton*, for appellant.

O'Sullivan & Southard, contra.

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

GOSS, C. J.

Plaintiff had judgment for damages for personal in-

juries alleged to be caused by negligence of defendant, who has appealed.

The negligence charged consisted in the failure of defendant, in hitching a team of horses to a disk, to use hold-back straps. Plaintiff had done farm work for about twenty years. He had been in the employ of defendant for about two and a half years on the farm where he was injured. About 10:30 in the forenoon of May 24, 1931, plaintiff and his wife, who were in the house, saw defendant hitching four horses abreast to a farm disk. Being Sunday it was unusual and they went out to investigate. This machine was equipped with a pole or tongue, a set of doubletrees for each pair of horses, a singletree for each of the four horses, and a neckyoke for the pole team. Defendant did all of the harnessing and most, if not all, of the hitching. Plaintiff testified that when he arrived at the scene defendant had the team "all yoked together in front and was ready to hitch the tugs up;" that the only function plaintiff performed was to hold the near outside horse while plaintiff's wife held the lines and defendant fastened the tugs. The harnesses were equipped with breeching and with hold-back straps. There was evidence that the latter were either absent or, at any rate, that defendant did not on this occasion hook or snap them to the neckyoke of the pole team. After the team was hitched to the disk, defendant drove them to the field where he was disking and made a round or two, after which plaintiff took charge and drove the team until about 2 o'clock, when he suspended the work for dinner and undertook to drive the team and disk to the house. This necessitated driving down a hill. He testified the employer had directed him never to drive them on the road with the disk in gear. He had pleaded that he was "obliged to throw said disk out of gear and to drive down a hill." While so doing, there is evidence that the collars were pushed forward on the horses' necks and the disk ran suddenly forward, striking the doubletrees against the horses and causing

them to become frightened and unmanageable. They ran away. The disk killed one of the horses and ran over plaintiff, severely injuring him. Plaintiff's testimony is to the effect that he had two sets of lines to handle and that he was then unable, in the circumstances, to throw the disk in gear to retard its movement, even if that would have been practicable, because there is one lever for each of the two sections of disks. Plaintiff's theory was that if the hold-back straps had been attached in hitching the pole team they would have had no trouble in holding back the machine on the hill. Defendant's theory is that plaintiff should have put the disk in gear before starting down the hill, and that plaintiff, in the use of ordinary care, at the time of the hitching of the team to the disk, and while he was holding the outside horse, would have seen that the hold-back straps were not attached and also would have discovered it while he was driving the horses in the period before the accident. These theories were set before the jury in the evidence and in the instructions. There was sufficient evidence to go to the jury and the several assignments of error based upon this point are not well taken. The general rule is: "An employee assumes only the risks arising from the appliances and materials to be used by him or from the manner in which the business in which he is to take part is conducted, when such risks are known to him or are apparent and obvious to persons of his experience and understanding." *New Omaha Thompson-Houston Electric Light Co. v. Dent,* 68 Neb. 674. See *Union Stock Yards Co. v. Goodwin,* 57 Neb. 138; *Dehning v. Detroit Bridge & Iron Works,* 46 Neb. 556. These cases further support the rule concisely stated in *Grimm v. Omaha Electric Light & Power Co.,* 79 Neb. 387: "A servant by his contract assumes the ordinary risks and dangers incident thereto, but does not assume the risk of dangers due to his master's negligence."

Appellant charges that the court committed error in an instruction stating that "defendant alleges that the

plaintiff was guilty of negligence contributing to cause the accident * * * the claim being that the plaintiff by the exercise of ordinary care could have put the disk in gear and thereby have prevented the accident, but that plaintiff negligently failed to do so." Defendant asserts that he did not plead contributory negligence. It is true that in his answer he did not use that term, but he did allege that whatever injury the plaintiff received was due and caused by the negligence and carelessness of plaintiff. The trial was conducted as if this was a plea of contributory negligence. We have recently held that, where there is no specific allegation of contributory negligence, the character of the plea will be determined by its effect; and if the parties by their introduction of evidence have assumed that such a defense was in issue, it is not reversible error for the court to instruct thereon. *Grover v. Aaron Ferer & Sons,* 122 Neb. 755. See, also, *Johnson v. Weskamp,* 122 Neb. 381; *Hensley v. Chicago, St. P., M. & O. R. Co.,* 118 Neb. 690.

Under the pleadings and evidence it was necessary for the court to instruct the jury on the subject of comparative negligence. To have failed so to do would have been erroneous. The form of the instruction is not criticized, but defendant hangs his objection to it on the argument that defendant did not plead nor raise the issue of contributory negligence.

It is argued that the instructions were misleading, contradictory and conflicting. We have carefully checked the instructions and have compared them with defendant's argument. We find in them the things which defendant misses and we fail to discover the errors which defendant sees. Taken as a whole we are of the opinion they correctly and clearly set forth the law of the case.

Defendant complains because the court refused his request to send the jury out to the place of the accident to observe "a test to be made of the movement of the disk on that hill." The court said: "I am inclined to think that the operation is of such a character and such

a nature that the evidence of tests made is sufficient for the jury to determine for themselves the facts." Evidence of tests had been submitted to the jury. Section 20-1108, Comp. St. 1929, authorized the court to order the jury to be conducted in a body to the place in which any material fact occurred whenever in the opinion of the court it is proper for the jury to have such a view. Granting or refusing an order directing a view by the jury of the place of an accident rests within the sound discretion of the trial court. This court will not reverse a judgment of the district court refusing such a view unless an abuse of discretion is shown. *Robison v. Troy Laundry,* 105 Neb. 267; *Whelan v. City of Plattsmouth,* 87 Neb. 824; *Beck v. Staats,* 80 Neb. 482. There was no abuse of discretion in the ruling of the trial court on this point.

Appellant complains of error in refusing an instruction requested by him as follows: "You are instructed that by failure to call a witness that is present and that is available and in a position to know the facts, and not called by the plaintiff, the presumption is that the evidence of such witness would be adverse to the plaintiff." He states that one witness referred to is Dr. Pulver who, the brief says, was called immediately after the accident and treated plaintiff for many months; and the other witness is said to be G. B. Ingram. The brief fails to indicate where in the bill of exceptions may be found the evidence relating to these parties, as required by the rules of this court. On this point the brief of appellee likewise fails to cite the bill of exceptions, but states that Dr. Pulver was hired by defendant to attend plaintiff after his injuries and was paid by defendant; that just after the accident occurred, Ingram was driving along the road with the witness Booker, who testified in detail on the trial; that there is no showing that either party was available as a witness; and that defendant had as good an opportunity as plaintiff to call them. In view of the above facts and also because the appellant does

not question the nature and extent of plaintiff's injuries nor the size of the verdict, we do not consider the refusal of the requested instruction to be prejudicial error.

We have examined all errors assigned and find none of them prejudicial. For the reasons set forth, the judgment of the district court is

AFFIRMED.

DELBERT BARNES V. STATE OF NEBRASKA.

FILED MAY 12, 1933. No. 28552.

1. Criminal Law: VERDICT: TESTIMONY OF ACCOMPLICE. A conviction may rest on the testimony of an accomplice when, considered with all the evidence in the case, it satisfies the jury beyond a reasonable doubt of the guilt of the accused.
2. Statute: VALIDITY. Section 28-201, Comp. St. 1929, is not void for uncertainty.
3. Criminal Law: REFUSAL OF CAUTIONARY INSTRUCTION. Ordinarily, it does not constitute error to refuse a cautionary instruction as to the testimony of a sheriff or his deputy.

ERROR to the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed; sentence reduced.*

Wymer Dressler, for plaintiff in error.

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

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

GOSS, C. J.

Plaintiff in error, hereinafter called defendant, was convicted and sentenced on a charge of breaking and entering a county warehouse with intent to steal property.

The chief witnesses on the part of the state were two young men, Raymond Bohl and Dale Rumbaugh, both 21 years old, who testified that on Monday night, April 25, 1932, having previously agreed to help the defendant steal some oil from the county, they drove to his home, picked

up him and his friend, Jug Ross, and proceeded to the county barn or warehouse at Howe; that defendant tried but failed to break the lock with a tire tool which he had brought for the purpose; Rumbaugh then broke the lock, defendant remaining outside as a lookout. Bohl and Rumbaugh entered the barn and rolled out a thirty gallon drum containing twenty or twenty-five gallons of oil; the drum was put in the rumble seat of the car and all drove to defendant's home, where the oil was emptied into other containers and, by direction of defendant, the drum was taken by Bohl and Rumbaugh to a creek, where it was later found by the sheriff. The barrel was red. Marks of that color were found on the rumble seat of the car in which the witnesses testified the oil was transported to defendant's home. The containers into which the oil was poured and the funnel used in the operation were identified on the trial. Defendant denied any connection with the affair and produced an alibi to the effect that he was at home all that evening playing cards with his wife and Clifford Ross, both of whom corroborated him. The evidence was sufficient for submission to the jury. Barring errors, the judgment must stand.

Defendant contends that he was convicted by the uncorroborated testimony of admitted accomplices, who also testified falsely as to material matters in the case, and that such a conviction will not be sustained. "At common law the testimony of an accomplice, if it satisfies the jury beyond a reasonable doubt of the guilt of defendant, may be sufficient to warrant a conviction, although it is not corroborated." 16 C. J. 696. This rule is supported by almost unanimous authority. It is one of general application and has been applied to all classes of crimes, including burglary, among others. See *State v. Routzahn,* 81 Neb. 133; *Lawhead v. State,* 46 Neb. 607; *Lamb v. State,* 40 Neb. 312; *Olive v. State,* 11 Neb. 1. A conviction may rest on the testimony of an accomplice when, considered with all the evidence in the case, it satisfies the jury beyond a reasonable doubt of the guilt of the

accused. The rule as to the consideration of the testimony of accomplices was adequately expressed by the court to the jury in an instruction of which defendant complains.

The evidence indicates that defendant procured, aided and abetted in the offense. He was prosecuted as a principal by virtue of section 28-201, Comp. St. 1929, providing: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." Defendant argues that this section is void for uncertainty because couched in permissive language only. He asserts that to denounce an act as a crime the legislature must use mandatory language. This section does not fix the terms of a crime. It merely provides how any aider, abetter or procurer of the commission of any substantive crime may be proceeded against. The particular offense of which defendant is thus made a principal is substantively stated in section 28-538, Comp. St. 1929. The purpose of section 28-201 is to remove the inhibition against uniting in a prosecution two persons who formerly had to be prosecuted for separate substantive offenses. *Neiden v. State,* 120 Neb. 619, 622. The section is salutary and is not void for uncertainty.

Defendant complains because the court refused an instruction cautioning the jury to scrutinize the testimony of the sheriff and his deputies with more than ordinary attention given to the testimony of witnesses generally. Ordinarily, it is not error to refuse a cautionary instruction as to the testimony of a sheriff or his deputy. *Keezer v. State,* 90 Neb. 238; *McMartin v. State,* 95 Neb. 292; *Hudson v. State,* 97 Neb. 47; *Flanagan v. State,* 117 Neb. 531.

Other errors are assigned based upon the happenings at the trial. We have examined them and find them without merit. To discuss them would serve no good purpose and would unduly prolong this opinion.

The refusal of the district court to grant a new trial on the ground of newly discovered evidence is assigned as erroneous, both on the conventional motion and on a supplemental motion for a new trial. The first point related to a chemical test of oil submitted on behalf of the state to a chemist who could not positively identify and certify it as county oil. There was a good reason shown in the evidence for that in the fact that the stolen oil was poured into defendant's containers at his farm. The state was not bound to submit to the jury the fact that it had tests made nor what they showed, nor was it required to disclose to defendant the facts in relation to the tests. The same diligence on the part of defendant before the trial as after would have put him in possession of the facts. It does not appear that this would have changed the result. The second point relates to a newly discovered witness who is asserted to be able to testify that he witnessed the breaking and entering and that defendant was not there. This witness made one affidavit to the foregoing effect, executed another the next day stating that the first was false, and on the third day made still another affidavit, stating that he told the truth in the first and that the second affidavit was obtained by threats of the prosecuting attorney and sheriff. Counter affidavits impeach the witness. The third point related to further and cumulative evidence of an alibi. This was furnished by a witness who made affidavit that he saw Bohl and Rumbaugh taking the stolen oil towards defendant's place between 11:30 and midnight the night of the burglary and that defendant was not with them, and a few minutes later he saw defendant, with his wife, and Clifford Ross, driving in the opposite direction. Other affidavits on behalf of the state clouded the accuracy of the witness. We are of the opinion that the trial judge did not abuse the discretion reposing in him by refusing to grant a new trial on the ground of newly discovered evidence.

Defendant was sentenced to imprisonment in the penitentiary from one to three and a half years. In view

of all the circumstances and in the exercise of the power granted by section 29-2308, Comp. St. 1929, the sentence is reduced to one year in the penitentiary. As thus modified the judgment of the district court is affirmed.

AFFIRMED; SENTENCE REDUCED.

WILLIAM SONNEMAN ET AL., APPELLEES, V. FARRELL F. DOLAN ET AL.: JESSE HIGHBERGER, APPELLANT.

FILED MAY 12, 1933. No. 28509.

Execution: PRINCIPAL AND SURETY. The statute requiring a judgment creditor to exhaust the property of the principal debtor on execution, before levying on property of his sureties, applies generally to judgments on supersedeas bonds which stay proceedings pending appeals from district courts to the supreme court. Comp. St. 1929, sec. 20-1544. *Van Etten v. Kosters*, 48 Neb. 152, followed; *Palmer v. Caywood*, 64 Neb. 372, distinguished.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Reversed to correct judgment.*

E. H. Evans and *Urban Simon*, for appellant.

Milton C. Murphy, William E. Shuman, George N. Gibbs and *Halligan, Beatty & Halligan, contra.*

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

ROSE, J.

This is an action on a supersedeas bond. Judgment was rendered against three defendants, all of the obligors, without reciting who was principal and who were sureties. One of the sureties appealed, assigning omission of such a recital as an erroneous departure from statute. Comp. St. 1929, sec. 20-1544. This assignment raises the question presented by the appeal.

The facts are not in dispute. In a former action by William Sonneman, for the alienation of his wife's af-

fections, against Burford J. Atkinson, the jury rendered in favor of plaintiff a verdict for $20,000, which was reduced by remittitur to $15,000. Judgment therefor was entered on the verdict. To stay execution pending appeal, Atkinson gave a supersedeas bond in the penal sum of $31,000, binding himself to prosecute his appeal without delay and to "pay all condemnation money and costs which may be found against him on a final determination of said cause in the supreme court." The supersedeas bond recited on its face that Atkinson was principal and that F. F. Dolan and Jesse Highberger were sureties and was so signed by them. Pending appeal, Sonneman assigned 55 per cent. of his judgment to his attorneys, George N. Gibbs, William E. Shuman, and Robert H. Beatty. The judgment was affirmed. *Sonneman v. Atkinson,* 121 Neb. 752.

After the cause was remanded to the district court for enforcement of the judgment, Sonneman and his assignees, plaintiffs, brought the present action on the bond, making the three obligors defendants, pleading the 15,000-dollar judgment, the supersedeas, the affirmance, and nonpayment. In an answer to their petition, Dolan and Highberger stated they were sureties and denied liability, but alleged, in the event of a decision against them, that the judgment should designate them as sureties and direct the clerk, in issuing execution, to order the sheriff to exhaust the property of the principal before levying on property of the sureties.

The parties waived a jury and the cause was tried to the district court. Judgment was entered against the three obligors, holding them jointly and severally liable for $15,000, interest and costs, without reciting that Dolan and Highberger were sureties for Atkinson or requiring the judgment creditor to exhaust the principal's property before levying on the property of the sureties. From this judgment Highberger appealed.

Does the law require the obligee, judgment creditor, to exhaust the property of the principal on execution be-

fore resorting to the property of the sureties? On the affirmative of this question a statute and an earlier decision are cited. The statute provides:

"In all cases where judgment is rendered in any court of record within this state, upon any other instrument of writing, in which two or more persons are jointly and severally bound, and it shall be made to appear to the court, by parol or other testimony, that one or more of said persons so bound signed the same as surety or bail for his or their codefendant, it shall be the duty of the clerk of said court in recording the judgment thereon, to certify which of the defendants is principal debtor, and which are sureties or bail. The clerk of the court aforesaid shall issue execution on such judgment, commanding the sheriff or other officer to cause the money to be made of the goods and chattels, lands and tenements, of the principal debtor, but for want of sufficient property of the principal debtor to make the same, that he cause the same to be made of the goods and chattels, lands and tenements, of the surety or bail. In all cases the property, both personal and real, of the principal debtor, within the jurisdiction of the court, shall be exhausted before any of the property of the surety or bail shall be taken in execution." Comp. St. 1929, sec. 20-1544.

This statute was held to apply to a judgment on a supersedeas bond staying execution pending appeal from the district court to the supreme court in *Van Etten v. Kosters*, 48 Neb. 152—a case directly in point cited by Highberger, surety and appellant. If the opinion therein correctly states and applies the law, the obligee, judgment creditor, should be required to exhaust the property of the principal on execution before levying on property of the sureties.

On the contrary, it is argued that the liability of the sureties is the same as that of the judgment debtor and that their property may first be seized by the sheriff and sold on execution to satisfy the debt. In support of this

view, another statute and another Nebraska case are cited. The statute upon which the judgment creditor relies is in part as follows:

"No appeal in any case shall operate as a supersedeas, unless the appellant or appellants shall within twenty days next after the rendition of such judgment or decree, or the making of such final order, execute to the adverse party a bond with one or more securities as follows: First. When the judgment, decree or final order appealed from directs the payment of money, the bond shall be in double the amount of the judgment, decree or final order, conditioned that the appellant or appellants will prosecute such appeal without delay and pay all condemnation money and costs which may be found against him or them on the final determination of the cause in the supreme court." Comp. St. 1929, sec. 20-1916.

It is argued on behalf of obligee, judgment creditor, that this statute is part of the bond; that it is a "special law," so called, imposing on sureties the liability of their principal and controlling the "general statute" relating to judgments and executions against sureties. To sustain this position *Palmer v. Caywood*, 64 Neb. 372, is cited and discussed with confidence. The question therein presented was the right of a judgment creditor to maintain an action on a supersedeas bond before pursuing the principal debtor by execution. The right to do so was properly sustained, but the opinion goes further and adopts the dictum that "The judgment creditor cannot, unless, perhaps, in very exceptional cases, be required to exhaust the property of the principal on the undertaking before he is entitled to have recourse against the sureties and collect from them what is due under the terms of the instrument." The earlier case and statute were not mentioned in the opinion in the case last cited and were apparently overlooked. With the quoted dictum eliminated, the two cases may be harmonized, when the special and the general statutes are considered together, as they should be. The sureties on a supersedeas bond may be

adjudged liable under the special statute for the full amount of the superseded judgment and at the same time may insist on the exhausting of the principal's property first, as authorized by the general statute. Effect should be given to both unless there is an irreconcilable conflict between them, which does not exist, when each is properly construed with reference to the other. Both, in so far as applicable, should be considered parts of the supersedeas bond. The dictum in the *Palmer-Caywood* case cited recognizes exceptions to the general doctrine stated therein. If the judgment debtor or principal has no property subject to levy, or dies and leaves an estate in course of settlement, or absconds, taking his property with him, or possesses only property impounded or attached in other litigation, the law does not necessarily require the innocent obligee, judgment creditor, to trifle with a vain execution before levying on property of sureties against whom judgment has been rendered on the supersedeas bond. The present case is different. The record discloses without dispute that Highberger signed the supersedeas bond as surety, but fails to show that Atkinson, the principal, had no property in Lincoln county subject to execution. The statute requiring the judgment creditor to first exhaust the property of the principal is applicable generally to sureties on supersedeas bonds to stay proceedings pending appeals from the district courts to the supreme court, as held in *Van Etten v. Kosters*, 48 Neb. 152, but, for the reasons stated in the opinion in that case, does not apply to undertakings in appeals from justices of the peace.

In these views of the law, the judgment of the district court is erroneous in failing to state who is principal and who are sureties, and in failing to require plaintiffs to exhaust on execution the property of Atkinson, the principal, before levying on the property of Highberger, one of the sureties. For the purpose of correcting the judgment below in those particulars, it is reversed as to Highberger and the cause remanded.

REVERSED TO CORRECT JUDGMENT.

NASH-FINCH COMPANY ET AL., APPELLANTS, V. HENRY BEAL, COUNTY ATTORNEY, APPELLEE.

FILED MAY 12, 1933. No. 28617.

1. Licenses. In fixing the amount of a license fee as an incident of statutory regulation to prevent public injury, the legislature has a greater latitude than is necessary in authorizing an inspection fee for a definite official service. *State v. Standard Oil Co.*, 100 Neb. 826, distinguished.
2. ———. A reasonable license fee for the privilege of trafficking in tobacco under a regulatory statute is not a tax on property.
3. ———. Failure to prosecute violators of the statute regulating the traffic in tobacco and forbidding sales without a license does not render void reasonable license fees sufficient to meet the expenses of licenses and regulation.
4. Statutes: LICENSE FEES. A statute regulating the traffic in tobacco and requiring each dealer to pay a license fee is not necessarily invalid because methods of enforcement are not prescribed in the legislative act.
5. ———: ———: POLICE POWER. The legislature has a considerable latitude in fixing license fees by a regulatory statute enacted in the exercise of police power and courts will not declare such legislation void unless from its inherent character, or by proofs adduced, it is shown to be unreasonable.
6. ———: VALIDITY. In testing the validity of a regulatory statute, the enrichment of school funds by license fees and payment of expenses of licenses and regulation out of money raised by taxation are not generally material factors.
7. Licenses. Under the statute regulating the traffic in tobacco, each dealer is required to procure a license for each place of business, whether wholesale or retail.
8. ———: CLASSIFICATION. Legislative classification of tobacconists and places of business, for the purpose of licensing and regulating the traffic in tobacco, *held* to be reasonable and uniform as to class.
9. Statutes: VALIDITY: TITLE. State statute providing for the "regulation" and licensing of the traffic in tobacco, under a title clearly stating that subject, *held* not shown to be unconstitutional as a "revenue measure," a subject not mentioned in the title, or as levying taxes on property, or as imposing a burden on interstate commerce.

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

Ziegler & Dunn and *G. W. Becker,* for appellants.

Henry J. Beal, Jack W. Marer and *John W. Yeager, contra.*

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

ROSE, J.

This is a suit for an injunction preventing the county attorney of Douglas county from enforcing the statute prohibiting wholesale and retail tobacconists from selling, keeping for sale, or giving away cigars, tobacco, cigarettes or cigarette material, without paying annual license fees. Comp. St. 1929, secs. 28-1023 to 28-1027. The ground for the relief sought by plaintiffs is the alleged unconstitutionality of the statute. The district court sustained a demurrer to the petition and dismissed the suit. Plaintiffs appealed.

It is first argued by plaintiffs that the legislative act which requires a wholesale tobacconist to pay a 100-dollar annual fee as a condition of transacting business is a revenue measure providing for a property tax, and as such is a violation of the Constitution, which provides:

"Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property." Const. art. VIII, sec. 1.

The statute provides that it shall be unlawful to sell, keep for sale, or give away "any cigars, tobacco, cigarettes or cigarette material" without a license, and the penalty for each offense is a fine of not less than $100 nor more than $200, or imprisonment in the county jail not less than 10 days nor more than 60 days; that licenses shall be issued by any city, town, village or county clerk; that an applicant for a license shall file with the proper clerk a written application, stating the name of the prospective licensee and the exact location of the place where the business is to be conducted, and deposit the required fee; that

the term of a license shall end with the calendar year during which it is issued; that a retailer's fee shall be $25 in metropolitan cities, $15 in cities of the first class, and $10 elsewhere; that a wholesale dealer annually disposing of 150,000 cigars, packages of cigarettes and packages of tobacco in any form shall pay a license fee of $100; that at the proper place of business the license shall authorize sales to persons over 21 years of age. Comp. St. 1929, secs. 28-1023 to 28-1027. Sales to minors are forbidden and cancelation of a license for violation of the law is authorized. The license fees become public school funds where collected.

In substance it is stated in the petition, among other things, that Nash-Finch Company, plaintiff, is a foreign corporation, with its principal place of business in Minneapolis; that as a wholesale tobacconist it maintains in Nebraska eight branches and at each annually disposes of more than 150,000 cigars, packages of cigarettes and tobacco, and is required to pay $800 a year to carry on such business; that McCord-Brady Company, plaintiff, is a Nebraska corporation engaged in the wholesale grocery business, including the sale of tobacco products; that its annual sales exceed 150,000 cigars, packages of cigarettes and tobacco; that it is required to pay the city of Omaha annually $100 as a condition of engaging in such business; that there have been no prosecutions for violations of the statute; that the revenue arising from the license fees is out of all proportion to any legitimate expense of licensing and regulating the traffic; that fees collected without any expense or cost of prosecution amount to many thousands of dollars annually; that no part of the money so raised is devoted to regulation; that Nash-Finch Company is required to pay annually eight fees of $100 each, though the legislation provides that a corporation engaged in the wholesale disposition of tobacco products shall pay one license fee of $100; that a method of enforcing regulation is not provided; that the legislative provisions are indefinite, unreasonable, arbitrary and discriminatory, and therefore null and void.

The position which plaintiffs have taken is indicated by one of their quotations from a standard work:

"If the fee or tax is imposed in the exercise of the police power for purposes of regulation, as a general principle the amount which may be exacted may include, and must be limited and reasonably measured by, the necessary or probable expenses of issuing the license, and of such inspection, regulation, and supervision as may be lawful and necessary. If it is manifest that the amount imposed is substantially in excess of, and out of proportion to, the expenses involved, it generally will be regarded as a revenue measure, and be held unreasonable and void as a regulation under the police power, particularly where the act or ordinance makes no provision for inspection or regulation of the business, and expressly provides for use of the funds for other purposes." 37 C. J. 190.

To sustain this position plaintiffs rely on *State v. Standard Oil Co.*, 100 Neb. 826, *Century Oil Co. v. Department of Agriculture*, 110 Neb. 100, and *Century Oil Co. v. Department of Agriculture*, 112 Neb. 73. The first of those cases involved the validity of a fee of 10 cents for the inspection of each barrel of oil. The opinion of the court shows that inspection on that basis resulted in the collection of a vast sum of money in excess of the cost of the service performed, and it was held that the operation of the statute gave to the legislation the character of a revenue measure rather than a police regulation and that the excessive statutory exaction was unreasonable and void. In the next case cited an inspection fee of six cents a barrel was held void for the same reason. In the last of the three cases mentioned, the court decided that the fee of six cents was void only to the extent of the excess, measured by the reasonable cost of inspection. There is an obvious distinction between those cases and the case at bar. The statutes considered in the former cases authorized an unreasonable fee for a specific service. The fee was a reasonable charge for

inspection when the statute was enacted, but subsequent increases in the use of petroleum products resulted in the creation of a large amount of public revenue in excess of the ascertainable cost of inspection.

Throughout the legislation now under consideration in the case at bar, the fee of which plaintiffs complain is designated a "license fee" for the privilege of trafficking in tobacco and tobacco products. The title of the legislative act and the statute itself show a distinct legislative purpose to provide for the licensing and regulating of the traffic in tobacco by an exercise of police power. The licensed traffic is specifically limited to purchases by adults. Sales to minors are positively forbidden. Severe penalties are authorized for violations of the law. Protection of minors is intended to prevent public injuries to which police power applies. The licensed traffic in tobacco extends to every part of the state. Clerks in municipalities and counties may issue licenses. On complaints authorized by other statutes, courts may acquire jurisdiction over offenses and punish offenders. The reasonable expenses of licensing and regulating the traffic throughout the state, or in jurisdictions where sales are made, are not definitely estimated in the petition and are not ascertainable in advance. For the purposes of regulation, the fixing of reasonable license fees was within the discretion of the legislature. The lawmakers had the means of ascertaining all available facts essential to valid legislation and are presumed to have acted with knowledge thereof. Plaintiffs did not plead facts, as distinguished from conclusions, showing that the revenue arising from licenses is out of all proportion to any legitimate expense of licensing and regulating the traffic. Failure to prosecute violators of the statute regulating the traffic in tobacco and forbidding sales without a license does not render void reasonable license fees sufficient to meet the expenses of licenses and regulation. A statute regulating the traffic in tobacco and requiring each dealer to pay a license fee is not necessarily invalid because

methods of enforcement are not prescribed in the legislative act. In a recent law text, principles based on precedents were stated as follows:

"If the language used in an act or ordinance imposing a license tax expresses a plain meaning, it is not rendered invalid by the fact that its exact enforcement may be difficult, or that it does not prescribe the methods for its enforcement, or that it does not properly provide for an appeal from any action of the licensing authorities; nor is it invalid by reason of the fact that it has never been enforced." 37 C. J. 195.

The rule in Nebraska is that the legislature has a considerable latitude in fixing license fees by a regulatory statute enacted in the exercise of police power and courts will not declare such legislation void unless from its inherent character, or, by proofs adduced, it is shown to be unreasonable. In testing the validity of a regulatory statute, the enrichment of school funds by license fees and payment of expenses of licenses and regulation out of money raised by taxation are not generally material factors. *Littlefield v. State,* 42 Neb. 223. It seems clear that the primary purpose of the statute was to license and regulate the traffic in tobacco and not to raise revenue by a tax on property. The license fee is an incident of regulation and not the main object. In these views of the law, facts pleaded in the petition and admitted by the demurrer are insufficient to show that the act was invalid when passed or that it subsequently became an invalid revenue measure by changes in conditions. A fair construction of the statute leads to the conclusion that a license is required at each place of business, whether wholesale or retail, and that Nash-Finch Company was properly required to pay a license fee of $100 at each of its eight wholesale branches. The classifications on which the differences in license fees are based are not shown to be unreasonable or beyond legislative power. They apply alike to all dealers in a class. The system of fees and regulation adopted by statute is workable and

may be enforced. On all these issues the findings are in favor of defendant.

Plaintiffs insist further that the legislation in controversy is void on the ground it violates the constitutional provision that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." Const. art. III, sec. 14. The title, in part, is "An act to regulate the licensing and sale of cigars, tobacco and cigarettes and cigarette material to persons over 21 years of age, and to provide penalties for violations by licensees, or any other person, partnership or corporation." Laws 1919, ch. 180. The objection to this title is that "revenue," which plaintiffs call the subject of the legislation, is not mentioned. Having reached the conclusion that the subject of the legislation is the regulation and the licensing of the traffic in tobacco, it necessarily follows that the title adopted by the legislature is sufficient.

Another argument is directed to the point that the statute is void for the reason it imposes a burden on interstate commerce in violation of the Constitution of the United States. An examination of the legislative act shows that it provides alone for licensing and regulating traffic or commerce within the state. The demurrer to the petition was properly sustained.

AFFIRMED.

JOHN HAMBLIN, APPELLEE, V. EQUITABLE LIFE ASSURANCE SOCIETY, APPELLANT.

FILED MAY 12, 1933. No. 28531.

1. Estoppel. "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold." *Mitchell v. Brotherhood of Locomotive Firemen and Enginemen*, 103 Neb. 791.
2. 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.

3. ———: ———: TOTAL DISABILITY. Total disability, preventing the insured from pursuing a gainful occupation, exists when the injured party is unable to perform the substantial duties of a given occupation.

4. ———: ———: ———. One may be totally incapacitated to pursue a gainful occupation, although he may be able to perform some of the inconsequential duties appertaining thereto.

5. Parties. Application to have one made a party to the litigation who has no financial interest therein should be denied.

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

Brown, Fitch & West, for appellant.

Troyer, Pardee & Felton, contra.

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

GOOD, J.

This is an action based on a group policy of life insurance and an individual certificate issued to plaintiff, who recovered judgment. Defendant has appealed.

Defendant issued to Union Pacific Railroad Company the policy in question, insuring the lives of certain of its employees. Plaintiff was one of the insured. In a rider attached to the policy, the defendant agrees "that, if any employee insured under this contract shall furnish the society with due proof that he has, before having attained the age of 70, become wholly disabled by bodily injuries or disease, and will be permanently, continuously and wholly prevented thereby for life from pursuing any and all gainful occupations, the society will, at the option of the employer, pay, during such disability and in full settlement of all obligation under this contract pertaining to such life insured, the full amount of the insurance on such life in five equal annual instalments, the first instalment to be payable six months after receipt of due proof of such permanent total disability and the remain-

der annually thereafter." By a provision in the policy, the amount of plaintiff's insurance was limited to one year's salary, which, in the instant case, amounted to $1,140. The instalment payments therefor would be $228 each. When the action was brought only four instalments were due, and it was for this amount plaintiff sought recovery.

In his petition plaintiff alleged that, while in the employ of the railroad company, he had received an injury, as the result of which he was totally and permanently disabled from pursuing any and all gainful occupations. Defendant in its answer denied plaintiff's total and permanent disability, and alleged that the Union Pacific Railroad Company had not exercised the option provided for in the quoted rider, and that this was a condition precedent to any right of plaintiff to recover. To the latter defense plaintiff in his reply pleaded an estoppel.

From the evidence it appears that prior to bringing action plaintiff made demand upon defendant for payment of the four instalments, and defendant refused, on the sole ground that plaintiff was not totally and permanently disabled from pursuing any and all gainful occupations. It is a familiar rule that, "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold." *Mitchell v. Brotherhood of Locomotive Firemen and Enginemen*, 103 Neb. 791. See *Ballou v. Sherwood*, 32 Neb. 666; *Frenzer v. Dufrene*, 58 Neb. 432; *First State Bank of Overton v. Stephens Bros.*, 74 Neb. 616; *Powers v. Bohuslav*, 84 Neb. 179; *Yates v. New England Mutual Life Ins. Co.*, 117 Neb. 265; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693. Under the facts disclosed by the record, failure of the railroad company to exercise the option provided for in the rider is not available as a defense.

It is earnestly insisted by defendant that the evidence will not support a finding that plaintiff is totally and permanently disabled, within the meaning of the terms of the policy. It appears that by occupation plaintiff was a cook, and that, while so engaged in the employ of the Union Pacific Railroad Company, he received a severe injury which did not, at the time, incapacitate him for his work, but that he continued for nearly a year thereafter, when, by reason of the injury received, the railroad company deemed it unsafe for him to continue his work, and he was discharged. The injury that he received affected the lower portion of his spine and resulted in spastic paralysis of plaintiff's legs. After his discharge by the railroad company, plaintiff attempted to pursue his occupation as a cook with other companies, but was unable to do more than a small part of his work, his wife assisting him and doing the greater part of the work. Plaintiff's disability increased to such an extent that he is totally unable to follow his occupation or perform any other substantial amount of physical labor; but he is able to use a telephone and solicit orders for the sale of merchandise, and has thereby been able to earn a trifling sum. Apparently, it is defendant's contention that the disability contemplated by the policy is that plaintiff must be so entirely disabled as not to be able to earn any wages or income whatever.

The expressions used in the policy of insurance and other like expressions in other policies have received the attention of many of the courts of this country, and, with few exceptions, they hold that the terms of an insurance policy are not to be construed literally. We think the great weight of authority, as well as that supported by the better reason, requires that a contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured, so that in all proper cases he may receive the indemnity contracted for. *Young v. Travelers Ins. Co.*,

80 Me. 244; *Coad v. Travelers Ins. Co.*, 61 Neb. 563, 569. If the language of the policy were to be literally applied, in order to recover one would have to be either deprived of mentality or be physically helpless to do anything. Such was not the contemplation of the parties. In interpreting similar provisions in other policies, the courts usually take the view that total disability to pursue any occupation exists when the injured party is unable to perform the substantial duties of that occupation. Many authorities are collated in an annotation to the case of *Metropolitan Life Ins. Co. v. Blue* (222 Ala. 665) 79 A. L. R. 852, the annotation appearing at page 857 *et seq.*

In the case of *Maresh v. Peoria Life Ins. Co.*, 133 Kan. 191, it was said: "The court regards the policy as one designed to provide a substitute for earnings when the insured is deprived of capacity to earn by bodily injury or disease. He must be prevented from performing work and conducting business for compensation or profit. Interpreting the policy in the light of its purpose, the words 'performing any work' mean engaging in any gainful occupation or employment in the customary manner as a workman. The words 'conducting any business' mean managing, directing, controlling, or carrying on habitually any gainful enterprise involving transactions, dealings, and the like, as distinguished from work as just defined. The words 'for compensation or profit' mean remuneration for effort expended in performance of work or conduct of business. The definitions contemplate the substantial doing of those things which are generally regarded as constituting performance of work and conduct of business, and not simply the sporadic doing of simple tasks, or the giving attention to simple details incident to performance of work or conduct of business. The definitions also contemplate that compensation shall be in a fair sense remunerative, and not merely nominal."

The term "total disability" is rarely, if ever, given a strictly literal meaning of absolute helplessness or entire physical disability, but rather inability to do substantially,

or practically, all material acts for the transaction of insured's business in the customary and usual manner. *Provident Life & Accident Ins. Co. v. Harris*, 234 Ky. 358. Sound reason and the great weight of authority sustain this view. It is unnecessary to encumber this opinion with a citation of the many authorities holding to like effect. We are satisfied from the evidence that the finding of total disability is amply sustained. The evidence further discloses that the spastic paralysis from which plaintiff is suffering is progressive in its nature, and will continue throughout his life.

Complaint is also made of the refusal of the court, at defendant's request, to have the Union Pacific Railroad Company made a party to the litigation. We find nothing in the record which would justify the court in requiring the railroad company to be made a party. So far as we are able to see, it has no financial interest in the litigation. The only party who could claim any benefits under the policy and certificate issued to plaintiff was the plaintiff himself. The only one to pay, if a liability exists, is the defendant. No recovery could be had by the railroad company; nor is anything demanded of it. We think the request to make the railroad company a party defendant was properly denied.

The record appears to be free from prejudicial error.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. CITIZENS STATE BANK OF WAHOO: MARTIN ERICKSON, INTERVENER, ET AL., APPELLEES: SAUNDERS COUNTY NATIONAL FARM LOAN ASSOCIATION, APPELLANT.

FILED MAY 12, 1933. No. 28438.

1. **Equity.** The maxim, "Equity regards as done that which ought to de done," implies that, where there has been a failure to perform duties imposed, all parties whose interests are in any

manner affected by such default will be deemed entitled to the same rights as if the duties had been actually performed at the proper time.

2. **Banks and Banking**: MISAPPROPRIATION OF FUNDS: IMPUTED KNOWLEDGE. "Where the managing officer of a banking corporation deposits in his bank, in the name of another corporation of which he is also manager, money and securities belonging to others, for whom he is agent and trustee, and receives and accepts the deposit for the bank as its sole directing authority, his knowledge of the rights of the beneficiaries of the trust may be imputed to the bank." *State v. American State Bank*, 108 Neb. 111.

3. ———: ———: FALSE ENTRIES. "False entries on the books of a bank, whereby one depositor is credited with the funds of another, do not change the relation of banker and depositor in regard to that particular item or relieve the bank from liability for a proper disbursement of the fund, if the bank is chargeable with knowledge of the facts." *State v. American State Bank*, 108 Neb. 98.

4. ———: GENERAL DEPOSIT. In commercial banking transactions, where money is deposited as a general deposit, it ceases to be the money of the depositor and becomes the money of the bank, and the depositor becomes a creditor of the bank to the extent of such deposit.

5. EVIDENCE examined, and *held* insufficient to sustain the judgment of the district court.

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

Sanden, Anderson & Gradwohl, for appellant.

F. C. Radke, J. F. Berggren, Barlow Nye, Good, Good & Kirkpatrick and *E. S. Schiefelbein, contra.*

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

EBERLY, J.

Prior to May 10, 1930, the Citizens State Bank of Wahoo, Nebraska, was conducting a general commercial banking business in that city. On the day mentioned, in a proper proceeding instituted for that purpose, an adjudication of the insolvency of that institution was made

and a receiver therefor appointed, with direction to liquidate this bank as provided by law.

On June 4, 1931, in this proceeding, a petition of intervention was filed by Martin Erickson against the appointed receiver and the Saunders County National Farm Loan Association. So far as the issues here presented for consideration are concerned, that petition embraced the following allegations:

"That on or prior to the 17th day of August, 1929, this intervener had on deposit in an open checking account belonging to him in said Citizens State Bank a sum of money in excess of $2,500; * * * that on the said 17th day of August, 1929, the said bank wilfully, wrongfully and unlawfully caused a check to be drawn upon said account in the sum of $2,500 and caused said check to be signed with the name of this intervener and deposited the said check in the said bank to the credit of the respondent, the Saunders County National Farm Loan Association; that said check was drawn wholly without consideration and without authority from this intervener and without the knowledge of this intervener; that the said check was drawn and deposited as hereinbefore alleged for the purpose of transferring the said sum of $2,500 from the account of this intervener and giving the same to the respondent, the Saunders County National Farm Loan Association. * * *

"That the active managing officer of the respondent, Saunders County National Farm Loan Association, at all times herein mentioned was Emil Benson, who was at such times secretary-treasurer of said Saunders County National Farm Loan Association, and such officer was in exclusive control of the affairs, property and business of said Saunders County National Farm Loan Association. That the said Emil Benson was also at all of said times cashier of the said Citizens State Bank, and that the transfer hereinbefore described was made fraudulently and intentionally by the said Benson as agent and managing officer of the said Saunders County National Farm

Loan Association and as its active managing officer and for its use and benefit.

"That the said Saunders County National Farm Loan Association used for its use and benefit all of the said sum of money so transferred to it from the property of this intervener and has accepted the benefit of all of said transaction with knowledge of the source of the money as hereinbefore described and by reason thereof has ratified and confirmed the said transaction and is now estopped to question or deny that the said transaction was made by it and for its use and benefit."

The defendant, Saunders County National Farm Loan Association (hereinafter called the Loan Association), as its defense, "denies each and every allegation in said petition in intervention contained."

Prior to the introduction of any evidence, the Loan Association presented a general demurrer *ore tenus*, which was overruled, and upon consideration of the evidence subsequently introduced, the district court awarded judgment to intervener as prayed against the Loan Association, and also against the Citizens State Bank of Wahoo. From the order overruling its motion for a new trial, the Loan Association separately appeals.

The intervener contends that, "Where a defendant holds the proceeds of the collection of a negotiable instrument based upon a forged or unauthorized signature, the true owner of the money may recover the amount from the person receiving such proceeds." He cites, as supporting his position, the following cases: *Allen v. Mendelsohn & Son*, 207 Ala. 527; *Schaap v. First Nat. Bank*, 137 Ark. 251; *George v. Security Trust & Savings Bank*, 91 Cal. App. 708; *United States Portland Cement Co. v. United States Nat. Bank*, 61 Colo. 334; *Merchants Bank v. National Capital Press*, 53 App. D. C. 59, 288 Fed. 265; *Hamlin's Wizard Oil Co. v. United States Express Co.*, 265 Ill. 156; *Indiana Nat. Bank v. Holtsclaw*, 98 Ind. 85; *Hope Vacuum Cleaner Co. v. Commercial Nat. Bank*, 101 Kan. 726; *Meyer v. Rosenheim & Co.*, 115 Ky. 409; A.

Blum Jr.'s Sons v. Whipple, 194 Mass. 253; *National Union Bank v. Miller Rubber Co.,* 148 Md. 449; *Thomas v. First Nat. Bank,* 101 Miss. 500; *Good Roads Machinery Co. v. Broadway Bank,* 267 S. W. (Mo. App.) 40; *Robinson v. Chemical Nat. Bank,* 86 N. Y. 404; *Crisp v. State Bank of Rolla,* 32 N. Dak. 263; *Shaffer v. McKee,* 19 Ohio St. 526; *Bell-Wayland Co. v. Bank of Sugden,* 95 Okla. 67; *Charleston Paint Co. v. Exchange Banking & Trust Co.,* 129 S. Car. 290; *Farmer v. Bank,* 100 Tenn. 187; *Labor Bank & Trust Co. v. Adams,* 23 S. W. (2d) (Tex. Civ. App.) 814; *California Stucco Co. v. Marine Nat. Bank,* 148 Wash. 341.

But these cases involve valid negotiable instruments on which indorsements only were forged. As applied in banking transactions, the rule they sustain is: "If a negotiable instrument having a forged indorsement comes to the hands of a bank and is collected by it, the proceeds are held for the rightful owners of the paper, and may be recovered by them, although the bank gave value for the paper, or has paid over the proceeds to the party depositing the instrument for collection." 1 Morse, Banks & Banking (5th ed.) sec. 248, p. 491.

"The cases are based upon the theory of ratification by the payee or owner of the check of its collection from the drawee, and that the collecting bank can then be held as for moneys had and received, and that the payment by the drawee bank to the collecting bank with the forged or unauthorized indorsement thereon is evidence that the check was accepted and paid by the drawee bank, which acts the payee ratifies. In other words, the true owner of a check, with a forged unauthorized indorsement may ratify the act of a bank, in receiving it, in that condition; and collecting the proceeds or paying them out without authority, and yet not ratify the forged or unauthorized indorsement. In such cases the bank cannot avoid liability by showing that its conduct was governed by good faith, and the payee is entitled to recover unless he has been guilty of fraud or negligence in the matter." *Schaap v. First Nat. Bank,* 137 Ark. 251, 259.

But it would appear that these principles, unquestionably sound as abstract propositions, are inapplicable to the facts here involved. The instrument made use of in the instant case is a forged check, not a forged indorsement on a valid check. By its terms it was drawn on the Citizens State Bank of Wahoo, and payable to "Note or order." It is not indorsed. The payee named as "Note or order" is a fiction, a nonexisting person, a fact which all persons concerned in its execution or use must have known. From the evidence in the record its sole use was as a "debit slip" by the officers and servants of the bank. If, however, it is to be credited with the qualities of negotiable paper, it must be deemed a forged check payable to bearer. Comp. St. 1929, sec. 62-109. Plainly, such an instrument was not considered in any of the authorities cited by intervener, nor is it subject to the rule announced therein.

In the discussion of the determinative questions presented in this record, it is quite apparent that we have mirrored in this testimony a part of the history of a losing fight by the officers of the Citizens State Bank of Wahoo to avoid the effects of impending, if not the then present, insolvency of that institution. These developing conditions culminated in the appointment of a receiver a very few months later. We are justified in considering the evidence in the light of these facts.

The petition in this case, as quoted, in effect first alleges that the actual unlawful transfer of the $2,500 in controversy was made by the bank itself. Later it avers it was made by the Loan Association. Admittedly there was but one transfer. Both statements cannot be true. It must be manifest that, if the bank is the responsible actor that made or caused to be made the unlawful transfer of credit, the Loan Association could not have been. Therefore, if one statement is true, the other must necessarily be untrue. The rule appears to be: "Inconsistent, repugnant, or contradictory averments of matters of substance neutralize each other." 49 C. J. 99.

Notwithstanding this situation presented by the pleading, we are inclined to the view that, under the provisions of our Civil Code, aided by a liberal construction, even eliminating the contradictory allegations noticed, circumstances and facts are alleged in the petition, from which, if true, it appears that in justice and fairness the money ought to be returned to intervener. In short, while the proceedings are equitable in form, still the pleading may be sustained as setting forth a claim for relief in the nature of an action for money had and received. *Thiele v. Carey,* 85 Neb. 454. To sustain his recovery on this basis, intervener must establish that the Loan Association has money which in equity and good conscience belongs to him. 41 C. J. 33, 46. See, also, *Shotwell v. Sioux Falls Savings Bank,* 34 S. Dak. 109.

There seems to be no substantial dispute in the evidence. The intervener and the Loan Association were each customers of the Citizens State Bank of Wahoo. Both carried checking accounts with that institution. On June 24, 1929, the Loan Association drew its check upon the Citizens State Bank of Wahoo for the sum of $4,725 payable to the order of the Lincoln Trust Company. This check was sent to the Lincoln Trust Company, and, in due course of exchange, was on August 5, 1929, presented to the drawee bank by the First National Bank of Wahoo, and on that day honored and paid. The record shows that on the day of its presentment and payment there was a credit balance in the checking account of the Loan Association of but $1,855.50. Obviously, the instant payment was effected, the Loan Association had an overdraft in the bank of $2,869.50. The Loan Association then owed the bank that sum; the bank was not then indebted to it in the sum of $1,855.50. True, Benson, the cashier and managing officer of the bank, did not enter up the transaction at once as he was required to do. Comp. St. 1929, sec. 8-102. He also failed to affix the usual "paid stamp." The reason, in absence of explanation, is obvious, for, by not entering the transaction in the books

and by placing the "paid check" (now a worthless instrument save as a voucher) on the cash tray as a cash item, he was enabled to falsely and fraudulently conceal the real situation of his bank from day to day by thus effectively representing to all parties in interest that the cash till had $4,725 more in it than it really contained. The Loan Association had no knowledge of this, and neither could its interest be possibly promoted thereby. The only party in interest was the bank, and in its behalf the acts of its cashier must be deemed for all purposes to have been performed. But in this proceeding, which is equitable in form, the facts just recited invoke the application of the well-established maxim, in equity, that "Equity regards as done that which ought to be done." It would follow that in this case, in view of the obligation resting upon the officers of this bank to keep accurate and convenient records of its transactions and accounts, the fact of the payment of this check of $4,725 should have been entered upon its books on the day it was made. Therefore all parties whose interests are in any manner affected by this default will be deemed entitled to the same rights as if that duty had been actually performed. 21 C. J. 200.

It follows that, for the purposes of this case, the checking account of the Loan Association must be deemed overdrawn in the sum of $2,869.50 on and after August 5, 1929. Following this transaction the evidence discloses that on August 17, 1929, E. B. Benson, the cashier, employing the usual blank counter check form of the Citizens State Bank, wrote a check, directed to this bank as drawee, for the sum of $2,500, in which the payee is designated as "Note or order," and which he signed as "Martin Erickson, E. B.," and credited it as the deposit of a check of $2,500 to the account of the Loan Association. No indorsement appears on this check. On the same day the "paid stamp" is affixed to the check of $4,725, which, since August 5, 1929, has been carried as a "cash item," and that amount is entered as of the 17th day of August,

1929, as a charge on the Loan Association's account. So also, on August 17, 1929, the account of Martin Erickson is charged with a $2,500 check. Nothing appears to have been actually withdrawn by the Loan Association from the Citizens State Bank since August 5, 1929. The last amounts paid out on their behalf was when the check of $4,725 was honored and paid on that date. So too it is conceded that the deposit of $2,500 in the account on August 17 was wholly unauthorized by Martin Erickson and the so-called check was tantamount to a forgery, by Benson, the cashier of the bank. We are committed to the view: "Where the managing officer of a banking corporation deposits in his bank, in the name of another corporation of which he is also manager, money and securities belonging to others, for whom he is agent and trustee, and receives and accepts the deposit for the bank as its sole directing authority, his knowledge of the rights of the beneficiaries of the trust may be imputed to the bank." *State v. American State Bank,* 108 Neb. 111.

The following is also the accepted doctrine of this court: "False entries on the books of a bank, whereby one depositor is credited with the funds of another, do not change the relation of banker and depositor in regard to that particular item or relieve the bank from liability for a proper disbursement of the fund, if the bank is chargeable with knowledge of the facts." *State v. American State Bank,* 108 Neb. 98.

See, also, *State v. Farmers & Merchants Bank of Kennard,* 118 Neb. 495; *Blakey v. Brinson,* 286 U. S. 254, 76 L. Ed. 1089.

So it must be conceded that, where money is deposited as a general deposit, it ceases to be the money of the depositor and becomes the money of the bank, and the depositor becomes a creditor of the bank to the extent of such deposit. *Harrison State Bank v. First Nat. Bank,* 116 Neb. 456; *State v. Farmers & Merchants Bank,* 114 Neb. 378; *Citizens State Bank v. Worden,* 95 Neb. 53.

Not only does it thus affirmatively appear that the Loan

Association has never received any part of this $2,500, exclusively book-keeping transaction, but it also affirmatively appears that, in the settlement of all controverted matters between the Loan Association and the bank, the Loan Association received no credit whatever for the $2,500 thus deposited, and is not claiming to own it in the present litigation.

It necessarily follows that the action by intervener against the Loan Association cannot be sustained for moneys that the latter never has had; that the attempted deposit in the account of the Loan Association by Benson, the cashier, was wholly invalid and in no way impairs the rights of Erickson against the Citizens State Bank. The district court therefore erred in the rendition of the judgment against the Loan Association appealed from, and the same, in so far as affecting that association, is reversed and the cause is dismissed.

REVERSED AND DISMISSED.

GRACE M. COTTEN, GUARDIAN, APPELLEE, V. FRED STOLLEY, JR., APPELLANT.

FILED MAY 12, 1933. No. 28569.

1. **Negligence**: CONTRIBUTORY NEGLIGENCE: BURDEN OF PROOF. Burden of proving contributory negligence, an affirmative defense, is upon party pleading it and must be established by preponderance of evidence.
2. **Automobiles**: INJURY TO PEDESTRIAN: CONTRIBUTORY NEGLIGENCE: PRESUMPTION. "Where there is no eyewitness, no direct evidence of the accident causing the injury, the facts and circumstances may be proved by circumstantial evidence, and the presumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of contributory negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown." *Engel v. Chicago, B. & Q. R. Co.*, 111 Neb. 21.
3. ———: ———: ———. Pedestrian has right to walk longitudinally in highway, unless forbidden by statute, and is not, as a matter of law, guilty of contributory negligence in so doing.

4. ———: ———: ———. Pedestrian lawfully on highway may rely on reasonable care of automobile drivers, and is not negligent, as a matter of law, in failing to anticipate driver's negligence.
5. **Evidence**: SECONDARY EVIDENCE. Secondary evidence received without objection is competent proof of fact in issue, even though that which is primary is available.
6. **Damages**. Evidence that twenty-year-old girl with life expectancy of 41.53 years, was at time of injury healthy and strong, capable of earning one dollar a day doing housework; that she was struck in back by automobile, causing bruises and contusions over her body, and a fracture of skull; that she is nervous, irritable, and unable to sleep nights; that she is unable to work as before and has greatly impaired memory; and that the injury to her nervous system is permanent, is sufficient to support verdict for $7,000.

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

Cleary, Suhr & Davis, for appellant.

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

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

DAY, J.

This is an action by the guardian to recover damages for personal injuries sustained by Alta Cotten when she was struck by defendant's automobile. The petition of the plaintiff, as well summarized in the appellant's brief, alleges that on March 17, 1931, Alta was walking in a northerly direction on the right-hand side of a highway in Grand Island, pushing a baby cart in which a child was riding; that the defendant drove an automobile in the same direction on said highway upon and against Alta Cotten, striking her with a bumper and throwing her on the highway; that Alta's head was bruised, lacerated, and injured thereby, her skull fractured and various other bruises and cuts inflicted; that her injuries are permanent; that she is unable to perform manual labor, is nervous, has dizzy spells, and suffers other similar dis-

abilities; that the defendant was negligent in failing to sound his horn, failing to slacken his speed, failing to turn to the left of Alta Cotten, and failing to have his automobile under control. The answer of the defendant admitted that he was driving upon the road in question at the time alleged, and denied all other allegations of the petition. The answer also alleged that Alta Cotten was at the time of the accident careless and negligent in that she walked on the pavement in the nighttime without looking out for automobile traffic and without taking care to avoid being struck by one approaching behind her; that the traffic was heavy, and that she walked carelessly and negligently directly into the line of travel and immediately into the path of defendant's automobile without looking for approaching cars, and her injuries, if any, were the direct and proximate result of her own negligence, and not the result of any negligence on the part of defendant. The reply was a general denial. Upon a trial, a verdict, signed by ten jurors, was for $7,000, and defendant appeals from judgment thereon.

At the close of the evidence, the court sustained the motion of the plaintiff to withdraw the defense of contributory negligence from the consideration of the jury upon the ground that there was no evidence to support it. This is the basis of the assignment of error upon which the appellant principally relies. The trial court took the view that the plaintiff had a right to walk upon the highway, and that the mere fact that she did so walk was not as a matter of law evidence of contributory negligence. The plaintiff testified that she was walking upon the graveled shoulder of the paved highway, and not upon the pavement. The defendant and his wife testified that they did not see Alta Cotten until they realized they had struck something, and when they alighted from their car they found Alta Cotten lying on the pavement in an injured condition. The defendant undertook to prove by a witness that he had seen a woman pushing a baby cart on the pavement some time prior

to the accident and some distance away. This was too remote to be pertinent, as one might be negligent at another time and place, and at the time of an accident at another time and place have used the highest degree of care. The trial court properly sustained an objection to the admission of this testimony on the theory, as shown by the record, that it was an attempt to impeach Alta Cotten as a witness upon an immaterial matter, since, in the view of the trial court, it was immaterial whether Alta Cotten was walking on the graveled shoulder of the highway or upon the pavement, as a pedestrian had a right to walk in a street or highway, and, in so doing, was not as a matter of law guilty of contributory negligence. The burden of proving contributory negligence, which is an affirmative defense, is upon the party pleading it and must be established, if at all, by a preponderance of the evidence pertinent to that issue contained in the whole record. *Schrage v. Miller,* 123 Neb. 266; *Vertrees v. Gage County,* 81 Neb. 213.

Is the evidence in this case, which establishes that Alta Cotten was walking either upon the right-hand side of the pavement or upon the graveled shoulder to said pavement, proof of contributory negligence on her part? There is no presumption of contributory negligence in this case. In *Engel v. Chicago, B. & Q. R. Co.,* 111 Neb. 21, it was held: "Where there is no eyewitness, no direct evidence of the accident causing the injury, the facts and circumstances may be proved by circumstantial evidence, and the presumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of contributory negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown." The rule applicable to this situation is stated by one authority as follows: "Pedestrians have the right to use a public street at any time of day or night. * * * They have a legal right to travel in the street, * * * and the mere fact that one does so, does not render him guilty of contributory negligence

as a matter of law." 13 R. C. L. 291, sec. 242. In an annotation, 67 A. L. R. 109: "The rule is generally recognized that, in the absence of applicable statute or ordinance, a pedestrian has the right to walk longitudinally in a street or highway, and is not, as a matter of law, guilty of contributory negligence in doing so." In *Hatzakorzian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 41 A. L. R. 1027, it is held that the common-law rule that pedestrians have a right to travel anywhere upon a public highway has not been changed in California by the legislature. And again, in *Kofoid v. Beckner*, 70 Cal. App. 624, it was said: "Notwithstanding the fact that the number of reckless drivers have rendered the paved portion of our highways a danger zone, pedestrians have a right to the use thereof, and are chargeable only with such ordinary and reasonable care for their own safety as a prudent person would ordinarily exercise." In *Pixler v. Clemens*, 195 Ia. 529, it was held that it is not contributory negligence, as a matter of law, to walk along the side of the road. There is no statutory provision in this state restricting the use of the highway by a pedestrian, and while a pedestrian walking on the highway is bound to exercise reasonable and ordinary care for his safety, one who is walking either on the right hand edge of the pavement or on the graveled shoulder adjacent thereto is not guilty of contributory negligence as a matter of law. In 42 C. J. 1146, the rule is stated as follows: "In the absence of statutory restriction, a pedestrian traveling on a street or highway is not confined to the use of the sidewalk or footpath, but has a right to walk in the roadway, and is not negligent as a matter of law in so doing. * * * A person walking in the roadway is bound to use ordinary care to discover approaching motor vehicles, and a failure so to do is negligence; but he is not as a matter of law negligent in failing to turn about constantly and repeatedly to observe the possible approach of vehicles from behind him, especially where there is ample room for an automobile to pass him." There

is no evidence of contributory negligence on the part of Alta Cotten, even if she were walking on the pavement in the line of traffic, as is contended, though not proved, by the defendant.

The testimony is that Alta Cotten was walking upon the right side of the road, on the graveled shoulder off the pavement, that she was hit by the right lamp and right side of bumper, hit the right fender and was found on pavement back of car; that plaintiff was driving close to right side of pavement at time of accident. While this testimony cannot be wholly reconciled, in any event, the only inference which can be drawn from it is that Alta Cotten was walking carefully along the right side of the road. There is no eyewitness to the accident, as Alta was hit in the back, and defendant and his wife did not see her until after the accident, when they found her on the pavement. It would have been physically impossible for her to have been in the middle of the pavement, as argued, but not proved, by appellant, if, as he testified, he was driving near the right edge of the pavement, since the right side of his car hit her. She was not negligent as a matter of law, and the trial court very properly withdrew the question of contributory negligence from the consideration of the jury.

The appellant relies upon a line of cases wherein different situations obtained at the time of the accident, such as plaintiff crossing a highway carrying heavy traffic (*Pollock v. McCormick,* 169 Minn. 55; *Schmitt v. Jackson,* 174 Minn. 577; *Neeb v. Jacobson,* 245 Mich. 678), upon which construction work was being done (*Leary v. Fisher,* 248 Mich. 574); or under the evidence does not represent the rule in this state, as where an automobile slid across the road, hitting plaintiff in a footpath on other side of pavement (*Work v. Philadelphia Supply Co.,* 95 N. J. Law, 193).

Where, as in this case, there is no evidence to support a finding of plaintiff's contributory negligence, the trial court should withdraw the question from the consider-

ation of the jury. There is no evidence that the injured girl was not exercising ordinary and reasonable care in walking down the highway.

While, on the other hand, the evidence establishes that the defendant was guilty of negligence as a matter of law, for in *Roth v. Blomquist,* 117 Neb. 444, we held that it is negligence, as a matter of law, for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps. In this case, it is further said: "There are recognized exceptions to the general rule or instances to which it does not apply, among them an unbarricaded, unknown, open, unlighted ditch across a highway that could only be seen at close range and not anticipated (*Tutsch v. Omaha Structural Steel Works,* 110 Neb. 585); corner of a platform with a narrow edge extending from a drag line over a street car track and discernible only in close proximity to the obstruction (*Day v. Metropolitan Utilities District,* 115 Neb. 711); an obstruction consisting of a pile of gravel similar in color to the surface of the highway (*Frickel v. Lancaster County,* 115 Neb. 506)."

More recently this court, in similar situations, has held other exceptions to be an unlighted and unguarded vehicle standing on a highway on a dark misty night. *Giles v. Welsh,* 122 Neb. 164; *Johnson v. Mallory,* 123 Neb. 706. The evidence in this case does not present a situation at the time of accident which would constitute an exception to the general rule. The pavement was dry and clear; defendant's lights were in good order, lighting the entire road, so that defendant could see it plainly at the time of the accident. Pedestrian lawfully on a highway may rely on reasonable care of automobile drivers, and is not negligent, as a matter of law, in failing to anticipate driver's negligence.

The plaintiff's right to maintain this action as the guardian of Alta Cotten is challenged by the appellant for that it is alleged she failed to prove any right to

maintain this action, for there is nothing in the record to indicate that the injured girl was an incompetent person. Section 38-502, Comp. St. 1929, authorizes a guardian to bring an action for the ward. The best evidence that the plaintiff was the guardian for Alta Cotten would have been the record of her appointment. The plaintiff testified, without objection, that she was the mother of Alta Cotten, and had been appointed guardian for her, and that she was still acting as guardian at the time of the trial. This evidence establishes the fact that plaintiff was the guardian of Alta Cotten. We have recently held that parol evidence is sufficient to establish a fact, though it is secondary evidence and primary evidence was available, where it is received without objection, particularly where there is no evidence in conflict. *Western Securities Co. v. Naughton, ante,* p. 702. This rule is supported by authority. In 2 Jones, Commentaries on Evidence (2d ed.) 1435: "The rule excluding secondary evidence, when that which is primary is attainable, is not so rigid as to be enforced if no objection is made by the party against whom the inferior evidence is offered. It frequently happens that secondary evidence is admitted, and thus becomes primary, when it might have been excluded if proper objection had been taken. If the opponent is lax and permits secondary evidence to be given when he might have insisted upon the primary evidence or none at all, an appellate court will not come to his assistance."

At 22 C. J. 977, the rule is given: "Before evidence can be excluded on the ground that it is secondary it must appear either from the nature of the fact to be proved * * * that there is higher evidence in existence * * *; that it is material, relevant, and competent to prove the fact; and that if produced it would more satisfactorily explain and establish the fact than the evidence offered. Consequently if evidence of a fact, although secondary in its nature, is admitted without objection, it is competent proof of the fact."

In *Salistean v. State,* 115 Neb. 838, we held: "Secondary evidence of a fact in issue received without objection is thereby, in law, evidence tending to prove such fact and may be considered as such."

The only other assignment of error that is argued in the briefs (others are waived) is that the verdict is excessive. When injured, Alta Cotten was twenty years of age, with a life expectancy of 41.53 years, in good health, able to do housework, earning one dollar a day, board and room. She was struck in the back with sufficient force to bend the automobile lamp back and to make a dent in the fender, causing numerous bruises and contusions over her body, and a fracture of the skull. She was confined to the hospital for a week, and when taken home by her mother required the care of a baby, as she was unable to control her bowels and kidneys. She suffered much pain and still complains of pains in her back and head. She is nervous, irritable, and unable to sleep nights. She is unable to work as before and has a greatly impaired memory. The extent of the injury rests entirely upon the testimony of the medical experts, called in behalf of the plaintiff, as the appellant did not introduce any medical testimony. The evidence of the medical experts, together with the other evidence as to the injuries, and the evidence relating to expenses for medical attention and hospital bills, is sufficient to support the amount of the verdict. We have examined the record and especially those assignments of error argued by appellant and find no reversible error, and the judgment of the district court is accordingly

AFFIRMED.

MARTIN J. BARRETT, APPELLEE, V. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

FILED MAY 12, 1933. No. 28572.

1. Insurance: "AGENT." An assistant cashier of an insurance company, to whose desk the general public come to pay premiums and receive receipts, to make loans on policies, to sign legal instruments relating thereto, is an agent of such company, under section 44-307, Comp. St. 1929.
2. ———: PROOF OF DISABILITY: WAIVER. A denial by an insurer, or its authorized agent, of liability under a provision of its policy, or any act or artifice to mislead the insured in reference thereto, and cause him to omit to file a required proof he would otherwise have filed, will operate as a waiver thereof.
3. ———: WAIVER OF PREMIUMS. A policyholder, who is deceived by an agent of insurer as to the degree of physical disability necessary before the company will be required to waive premiums under total disability rider, is entitled to a return of the premiums paid through such misrepresentations.

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

Montgomery, Hall & Young, for appellant.

Gray & Brumbaugh, contra.

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

PAINE, J.

This was an action brought to recover premiums, alleged to be wrongfully and fraudulently collected by the defendant company from plaintiff from August, 1924, to December, 1930, on a life insurance policy providing for waiver of premiums in the event of total disability. At the close of the evidence, both parties moved for directed verdicts. The jury were discharged, and judgment was awarded plaintiff for $3,515.68 and attorney's fee of $300. Defendant appeals.

On August 15, 1916, defendant issued a policy for $10,000 to the plaintiff, who was born September 15, 1877,

and was 39 years of age when the policy was issued. The policy was a 20-payment life policy, with annual premiums of $401.70, the beneficiary in said policy being his wife, Marie A. Barrett. Attached to said policy was a rider, issued the same date, which provided that, for an extra premium of $3.60 annually, the defendant would waive premiums in the event of total disability of the insured before attaining 60 years of age. While the policy, including the said rider, was in full force and effect, the plaintiff, in August, 1922, was advised by his physician, Dr. O'Connor, of Omaha, Nebraska, that he had a carcinoma of the bowels and rectum, and that his only chance of living was an immediate operation, and advised him to be operated upon at Rochester, Minnesota, which advice he followed. Dr. Charles Mayo performed a colotomy in August, 1922, in which the abdomen was opened and the intestine was pulled out to the surface, and a new exit made about four inches to the left of the umbilicus, and the intestine from that point downward was removed from the plaintiff. In September, 1922, Dr. Mayo followed this with the Kraske operation, in which he removed the coccyx and several vertebræ, constituting the lower end of the spinal column, so as to be able to remove all of the cancer.

In July, 1923, the plaintiff attempted to work at the Burlington postal station for a day or so, but was seized with severe hemorrhages of the bowels and pain, and was required to go to bed, and, although he tried thereafter on several occasions to work for a day at light work, severe hemorrhages and pain followed every such exertion, as is customary following these two operations, and he has been confined to his bed more or less continuously, and has been totally disabled physically, since the operations which took place in 1922.

In August, 1923, the premium again became due. Plaintiff's wife, who acted as his agent, and was the beneficiary in the policy, went to the office of Franklin Mann, who had been general agent of the defendant company

in Nebraska for some 20 years, having 135 to 140 agents under him, to arrange for a loan on the policy to pay the premium. She transacted all of this business with Miss B. Marie Petersen, who was the assistant cashier, and who had authority to make loans on policies, who dictated correspondence, and signed the same by attaching Franklin Mann's name thereto with a rubber stamp, and attended to as high as 50 customers a day. Miss Petersen arranged for a loan on the policy, and required that the policy be surrendered to her as collateral security, and neither the plaintiff nor his wife have seen the policy since that time.

Two or three weeks before the premium became due in August, 1924, the plaintiff's wife went to the same office, and was again waited upon by Miss Petersen, and she testified as follows: "Mr. Barrett's policy provided for waiver of premium, and I had come in to have the premiums waived; I told her Mr. Barrett had two severe operations sometime ago that had left him a permanent invalid, and he had waited this long hoping he would regain his health, and be able to work again, but each time he got worse, and I told her there was a premium coming due in a short time, and we wanted the company to take care of it before it became delinquent. She said, 'Is he confined to his bed?' and I said, 'A good share of the time,' and she said he would have to be confined to bed all the time and hardly able to move a muscle, just the same as being paralyzed. I said, 'What are we paying $3.60 for?' I said, 'It was our understanding that any time he became disabled, at any time, the premium would be waived,' and she said, 'Oh, no; he would have to be bedfast all the time.'" That plaintiff's wife returned home and reported this conversation to the plaintiff, and that he, relying on the statement of Miss Petersen, assistant cashier, as properly reflecting the terms of the policy, borrowed more money on the policy to pay the premium due August 15, 1924.

In February, 1926, plaintiff's wife again went to the

office of the general agent of defendant, and Miss Petersen, assistant cashier, again waited upon her. Mrs. Barrett said that she was there again to see if the premium on the policy could not be waived, because they were so hard up and he was not able to work at all. Miss Petersen took Mrs. Barrett into Mr. Mann's office. This was the first time that she had met him, and she told Mr. Mann that Mr. Barrett had not been able to work for four years, and that she wanted to see about waiving the premiums on the policy. After getting the card on Mr. Barrett's policy and figuring a little while, she testifies that Mr. Mann answered that there might be a little gain from changing it from a 20-payment policy to an ordinary life, and that, before he could say anything definite, he would have to see the policy and go over it thoroughly, and that he would write to her, with which statement she was dismissed from the office. Exhibit No. 4, dated February 15, 1926, is a copy of the letter Mr. Mann wrote plaintiff, in which he says that the loans have so reduced the value of the policy that it would be impracticable to make the change from a 20-payment policy to an ordinary life policy, and closed with the sentence: "About the only thing to be done if the coverage is to be preserved is to pay the premium." Nothing in the letter refers to the only question she asked him, which was, how to get premiums waived after four years of total disability, and this subject he entirely avoided. She testifies that, neither on this occasion, nor the occasion of her conversations with Miss Petersen, did either Miss Petersen or Mr. Mann give her any blanks to fill out on his total disability. That later on in 1926, the plaintiff was compelled to pay the premium due in cash, because there was not enough money on the policy that could be borrowed. Again, in the spring of 1930, plaintiff's wife went to the office of the defendant company, and Miss Petersen, to whom they had paid the premiums, again waited upon her, and she testifies that she said to Miss Petersen, "Why do we have to pay premiums on Mr.

Barrett's insurance? * * * Nearly all winter he has been in bed all day long, except a short time in the evening when he was too tired, and would sit up;" and she further testified that she said to Miss Petersen, "I know a person not nearly so bad as Mr. Barrett and they didn't have to pay premiums any more," and she testifies that Miss Petersen replied, "Oh, well, some companies have clauses in their policy that ours do not have," and Mrs. Barrett testifies that she relied upon Miss Petersen's statements as to what the disability clause in plaintiff's policy contained.

Plaintiff's wife testifies that about the 1st of December, 1930, after receiving information from Mr. Gwin, an insurance agent, she went to the office of Mr. Mann and demanded and received blanks on which to file a claim for waiver of premium. It was stipulated between the parties that, between the dates August 9, 1924, and August 14, 1930, the total premiums paid by the plaintiff amounted to $2,596.23, without interest. The plaintiff, in his testimony, corroborated the testimony of his wife.

The defendant introduced the Miss B. Marie Petersen heretofore referred to, who, at the time she testified, was Mrs. Marie Burmester, having married the cashier of the defendant company. She testified that she did not remember Mrs. Barrett coming to the defendant's office in reference to the plaintiff's policy, nor remember her paying premiums thereon, or consulting with her in reference to loans on the policy, and testified that she had never seen Mrs. Barrett prior to the time she saw her in the courtroom. Upon cross-examination, Mrs. Marie Petersen Burmester admitted that, in a deposition taken in April, 1931, she was asked this question, "Do you know Mrs. Barrett?" and that she made the answer, "Just as she has come in the office," and, when asked if the answer was correct, her answer was, "After this trial started, I remember that she came in and asked for Mr. Mann," but that she had never been in the office before to her knowledge. She was also asked the question, in

reference to her deposition taken a few days after suit had been filed, "Then, the question, 'Have you known her a year?' and the answer, 'Well, it would be hard to say. You understand my position was taking care of the counter; sometimes there would be as high as fifty a day; they make inquiries as to their policies, securing loans, applications, and their signatures, and I take care of them.' Do you recall that question being asked and that answer being given? A. Yes, sir." The witness also testified that, if Mrs. Barrett had asked her about the total disability clause, she would have given her a blank to complete and send to the company; that she had blanks right there for that purpose. On further cross-examination, exhibit No. 5, being a note for a loan, signed by plaintiff and his wife, was shown her for the purpose of refreshing her recollection, and she admitted that she had signed her name as a witness opposite each of their signatures, but she said she could not remember the transaction otherwise. Upon further cross-examination for the purpose of refreshing her recollection, she was asked about an interview at her office with plaintiff's wife in 1923 or 1924, in which Mrs. Barrett had asked about the cost of a 20-payment or ordinary life policy for her son, who was at that time 19 years of age, and she was handed exhibit 6, which was a memorandum, written in lead-pencil on the back of an insurance circular to agency forces, reading: "Ord. Life 18^{76} at 1000. 20-P- Life 28^{73}." She denied that she remembered this exhibit, and denied that she had made out the statement, exhibit 6, from a book on her desk, and claimed to have no recollection of the transaction.

Mr. Franklin Mann, the general agent, testified that he never met Mrs. Barrett until 1930, nor did he recall having the conversation with her to which she testified, although he admitted on cross-examination it might have been possible. He testified that his letter, exhibit 4, was not in response to a conversation with her in his office, but was in response to a telephone conversation. Mr.

Barrett, upon being recalled to the stand, testified that he had never had a conversation with Mr. Mann over the telephone in his life.

At the close of the defendant's evidence, each party made a motion for a directed verdict. The jury were thereupon discharged, and the court, in discharging the jury, said that the case involves a question of law, and told the jury that there was no dispute about the fact that Mr. Barrett had been totally disabled since 1922, after the operation, and that the question is, whether or not proper proof has been made, or whether the company has waived proof of the total disability, and, therefore, that it did not leave anything for the jury to decide, and thereupon the court entered judgment, as prayed by the plaintiff.

1. The first question arising in this case is whether Miss Petersen, the assistant cashier of the defendant company, to whose desk the general public came to pay premiums, and received their receipts, to make loans on their policies, to sign legal instruments relating to the business of the company, is an agent of such company, and whether her statements will bind the company.

In the chapter on insurance, Comp. St. 1929, we find section 44-307 defines the term "agent," as relates to the case at bar, as any person who shall, with authority, receive or receipt for any money from other persons on account of, or for, any contract of insurance. Under the broad definition of this section of our statute, there can be no doubt that Marie Petersen was an agent of the defendant company.

A company has been held to be bound by the acts of an agent, in excess of actual authority granted, where it negligently permits such agent to so operate as to cause third persons, dealing with the agent in good faith, to believe him possessed of the powers exercised. *Mangiameli v. Southern Surety Co.*, 111 Neb. 801; *Creighton v. Finlayson*, 46 Neb. 457; *Holt v. Schneider*, 57 Neb. 523; *Fruit Dispatch Co. v. Gilinsky*, 84 Neb. 821.

2. Even if a policy stipulates for satisfactory proof, the company cannot demand proof other than what is reasonable and just, and such a provision should be considered as complied with when there has been furnished such proof as establishes the fact of the loss and the right of the claimant to recover. One court has even held, in a fire insurance case, that verbal notice of a loss to the company's local agent was sufficient under a policy requiring due notice and satisfactory proofs.

Waiver by denial of liability is based largely upon the principle that the law does not require a vain, useless, or unnecessary thing. The general rule is that a denial by the insurer, or its authorized agent, of liability under its policy, or any act or artifice to mislead the insured, and cause him to omit to perform a duty he would otherwise have performed, will operate as a waiver of a provision requiring proof. In fact, to effect a waiver by a denial of liability on the part of the insurance company, the denial must be of such a character, or made under such circumstances, as reasonably to induce the belief that the submission of proofs will be useless. Nor need the denial be express or unequivocal, it being sufficient that the facts and circumstances warrant the inference that liability was, and would be, denied. The insured may not be deprived of his rights by a narrow and technical construction of formal requisites, by which that right is to be made available. On the contrary, a liberal and reasonable construction should be given. Couch, Cyc. of Ins. Law, secs. 1541, 1573, 1589; *Robinson v. Pennsylvania Fire Ins. Co.*, 90 Me. 385; *Minnesota Mutual Life Ins. Co. v. Marshall*, 29 Fed. (2d) 977; *Ward v. Pacific Fire Ins. Co.*, 115 S. Car. 53; *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472; *Security Ins. Co. v. McAlister*, 90 Okla. 274; *Wilkinson v. Standard Accident Ins. Co.*, 180 Cal. 252; *Sinincrope v. Hartford Fire Ins. Co.*, 201 N. Y. Supp. 615; *Norfolk Packing Co. v. American Ins. Co.*, 120 Neb. 19; *Farrell v. Farmers & Merchants Ins. Co.*, 84 Neb. 72; *Brinton v. Grand Lodge, A. O. U. W., ante*, p. 680.

3. The gist of the plaintiff's case is that Miss Petersen, assistant cashier of defendant company, who knew that she had sent in plaintiff's policy as collateral to loans, and that plaintiff did not have the policy, or the total disability rider attached thereto, at the time she was served with oral notice and oral proof of the operations which totally disabled plaintiff, knowingly and fraudulently concealed from plaintiff the nature, character, and amount of proof required under the total disability rider, with which she was familiar, and knowingly and fraudulently advised plaintiff's wife that, to be entitled to a waiver of premiums, plaintiff "would have to be confined to bed all the time and hardly able to move a muscle, just the same as being paralyzed;" that she knew said information was false, and plaintiff, not having his policy, or said total disability rider, in his possession, believed and relied upon such statement of defendant's agent, knowing that she knew the facts in relation thereto, and was damaged at least by the amount of the payments on premiums he was thereby unnecessarily compelled to make.

It is clear that the defendant's agent wrongfully advised the plaintiff, with the design of influencing him from filing the proper claim, to the advantage of the defendant company. Plaintiff was misled, to his detriment, by the insurer's conduct.

"Insurance companies, doing business by agencies at a distance from their principal place of business, are responsible for the acts of the agent, within the general scope of the business entrusted to his care, and no limitation of his authority will be binding on parties with whom he deals which are not brought to their knowledge." *Forward v. Continental Ins. Co.*, 142 N. Y. 382, 25 L. R. A. 637.

And a principal, in equity and good conscience, should not be allowed to retain the benefits derived from fraudulent conduct of its agent. *Dresher v. Becker,* 88 Neb. 619; *Tylee v. Illinois C. R. Co.*, 97 Neb. 646; *Gough v.*

Halperin, 306 Pa. St. 230; *Newberg v. Chicago, B. & Q. R. Co.,* 120 Neb. 171.

The plaintiff insists that the fraudulent conduct of the defendant's agents, and his belief and reliance thereon, prevented the furnishing of other and additional proof, which was at all times available, and without question would have complied with the technical requirements of the company.

A careful reading of the total disability rider, attached to this policy, does not disclose that the proof required must be in writing, or upon any particular blank, but provides only that it must be proof satisfactory to the company, and a distinct denial of liability by an agent of the company is a waiver of such proof.

In the evidence in this case, it is not simply the evidence of Miss Petersen and Mr. Mann against the plaintiff and his wife, but the circumstantial evidence and the exhibits all clearly support the evidence of plaintiff, and the district court was right in finding the evidence sustained the plaintiff's allegations.

In this case, a man in his prime purchased a $10,000 life insurance policy, and, in addition, by the payment of an additional sum, purchased a total disability rider, which provided that the premiums would be waived if he suffered total disability. Six years after the policy was taken out, he discovered that he was a victim of cancer, and the severe operations, which barely saved his life, left him totally disabled physically. By the greatest sacrifice, he paid the premiums during these years, upon the representation of an agent of the company that his condition was not serious enough to warrant the company in waiving the premiums. Other errors alleged are not prejudicial and will not be discussed.

The terms of an insurance policy are to be construed liberally, and the facts and the law in this case entirely justify the trial court in entering a judgment requiring the premiums paid during those years to be returned to the insured, with 7 per cent. interest. The judgment is

therefore affirmed, and an additional attorney's fee of $200 is to be entered as part of the costs in this court.

AFFIRMED.

AMERICAN SURETY COMPANY OF NEW YORK, APPELLANT, V. FIRST TRUST COMPANY OF AURORA, APPELLEE.

FILED MAY 19, 1933. No. 28524.

1. **Appeal.** On appeal from a judgment in a case tried to the district court without a jury, it will be presumed that competent evidence only was considered below.
2. **Schools and School Districts: TREASURERS: MISAPPROPRIATION OF FUNDS.** Where a school district treasurer, who is also bookkeeper for a trust company, deposits to its credit in a bank school funds officially in his hands, the trust company, in good faith, may permit him to withdraw them without liability for a subsequent misappropriation thereof in absence of a reason to suspect it.
3. ———: ———: ———: **NOTICE.** Where a school district treasurer, who is also a bookkeeper for a trust company, surreptitiously, without authority, deposits, to its credit in a bank, school district funds and secretly withdraws and embezzles part of them, the trust company is not necessarily liable for the misappropriation, if neither the trust company nor any officer thereof had any actual notice or knowledge of the deposit or of the withdrawal or of facts suggesting an inquiry.
4. ———: ———: ———. Where a school district treasurer, who was also bookkeeper for a trust company, made on its records entries showing that he had deposited, to its credit in a bank, school district funds and that he had withdrawn part of them, inferences that he acted for the trust company with its knowledge may be overcome by direct evidence that he had no authority to thus make the deposit and that neither the trust company nor any officer thereof knew of the book entries or of the deposit or of the withdrawals.

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

Montgomery, Hall & Young and *Charles F. Adams*, for appellant.

Craft, Edgerton & Fraizer, contra.

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

ROSE, J.

This is a suit by the American Surety Company, plaintiff, surety on the official bond of Murlin F. Brock as a school district treasurer, to recover the amount of school funds which he mingled with funds of the First Trust Company of Aurora and embezzled. Brock deposited $2,929.88 of school district funds in the checking account of the First Trust Company in the Farmers State Bank of Aurora, from which he withdrew and embezzled $920. The records of the First Trust Company showed the items of school district funds deposited and the withdrawals. Plaintiff, the surety, restored to the school district the amount of Brock's shortage; charged him and the First Trust Company, defendants, jointly with conversion; sought to impress with a trust the school funds deposited to the credit of the First Trust Company; pleaded on behalf of the surety, by virtue of assignment and subrogation, the initial rights of the school district; prayed for judgment against the First Trust Company for the amount of the mingled funds which Brock embezzled. The facts upon which plaintiff sought relief were pleaded in detail.

The suit was defended on the grounds that the First Trust Company committed no wrong; that Brock, while acting as bookkeeper for the First Trust Company, during a temporary absence of the regular bookkeeper, surreptitiously deposited to its credit in its checking account in the Farmers State Bank of Aurora $2,929.88 belonging to the school district of which he was treasurer; that he afterwards drew out at three different times and embezzled $920, the amount in controversy, leaving in the account a remainder of $2,009.88; that the deposit in the name of the First Trust Company was unauthorized; that the First Trust Company and its officers had no knowledge of the deposit or of the withdrawals until

after the felony had been committed; that Brock was dismissed from the service of the First Trust Company without delay; that the remainder of the deposit, $2,009.88, was promptly restored to and accepted by the school district; that the First Trust Company received no benefit from the unauthorized deposit or from the withdrawals; that Brock did not act for it in making the deposit; that the First Trust Company did not borrow any school funds; that Brock, while withdrawing the $920, was the treasurer of the school district and was entitled to possession of the school funds entrusted to him in his official capacity. Unadmitted matter pleaded in the answer was denied in a reply.

Upon a trial of the cause, the district court found the issues in favor of the First Trust Company and dismissed the suit as to it. Plaintiff appealed.

In the brief and at the bar, counsel for plaintiff ably argued the propositions that the judgment below is not supported by competent evidence; that the records of the First Trust Company show that it had on deposit to its credit in the Farmers State Bank funds in the sum of $2,929.88 belonging to the school district of which Brock was treasurer; that it returned to the school district, the owner of the funds, only $2,009.88 thereof, leaving a balance of $920; that plaintiff restored the embezzled funds and to that extent was subrogated to the rights of the school district; that Brock was the agent of the First Trust Company in making the deposit and in withdrawing part of it; that it was chargeable with notice of its own records and with what Brock did in its name; that by its own wrong-doing it became a trustee with the duty of returning the entire deposit to the school district; that there is no competent proof to overcome evidence of the facts entitling plaintiff to relief.

The cause was tried to the court without a jury and it will therefore be assumed on appeal that competent evidence only was considered below. Except by inference there is nothing to connect the First Trust Company with

any wrongful act in connection with funds of the school district. There is direct evidence that the records and book entries made by Brock as bookkeeper were not examined by any officer of the First Trust Company prior to the embezzlement; that he had no authority to make the deposit as he did; that he did so for his own purposes exclusively; that the First Trust Company did not profit by the deposit or by the withdrawals. While treasurer, Brock was the proper custodian of the school district funds and had a right to possession thereof for the purpose of discharging his official duties. For that purpose, the First Trust Company, had it known of the deposit, could have turned it over to him as treasurer without liability for subsequent disbursement, in absence of any reason to suspect he would misappropriate it. *State v. Farmers & Merchants Bank*, 112 Neb. 840. Embezzlement after the withdrawal of the $920 from the Farmers State Bank was a felony in which the First Trust Company had no part. After Brock's removal as treasurer, upon discovery of the deposit and the shortage, the remainder of the deposit was turned over to the school district. Direct evidence not discredited proves that the First Trust Company and its officers knew nothing of the deposit or of the withdrawals or of the embezzlement or of Brock's book entries until after the felony had been committed. The First Trust Company, therefore, was not a participant in the wrong that made plaintiff liable on the treasurer's bond for the shortage. Competent evidence proves the defenses and overcomes the inferences in favor of plaintiff's cause of action. Prejudicial error has not been found in the record.

AFFIRMED.

MERNA WEBER, APPELLEE, V. JOHN H. WEBER ET AL., APPELLANTS.

FILED MAY 19, 1933. No. 28420.

Appeal: INSTRUCTIONS. An instruction which submits to a jury allegations of fact, not supported by the evidence, is erroneous and, if prejudicial to complainant, is ground for reversal.

APPEAL from the district court for Boyd county: ROBERT R. DICKSON, JUDGE. *Reversed.*

Wills & Wills and *Fred S. Berry*, for appellants.

W. L. Brennan and *J. A. Donohoe, contra.*

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

DEAN, J.

Merna Weber brought this action to recover damages from the parents of her divorced husband for the alienation of his affections. The defendants appeal from a judgment rendered against them.

An examination of the evidence discloses that the overt acts, which form plaintiff's complaint against the defendants, were committed solely by Hannah Weber. There is not a scintilla of evidence that John H. Weber, during the time plaintiff and Theodore Weber were husband and wife, either ever said or did anything that interfered with the marriage relationship or contributed in any manner to the unfortunate trouble which led to the filing of two different divorce suits, one of which was in Nevada, where a decree was granted Theodore Weber. The defendants are charged with a conspiracy to alienate their son's affections.

The evidence upon which the plaintiff relies to support her charge of conspiracy against defendant John H. Weber may be summarized as follows: He stood mute and tacitly gave his approval to the conversations of Hannah Weber, his wife, with their son about plaintiff. If the testimony of plaintiff as to the various charges made

about her by Hannah Weber are true, in manner and form, then there was scarcely an opportunity for John H. Weber to have spoken. His silence was wise. He is charged with being present and participating in a quarrel about the cattle, which caused the first separation, when plaintiff's testimony is that when "we were coming home I saw the Weber car leave our yard." He advanced his son money for various purposes, including expenses for a divorce suit, and afterwards sought to help his son get the custody of the baby. But the record is devoid of evidence tending to prove that John H. Weber, directly or indirectly, influenced the separation of his son and the plaintiff. A conspiracy need not be established by direct evidence, but may be inferred from acts of conspirators pursuing the same object, though by different means. *Marsh-Burke Co. v. Yost,* 98 Neb. 523. See *Talich v. Marvel,* 115 Neb. 255. The picture of John H. Weber, portrayed by the record, is that he was rather a passive figure in this domestic drama. The evidence is not sufficient to support a verdict as to John H. Weber.

Complaint is made in respect of the giving of instruction No. 1 by the court for that it was verbose and submitted issues of fact to the jury which were not supported by the evidence. In view of our conclusion as to the sufficiency of the evidence, and even independently, it submitted issues as to John H. Weber, without supporting testimony. But as to defendant Hannah Weber, the situation is somewhat different. This instruction set out in detail the allegations of the plaintiff's petition, as such. Some of these allegations were not supported by any evidence as against defendant Hannah Weber. It is conceded in the plaintiff's brief that there is no evidence sustaining the allegation that the plaintiff's husband, at the time the baby was born, requested defendant Hannah Weber to loan him money to pay the expenses incident thereto and that she refused, stating that such expenses were due solely to the plaintiff, and that if it had not been for the plaintiff and his marriage to her

he would not have had such expenses. An instruction is erroneous which submits to a jury allegations not supported by the evidence. *Koehn v. City of Hastings*, 114 Neb. 106; *Miller Rubber Products Co. v. Anderson*, 123 Neb. 247; *Hanna v. Hanna*, 104 Neb. 231. Submitting such an issue, as above set forth, is particularly prejudicial in a case of this nature where the situation is a sensitive one involving a new-born babe.

Other errors are assigned and argued which it is not necessary to discuss and determine in disposing of this appeal. The judgment of the trial court is reversed and the cause remanded.

REVERSED.

CLARENCE G. BLISS, RECEIVER, APPELLEE V. LIVE STOCK NATIONAL BANK OF OMAHA, APPELLANT.

FILED MAY 19, 1933. No. 28630.

Appeal: REVERSAL: REMAND. Where a judgment of the district court has been reversed and the cause remanded "for further proceedings in accord with this opinion," and where the admitted facts are such as to require the entry of a specific judgment, the trial court should enter such judgment without the useless formality of a new trial.

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

W. C. Dorsey, Malcolm Baldrige and *Harold C. Linahan*, for appellant.

George I. Craven, contra.

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

GOOD, J.

This is the second appearance of this cause in this court. For a complete statement of the facts, reference is made to the former opinion, reported in 122 Neb. 668.

The action was one to recover for conversion of funds belonging to the insolvent First State Bank, of which plaintiff is receiver. On the first trial, after all the evidence was adduced, both parties moved for a directed verdict. The trial court discharged the jury and took a submission of the cause on the evidence, briefs and oral arguments of counsel, and rendered judgment for plaintiff as against all the defendants except the Live Stock National Bank. As to the latter, the receiver appealed. This court reversed the judgment of the district court as to the Live Stock National Bank. The concluding paragraph of the opinion is as follows: "The Live Stock National Bank, having received payment of the individual note of the president and vice-president of the First State Bank, unauthorized, from funds of the bank with knowledge, is liable for conversion of the amount so paid. The judgment of the district court is reversed and the cause is remanded for further proceedings in accord with this opinion." It is now contended that the cause was remanded generally, and that the Live Stock National Bank was entitled to file an amended answer and to have another trial in the district court.

Without question it is a general rule that reversal of a judgment and remand for further proceedings in accord with the opinion, without specific direction to the trial court as to what it shall do, except such as conveyed by the words, "for further proceedings," is a general remand; and the parties stand in the same position as if the case had never been tried. This court and other courts have frequently so held. However, there are some exceptions to the rule. If the undisputed and admitted facts are such that but one judgment could be rendered, the trial court should enter such a judgment, notwithstanding the mandate did not specifically direct the trial court's action.

In the former opinion adopted by this court, there was no thought but that the remand was for the purpose only of having the trial court enter judgment for plaintiff

against the Live Stock National Bank. It may be conceded that the language of the mandate in the remand was not as specific as it should have been. The evidence taken on the former hearing is incorporated in the bill of exceptions on this appeal, and the admitted facts are such, in the opinion of this court, that no other judgment could properly have been entered, under any circumstances, than one in favor of plaintiff and against the Live Stock National Bank. It would be an idle gesture to require the trial court to go through the form of another trial to reach the result which had been attained and which would have been the only result that could have been upheld. It is true that defendant tendered an amended answer, in which it set out some allegations with respect to a custom of reconcilement statements between banks. However, the evidence as to such reconcilements was before the court on the former hearing, and was considered by this court, although not specifically mentioned in the opinion. The defendant further changed its position in its answer by alleging that the loan was made to the First State Bank, instead of to the individuals. The entire transaction between the banks was by correspondence, which is all in the record and is such as to absolutely and unqualifiedly negative any such contention. The loan by the Live Stock National Bank was made to the Heiligers, was guaranteed by other stockholders of the bank, and was borrowed by them for the specific purpose of restoring the impaired capital of the First State Bank. It was so used, and when it went into the bank it became the bank's money; it was not the money of the Heiligers or of the other guarantors on the Heiliger note. The note was not the obligation of the First State Bank. If any error was committed it was the oversight of this court in not making its mandate more specific.

The record is free from prejudicial error, and the judgment is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. NEMAHA COUNTY BANK: E. H. LUIKART, RECEIVER, APPELLANT: SCHOOL DISTRICT NO. 29, INTERVENER, APPELLEE.

FILED MAY 19, 1933. No. 28471.

1. **Schools and School Districts: SCHOOL FUNDS: DEPOSIT: ACTION TO RECOVER.** In all cases in which public moneys, or other funds, belonging to a school district have been deposited in any bank, it is lawful for the officer making such deposit, or his successor in office, in his official capacity, to maintain an action or actions for the recovery of such moneys so deposited.
2. **Judgment: RES JUDICATA.** As to the moneys of the plaintiff school district, here in controversy, deposited in the Nemaha County Bank (now insolvent) by the school district treasurer, the first action instituted and carried on by such treasurer in his official capacity against the receiver of that bank, pursuant to lawful authority of statute, and in accord with the duly expressed determination of the board of education of said district, and in which proceeding, prior to the final consideration thereof by the district court, pleadings were formally made up on said claim pursuant to directions of such district court and evidence was thereafter formally introduced to establish the contentions of the respective parties at an open public hearing, from which the right of review is guaranteed by the Constitution, and the final judgment then rendered therein, and now remaining in full force and effect, are conclusive, not only upon such treasurer and his successor in office, but also upon the school district which, under the terms of the statute, was therein actually and lawfully represented by that officer.
3. ———: ———. "The doctrine of *res judicata* is that a question once determined by a judgment on the merits is forever settled, so far as the litigants and those in privity with them are concerned. The question decided is, while the decision stands, a sealed and closed question." *State v. Savage*, 64 Neb. 684.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Reversed and dismissed.*

F. C. Radke, Barlow Nye, Skiles & Skiles, Fred G. Hawxby and *Edgar Ferneau*, for appellant.

Ernest F. Armstrong, Ira D. Beynon and *Yale C. Holland, contra.*

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

EBERLY, J.

The Nemaha County Bank of Auburn, Nebraska, is an insolvent state bank, whose affairs are now in charge of E. H. Luikart, its duly appointed receiver. The school district of the city of Auburn, as intervener, brings this action to enforce a claim for a trust fund in the amount of a deposit of funds belonging to the school district made by its school treasurer in the bank prior to insolvency. There was a trial to the court resulting in a finding and judgment for the school district as prayed. The receiver appeals.

The history of the transaction involved in the litigation is as follows: During all the time occupied by the transaction, prior to the insolvency of this bank and the appointment and qualification of its receiver, George E. Codington was its president and one of its executive officers, and also *"ex officio"* treasurer of the intervening school district. In his capacity as *ex officio* school treasurer he deposited, and kept on deposit, school funds as received in his official capacity. These deposits were credited to a separate account designated on the books of the bank as "G. E. Codington, School Treasurer." At the time that this institution was taken over by the state authorities there was a credit balance, concededly correct, of $5,400.46. A receiver for the Nemaha County Bank was appointed on August 12, 1929. Within 20 days thereafter, in accordance with law, the receiver filed in the district court for Nemaha county, where the receivership proceedings had been instituted and were then pending, an application in writing setting forth the names of the creditors of the bank, as shown by the books on August 31, 1929, pursuant to which an order was made by said court fixing October 21, 1929, as the final day

in which claims of creditors of said bank might be filed, and also fixed November 15, 1929, at an hour and place stated, as provided by law, for hearing of claims so filed. Statutory notices appear to have been correctly given of the order so made. It is conceded by all parties that on October 5, 1929, George E. Codington addressed and caused to be delivered to the secretary of the school board of Auburn a letter subscribed by Codington, of which the following is a copy:

"Gentlemen: I call your attention to the fact that the time for filing claims with the Receiver of the Nemaha County Bank will expire October 21, 1929, and that you should protect the interest of the school district of the City of Auburn, Nemaha county, Nebraska, in this matter and prepare and file a claim for the amount of all said school district funds deposited in said Nemaha County Bank. This should be speedily done. Please advise me whether you will prepare and file, on behalf of the school district of the City of Auburn, Nemaha county, Nebraska, the claim suggested herein. Yours truly, G. E. Codington."

At the adjourned regular session of this board of education, held on October 15, 1929, the following proceedings were had:

"Moved by Mr. Zacharius and seconded by Mr. Howe that the secretary be directed to notify Mr. G. E. Codington that the board believes that such school funds of the Auburn district as have been turned over to the treasurer are to be cared for by the treasurer on his own responsibility; and that such balance as may not have been expended according to law should be turned over to his successor at the close of the treasurer's term of office. The board does not believe it has any responsibility for the safekeeping of the school funds in the hands of the treasurer, and believes that he has the right and duty to take any necessary steps to safeguard the school funds; and that the duty of the board is to see that all funds not lawfully expended by the board are turned over by such treasurer to his successor."

Pursuant to the foregoing resolution adopted, the following written communication was, by the Auburn board of education, transmitted to George E. Codington:

"Dear Mr. Codington: It is the understanding of the Auburn board of education that the attorney general has ruled that the treasurer of a school district is personally responsible for all school funds of the district turned over to him. Since the school funds, once received by the treasurer, are protected in any way the treasurer sees fit, and may be deposited in any bank and withdrawn without the authority of the board of education, the board does not believe it has any responsibility for filing a claim with, or authority to file a claim with, the Nemaha County Bank. The board believes that it is the right of the treasurer on his own responsibility to take such steps as are necessary to protect the funds entrusted to his care. Respectfully yours, Auburn Board of Education, by J. A. Jimerson, Secretary."

Thereafter on October 19, 1929, George E. Codington caused to be properly filed a claim in writing, for the benefit of the school district of the city of Auburn, verified under oath by him as "Treasurer of the School District of the City of Auburn, in the County of Nemaha, in the State of Nebraska." This written claim, thus authenticated and filed, set forth the making of the deposit of $5,400.46 by Codington as treasurer of the school district; that moneys deposited were solely the property of the district; and also set forth the action of the school treasurer and board of education had in relation thereto, attaching to the claim as exhibits copies of the letters sent and received, and the resolution or motion in reference to the transaction adopted by the school board, hereinbefore set out. The claimant also expressly alleged in said claim: "That the said sum of $5,400.46 was and is a trust fund for the benefit of said school district and was and is held by the said Nemaha County Bank and its successors as such, and that said amount should be allowed as a preferred claim against said bank, but that

if said amount is not so allowed as a preferred claim, that it should be given the same priority as all other money deposited in the usual course of business without any agreement."

Thereafter, prior to November 15, 1929, the receiver filed, as provided by law, his list of claims and classification thereof, in which the claim of the school district was classified by the receiver as a valid and preferred claim for a deposit, but he denied that said claim was in truth for a "trust fund" and entitled as such to priority over other creditors.

On November 15, 1929, the district court, by its general order then entered, approved the classification of claims as made by the receiver, and by this order further provided that any dissatisfied claimant might file a petition of intervention within 25 days from the date of this order, and also designated a day for hearing petitions thus filed.

Thereafter on December 9, 1929, Codington, as treasurer, for and in behalf of the school district, caused to be filed a formal petition of intervention, setting forth the facts as to the deposit of the $5,400.46 of the school district at length; incorporated therein as exhibits the correspondence and action of the board of education, to which reference has hereinbefore been made; and prayed for the allowance of the claim as a "trust fund" and entitled to priority as such.

Issues were made up on behalf of the receiver, and trial was had on January 14, 1930, which resulted in a decree denying to the claim the qualities of a trust fund, but allowing it as a general deposit. On February 19, 1930, on motion, the judgment so entered was set aside and a new hearing ordered. On May 8, 1930, the matter was again heard by the district court for Nemaha county upon the merits, and it was again formally determined and adjudged that the $5,400.46 constituted a general deposit, and that said intervener was not entitled to the allowance of the claim as for a trust fund, with the

preference that such latter finding, if made, would entail. No appeal was prosecuted from this finding; and after the entry of the judgment of May 8, 1930, the receiver of said bank duly paid to the school district dividends to the amount of 35 per cent. or $1,890, which were duly accepted and since retained by such district. May 8, 1930, was a day of the February, 1930, term of the district court for Nemaha county, which adjourned *sine die* on September 29, 1930. Thereafter two regular terms of this district court were convened and each adjourned *sine die,* without further action being taken in this proceeding. On December 30, 1931, being one of the days of the regular September, 1931, term of this district court, a petition of intervention was again filed in behalf of the school district, which, for a second time, alleged the making of the deposit of $5,400.46 by Codington, its school district treasurer and also president of the Nemaha County Bank; alleged the trust nature of the fund thus deposited, and that the bank still had on hand the sum of $3,510.29 of the funds thus deposited; and asked that the said amount be allowed as a trust fund, and that all assets of every kind or nature belonging to and held by the Nemaha County Bank be impressed with a trust thereon superior to the claims and rights of all other creditors. This petition embraced no more than was contained in the petition of intervention caused to be filed by the school district treasurer; the facts alleged and relied on were identical.

To this pleading the receiver answered admitting the receipt of the deposit, and pleaded at length the proceedings theretofore had and the judgment duly made and entered therein as hereinbefore set forth, in bar, by way of estoppel, and as *res judicata.* The intervener replied. On February 25, 1932, the district court, after a trial on the merits, found generally for the intervener, and adjudged that the sum of $3,510.30 was a charge and first lien on all assets still remaining in the possession of the receiver, and directed the payment thereof to be made in preference to the claims of depositors.

In this court appellee, in its brief, states its position as to the proceedings on which appellant relies, as follows: "It is true that Mr. Codington, employing his own attorney, brought some action for an adjudication of this claim. This action was brought without notice to the school board, neither the school board nor the school district were a party to the suit and consequently are not bound by the adjudication in that proceeding."

Considered in its entirety, this statement is not justified by the record. The school board had actual and timely notice of the failure of the bank, the existence of the deposit of its moneys therein, and of the necessity of immediate action. It took formal official action thereon. It caused the action thus taken to be communicated to George E. Codington, its school treasurer, for his information and official guidance. His action followed as has already been outlined, and is in all respects consistent and in harmony with the action taken by the board of education. The school district was at least a nominal party to the court proceedings prosecuted by the school district treasurer for its sole benefit. After its termination the school district received, accepted, and appropriated $1,890, the results of such proceedings, under such circumstances as necessarily impute knowledge of their source.

The record discloses that these proceedings, thus carried on by George E. Codington, were carried on by him strictly and expressly in his official capacity as school district treasurer, to recover for the district its moneys thus deposited. The controlling question is, therefore, what was his power and authority, in view of the facts established by the evidence?

It may be conceded, in the following discussion, that this school district is the ultimate beneficiary, and that the general rule is: "Every action must be prosecuted in the name of the real party in interest." Comp. St. 1929, sec. 20-301.

"In ascertaining whether the plaintiff is the real party in interest, the primary and fundamental test to be applied is whether the prosecution of the action will save the defendant from further harassment or vexation at the hands of other claimants to the same demand. If the defendant is not cut off from any just defense, offset, or counterclaim against the demand and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end." 2 Bancroft, Code Practice and Remedies, 1094.

But this does not necessarily imply that the school district is vested with the sole and exclusive right of instituting and maintaining legal proceedings. Section 20-301, Comp. St. 1929, actually concludes with the words, "except as otherwise provided in section 26 (20-304)." The section thus referred to provides in part: "An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, *or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such* name as is authorized by law." (Italics ours) Comp. St. 1929, sec. 20-304.

This section 20-304, however, is not to be construed as depriving those holding the beneficial interest from suing in their own names as the real parties in interest. It merely creates an optional alternate method for the enforcement of rights. Thus, it is held that the trustee of an express trust who holds legal title may maintain an action without disclosing a beneficiary or the nature of the trust. So far as the defendant is concerned, such trustee is the real party in interest, as we have defined that term, and may sue in his own name. 2 Bancroft, Code Practice and Remedies, 1097. By a parity of reasoning the terms "a person expressly authorized by statute" and "officers," as employed in the statutory provision last above quoted, must be deemed to denote the real parties in interest in the sense that a judgment in their

behalf will fully protect the defendant sued by them, when discharged, and also, irrespective of the results thereof, will render such judicial proceeding binding and effective in all respects.

As to the statutory powers vested in school district treasurers in certain subjects of school district litigation, it will be remembered that, to remedy the situation created by the case of *State v. Keim,* 8 Neb. 63, the legislature of 1879 under the title, "To Provide for the Collection of Public Funds and Moneys," duly enacted legislation relating to judicial proceedings for the recovery of public funds and moneys (Laws 1879, p. 156), which provided in part: "In all cases in which public moneys, or other funds belonging to the state or to any county, school district, city or municipality thereof, have been deposited or loaned to any person or persons, corporations, bank, copartnership or other firm or association of persons, it shall be lawful for the officer or officers making such deposit or loan, or his or their successors in office, to maintain an action or actions for the recovery of such moneys deposited or loaned, and all contracts for the security or payment of any such moneys or public funds made shall be held to be good and lawful contracts binding on all parties thereto." Comp. St. 1929, sec. 77-2601.

The second section of this act of 1879 (not now appearing in Comp. St. 1929) also provided: "All actions heretofore brought by any public officer, either in his own name or officially, for the recovery of any public moneys heretofore loaned or deposited shall be sustained."

It is obvious that when this legislation is read in connection with its title as an entirety, in the light of the conditions that obtained at the time of its enactment, it must be deemed as involving more than a law made for the protection of the individual who has made an unlawful deposit. *Hagenbuck v. Reed,* 3 Neb. 17; *Union P. R. Co. v. Burlington & M. R. R. Co.,* 19 Neb. 386; *Logan County v. Carnahan,* 66 Neb. 693.

The proper interpretation of this statute was the question presented to this court in *McIntosh v. Johnson,* 51 Neb. 33. In that case an action was instituted in the district court by McIntosh in his official capacity, as treasurer of Cheyenne county, and as successor in office to Adam Ickes, who as county treasurer of that county, in his official capacity, had made certain deposits with defendant Johnson at the time when Johnson was a private banker. This court sustained this procedure and thus necessarily determined that the statute authorized and empowered the county treasurer to bring the action in his official capacity, and further determined that the bringing of it in his official name, as party plaintiff, was a proper, though not necessarily the exclusive, form of correct practice. In this *McIntosh* case, as applied to the facts then before the court, the following controlling principles were announced:

"Statutes remedial in their nature should receive a liberal, and not a restrictive, construction.

"An imperative rule of construction is that effect, if possible, must be given to every clause and part of the statute."

In construing this act of 1879, in connection with our Code provisions quoted, it is also to be remembered that "It was competent for the legislature, in authorizing the suit, to direct in what name, and by whom it should be brought." *Trustees of Greene Township v. Campbell,* 16 Ohio St. 11, 16.

This in turn necessitates the conclusion that, as the first action was instituted and carried on by George E. Codington in his official capacity, pursuant to the lawful authority of statute, and in accord with the duly expressed determination of the board of education, and wherein prior to the final consideration thereof by the district court pleadings were formally made up on said claim pursuant to directions of such district court and evidence was formally adduced to establish the contentions of the respective parties at an open public hearing,

from which the right of appeal is guaranteed by the Constitution, the final judgment then rendered therein is conclusive, not only upon Codington, but also upon his successor in office, and the interests of the real beneficiary, who, under the terms of the statute, was in fact actually represented by him.

In legal parlance, by these circumstances the doctrine of *res judicata* is invoked. *McIntosh v. Johnson,* 51 Neb. 33; *Holsworth v. O'Chander,* 49 Neb. 42; *State v. Savage,* 64 Neb. 684.

"The doctrine of *res judicata* is that a question once determined by a judgment on the merits is forever settled, so far as the litigants and those in privity with them are concerned. The question decided is, while the decision stands, a sealed and closed question." *State v. Savage,* 64 Neb. 684.

The facts presented in the present record, as above outlined, are so essentially different from the facts presented to this court in *State v. Bank of Commerce,* 54 Neb. 725, *State v. Bank of Commerce,* 61 Neb. 22, and *State v. First State Bank,* 121 Neb. 515, as to render the principles announced in the three cases last named wholly inapplicable to the present controversy.

It follows that the district court erred in failing to sustain the defense tendered and established by the receiver herein, and in its entry of judgment against such defendant.

The judgment of the district court is, therefore, reversed and the action dismissed.

REVERSED AND DISMISSED.

PAUL H. GILLAN V. GRACE BUNCE WILSON, APPELLANT: ELLEN G. WILSON ET AL., APPELLEES.

FILED MAY 19, 1933. No. 28476.

Perpetuities. The rule against perpetuities prohibits only the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and twenty-

one years, together with the period of gestation when the inclusion of the latter is necessary to cover cases of posthumous birth.

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

Drake & Drake and *William Niklaus,* for appellant.

R. O. Canaday, guardian *ad litem, contra.*

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

EBERLY, J.

This was an action in equity by plaintiff to foreclose a lien for taxes acquired upon real estate described in plaintiff's petition, through a purchase at a public sale duly held by the county treasurer of Adams county. In this proceeding Grace Bunce Wilson filed her separate answer and cross-petition, in substance denying generally the allegations of plaintiff's petition; and, for her cross-petition, setting forth the ownership of the property involved in the litigation in her father, Charles Bunce; alleging his death, testate, while owner thereof, leaving Grace Bunce Wilson, his sole surviving child, as his only heir; that specified portions of deceased's will, though admitted to probate by a court of competent jurisdiction, were void; that defendants Ellen G. Wilson aged 17, Florence Louise Wilson aged 16, and Mary Alice Wilson aged 14, were the issue of this answering defendant and her codefendant, Wade Wilson, her husband, and were all born more than five years after the death of Charles Bunce, her father; that upon the death of her father, due to the then invalidity of specified portions of his will, she became owner in fee of the premises involved in this suit, and that the void provisions of her father's will operate to cloud the title vested in her, and render the same practically unmerchantable; and prays that the court interpret said will, and determine in whom the title to said premises is vested.

The minor children above named, by Wade Wilson, their father, natural guardian and next friend, as their answer, in addition to a general denial of the allegations contained in plaintiff's petition, set forth that Charles Bunce died seised of the land described in plaintiff's petition, and left a will, "which was duly probated, whereby and wherein these answering defendants were named remaindermen, thereby vesting the fee in these three defendants" of the lands referred to; also setting forth the adverse claims of their mother to such real estate, and facts alleged to show the necessity of procuring a loan to pay the tax lien foreclosed, and praying for license to incumber the property for such purpose. A guardian *ad litem* was also appointed, whose answer embraced a general denial of the allegations of all parties pleading in said cause, and asked that title be quieted in the minors subject to a life estate in their mother, and for other relief.

Reply was filed. The cause was tried to the court, who found for plaintiff and the defendant Pipe Line Company, and entered a judgment of foreclosure and sale of the tax lien; and the court further found that Grace Bunce Wilson was vested with a life estate only in the premises in suit, and "that the remainder in fee simple is in the children of Grace Bunce Wilson which shall survive her," and entered judgment dismissing the cross-petition of Grace Bunce Wilson.

Grace Bunce Wilson alone filed a motion for a new trial, and from the adverse order of the trial court thereon she only appeals.

Appellant in this court in no manner attacks plaintiff's decree. It may be said that the determining question is the validity and the legal effect, if valid, of the last will and testament of Charles Bunce, deceased.

This will, in so far as formal requisites are concerned, is in usual form, and the following provisions thereof are challenged by the appeal:

"Second, I do hereby give, devise and bequeath to my daughter, Grace Bunce of Hastings, Adams county, Nebraska, the following described real property to wit: (description) all in Adams county, Nebraska, to have and to hold for her use for the period of her natural lifetime, without power to alienate or incumber the same.

"Third, If my daughter, Grace Bunce, shall marry and leave surviving her any child or children, then and in that case I devise all of the above described real property, in fee simple, absolutely to said child or children share and share alike as tenants in common, but if said child or any of said children shall die leaving a child or children surviving them, said share shall not lapse, but shall go to the said survivor or survivors of said deceased, but if such deceased shall not leave surviving him or her any child or children, then said share shall lapse, and shall go in equal shares to the surviving children of the said Grace Bunce, if any."

By the sixth paragraph of this will Grace Bunce was made residuary legatee.

It appears from the evidence that Grace Bunce was unmarried at the time of the death of her father; that the will was duly admitted to probate on August 18, 1908; that subsequent thereto she intermarried with defendant Wade Wilson, and that the three minor defendants are the issue of such marriage.

Appellant contends that, since there were neither remaindermen, nor prospects of any, at the time of the death of the testator, and for over five years thereafter, the attempted gift of the remainder over after her death was a contingent remainder, and therefore void; and that the title thereupon vested absolutely in appellant. Thus, the title of Grace Bunce Wilson, under the provisions of the will in controversy, is the sole question for our consideration.

Contingent remainders, however, are not necessarily void. Ordinarily, it is only when, in attempting to create

them, the rule against perpetuities is violated that they are to be determined invalid.

"Although the law favors the vesting of estates, and looks with disfavor on the postponement of the vesting of title, nevertheless, contingent remainders are lawful, and if a testator, by unambiguous language, creates a contingent remainder, it is the duty of the court to uphold it." *Hackleman v. Hackleman,* 88 Ind. App. 204.

"The law permits the vesting of an estate or interest, and also the power of alienation, to be postponed for the period of a life or lives in being, and twenty-one years thereafter, to which, in a proper case, may be added the period of gestation. It is only when postponed for a longer period that it is obnoxious to the rule against perpetuities, and the devise or grant is void. *Andrews v. Lincoln,* 95 Me. 541. 'In deciding the question of remoteness, the state of circumstances at the date of the testator's death, and not their state at the date of the will, is to be regarded. Thus, if a testator bequeaths money in trust for A for life, and after his death for such of his children as shall attain the age of twenty-five, the latter trust would be void if the testator were to die before A; yet if A should die before the testator leaving children, of whatever age, the trust will be good, since it must of necessity vest or fail within lives in being, viz., the lives of the children.' 1 Jarman, Wills (7th ed.) 271. See, also, *McArthur v. Scott,* 113 U. S. 340." *DeWitt v. Searles,* 123 Neb. 129, 132.

Conceding for the purpose of discussion that the paragraph of the will quoted created a contingent remainder in favor of the children of Grace Bunce, in the event of her marriage and death leaving children surviving, what fact or facts, if any, invalidate such provision?

"The rule against perpetuities is usually stated as prohibiting the creation of future interests or estates which by possibility may not become vested within a life or lives in being and twenty-one years, together with the period of gestation when the inclusion of the latter is

necessary to cover cases of posthumous birth. * * * Still another method of stating the rule is by describing it as prohibiting future interests which may not vest within twenty-one years after some life in being at the testator's death or the execution of the instrument creating future interests." 21 R. C. L. 282, sec. 2.

In accordance with natural law, it is patent that, upon the death of Grace Bunce, the remaindermen, if any there existed, would be definite and certain. This would constitute a complete compliance with the rule against perpetuities, and the provisions of the will objected to are valid beyond question. This in principle was recognized by this court in *Bunting v. Hromas,* 104 Neb. 383. See, also, *DeWitt v. Searles,* 123 Neb. 129; *Hill v. Hill,* 106 Neb. 17; *Wilkins v. Rowan,* 107 Neb. 180.

It follows that the provisions of the will in controversy are valid, and vest in Grace Bunce Wilson a life estate only in the premises in suit, and that the third paragraph of the last will of Charles Bunce, deceased, must be deemed in all respects valid as to the minors hereinbefore named.

The findings and judgment of the district court, appealed from, are therefore correct, and are

AFFIRMED.

INDEX

Action.

1. The declaratory judgments act applies only to actions where there is an actual controversy and where only justiciable issues are presented by proper parties. *Banning v. Marsh* 207
2. The declaratory judgments act is applicable only where there is a present, actual controversy, and all interested persons are made parties. *Dobson v. Ocean Accident & Guarantee Corporation* 652
3. A court may refuse to enter a declaratory judgment where it would not terminate the controversy giving rise to the proceeding. *Dobson v. Ocean Accident & Guranatee Corporation* 652

Appeal. SEE CRIMINAL LAW. TRIAL.

1. A judgment will not be reversed because of harmless error. *Yost v. Nelson* 33
2. In reviewing a directed verdict, the supreme court will regard every fact which the evidence proves or tends to establish as conclusively established. *Bainter v. Appel* 40
3. Where from the entire evidence different minds might draw different conclusions, a directed verdict constitutes error. *Bainter v. Appel* 40
4. Refusal of requested interrogatories *held* not abuse of discretion. *McGrew Machine Co. v. One Spring Alarm Clock Co* 93
5. Affidavits filed in the supreme court are ineffectual to vary or contradict recitals of bill of exceptions or supply omissions therein. *Shaw v. Diers Bros. & Co.* 119
6. Where will was denied probate, the person named executor therein cannot appeal from a judgment approving the action of the sole beneficiary canceling the will. *In re Estate of Raymond* 125
7. Where appellant fails to file supersedeas bond, or bond for costs, within time, appeal will be dismissed. *In re Estate of Raymond* 125
8. Determination of questions raised by the record and necessarily involved in the court's decision, whether touched upon in the opinion or not, become the law of the case. *Skeffington v. Kearney Savings & Loan Ass'n.* 175

9. When a judgment is reversed, the trial court should retrace its steps to the point where the first material error occurred. *Skeffington v. Kearning Savings & Loan Ass'n* 175
10. In trying a case *de novo*, the supreme court will consider the fact that the trial judge observed the witnesses and gave greater credence to some than to others. *Stone v. Thomson Co* 181
11. Where no appeal was taken from a decree finding that a referendum petition did not contain a sufficient number of valid signatures, the constitutionality of the referendum statute becomes a moot question. *Banning v. Marsh* 207
12. The supreme court will not determine abstract, hypothetical, and moot questions. *Banning v. Marsh* 207
13. A question not available to appellant may be disregarded, though discussed in the brief and argued at the bar. *Lougee v. Matters* 223
14. A litigant aggrieved by taxation of costs must present a record on appeal showing error. *City of Scottsbluff v. Southern Surety Co* 260
15. A party cannot complain of an instruction substantially the same as one he has requested. *Clausen v. Johnson* 280
16. It will be presumed that incompetent testimony was disregarded in trial to court. *Missouri Valley Pipe Line Co. v. Neely* 293
17. On appeal in equity, the supreme court will give weight to the trial court's conclusions. *Broeker v. Day* 316
18. A judgment sustained by the evidence will not be reversed for error in instructions which do not substantially affect rights of complaining party. *Peterson v. School District* 352
19. A verdict in a law action based on conflicting evidence will not be disturbed on appeal unless clearly wrong. *Faulhaber v. Griswold* 357
20. A verdict based on conflicting evidence will not be disturbed on appeal unless clearly wrong. *Lyons v. Joseph* 442
21. An erroneous instruction, if not prejudicial, is not ground for reversal. *Lyons v. Joseph* 442
22. Order of court giving directions to receiver of bank will not be disturbed on appeal in absence of abuse of discretion. *State, ex rel. Sorensen, v. Nebraska State Bank* 449
23. In action by husband for death of wife, where evidence of wife's life expectancy was introduced, and husband

was about the same age and appeared as a witness, it will be assumed that the jury considered the age and life expectancy of the husband. *Litwiller v. Graff* 460
24. Where a verdict is the only one which was justified by the evidence, erroneous instructions are not prejudicial. *Lebs v. Mutual Benefit Health & Accident Ass'n* 491
25. Findings in a law action tried without a jury, based on conflicting evidence, will not be disturbed unless clearly wrong. *Societe Titanor v. Paxton & Vierling Iron Works* 570
26. A defendant cannot complain of admission of evidence incompetent as to him, but competent as to his codefendant, but he is entitled, on request, to an instruction limiting jury's consideration of it to his codefendant. *Stroud v. Payne* 612
27. A person cannot complain of failure to give an instruction limiting consideration of evidence, unless he has requested it. *Stroud v. Payne* 612
28. Misconduct of counsel is not ground for reversal of a judgment unless prejudicial to the complaining party. *Stroud v. Payne* 612
29. An issue not presented in the trial court may not be raised for the first time in the supreme court. *Stroud v. Payne* 612
30. Where instructions are incomplete, complete instructions should be requested. *Newman v. Department of Public Works* 684
31. Refusal of instruction reflecting a defense made an issue by pleadings and evidence *held* error, where the issue had not been covered by other instructions. *Frazier v. Brown* 746
32. A verdict based on conflicting evidence will not be disturbed as against weight of evidence, unless clearly wrong. *Anderson v. Lotman* 795
33. Where an issue is tried without objection to pleadings, appellate court will consider them sufficient to raise an issue considered; the rule requiring agreement between pleadings and proof being inapplicable. *Anderson v. Lotman* 795
34. On appeal from judgment in case tried to court without a jury, it will be presumed that only competent evidence was considered. *American Surety Co. v. First Trust Co* 874
35. An instruction submitting issues not supported by evidence is erroneous. *Weber v. Weber* 878
36. Where a judgment is reversed and the cause remanded

"for further proceedings in accord with this opinion," and admitted facts require entry of a specific judgment, the trial court should enter such judgment. *Bliss v. Live Stock Nat. Bank* 880

Appearance.

Defendant's application for additional time to plead, and motion to make petition more definite and certain, and to strike parts thereof, *held* a general appearance. *Richards v. Goldstein* 438

Assault and Battery.

Evidence *held* to sustain conviction of assault with intent to wound. *Duffey v. State* 23

Assignments.

Generally, assignee of chose in action acquires only rights of assignor. *Lincoln Nat. Bank & Trust Co. v. School District* 538

Attachment.

No liability arises against either principal or surety under an attachment bond after an order of dissolution entered pursuant to a stipulation adjusting disputed matters. *Johnson v. Smith, Hultin, Andersons Co* 240

Attorney and Client.

1. An attorney, after receiving the confidence of a client, cannot enter the service of others having interests adverse to the client. *Federal Trust Co. v. Damron* 655
2. Equitable owner of judgment *held* liable for reasonable attorney's fees in procuring compromise settlement of judgment. *Hultman v. Hanley* 757
3. Evidence *held* to warrant disbarment. *State, ex rel. Sorensen, v. Kennedy* 789

Automobiles.

1. An act to secure uniformity in state laws regulating operation of motor vehicles should be construed in the light of cardinal principles of the act itself to give effect to such design. *Bainter v. Appel* 40
2. Law of the road stated. *Bainter v. Appel* 40
3. Care required by driver of automobile at intersection stated. *Bainter v. Appel* 40
4. Plaintiff, driving automobile on right side of road and traveling in a lawful manner, could assume that one

driving in the opposite direction would not project his car into a cloud of dust on plaintiff's side of the road and strike him. *Bainter v. Appel* 40
5. In an action to recover for injuries from collision with a truck, evidence *held* not to establish that the driver of the truck was defendant's servant and engaged in the master's business at the time of the accident. *Bainter v. Appel* 40
6. Evidence *held* sufficient to sustain conviction of intoxication, and driving a motor vehicle while intoxicated. *Rhodes v. State* 147
7. A motorist backing into a public alley must keep proper lookout and give signal of his intention. *Baumann v. Hutchinson* 188
8. Evidence *held* to sustain judgment for plaintiff. *Clausen v. Johnson* 280
9. It is not negligence, as a matter of law, to drive an automobile at night on a good highway at 35 miles an hour. *Monasmith v. Cosden Oil Co* 327
10. Prior to statute, the owner of an automobile gratuitously carrying a passenger owed him the duty of exercising ordinary care. *Moran v. Moran* 379
11. Evidence *held* to sustain defense of causal connection between negligence resulting in automobile accident and death of guest. *Moran v. Moran* 379
12. Owner of automobile *held* chargeable with results of son's negligent operation of car. *Moran v. Moran* 379
13. Guest *held* not guilty of contributory negligence in cautioning driver of automobile against driving too fast. *Moran v. Moran* 379
14. Presumption that truck in charge of employee was in service of employer *held* not sufficient to prevent directed verdict, in view of rebuttal evidence. *Wise v. Grainger Bros. Co* 391
15. Employer *held* not liable for employee's use of truck for private purpose. *Wise v. Grainger Bros. Co* 391
16. In an action for death of passenger in automobile collision, negligence of drivers *held* question for jury. *Litwiller v. Graff* 460
17. In a prosecution for manslaughter based upon unlawful operation of an automobile, contributory negligence of deceased is no defense. *Benton v. State* 485
18. One who drives an automobile into rear of another car on the highway is grossly negligent, where ordinary care would have avoided a collision. *Benton v. State* 485
19. In a prosecution for manslaughter, evidence *held* to

sustain finding that defendant negligently operated his automobile at excessive speed. *Benton v. State* 485
20. Where one driving an automobile in violation of law causes death to another, he is guilty of manslaughter. *Benton v. State* 485
21. Driving an automobile while intoxicated is an unlawful act, sufficient to sustain a conviction for manslaughter. *Benton v. State* 485
22. Evidence *held* to sustain conviction for manslaughter based on driving an automobile while intoxicated. *Benton v. State* 485
23. Driving an automobile after revocation of license *held* evidence of negligence. *Benton v. State* 485
24. Evidence that skid marks of taxicab striking pedestrian were from six to ten feet long justified submission of question of speed to the jury. *Sgroi v. Yellow Cab & Baggage Co.* 525
25. Statute prohibiting operation of motor vehicle while intoxicated, and depriving convicted person of privilege of operating a motor vehicle for one year, *held* a valid exercise of police power, and the court in which such conviction is had has jurisdiction to revoke license for first offense. *Smith v. State* 587
26. License to operate a motor vehicle is not a contract, but a mere privilege revocable for cause. *Smith v. State* 587
27. "Gross negligence," within statute relating to motorist's liability to guest, means negligence in a very high degree, or absence of even slight care in performance of duty. *Morris v. Erskine* 754
28. Evidence *held* to sustain verdict for plaintiff injured in collision with automobile. *Anderson v. Lotman* 795
29. Contributory negligence will not be presumed. *Cotten v. Stolley* 855
30. Pedestrian is not guilty of contributory negligence in walking on highway. *Cotten v. Stolley* 855
31. Pedestrian lawfully on highway may assume that motorists will exercise reasonable care. *Cotten v. Stolley* 855

Bankruptcy.

1. Discharge in bankruptcy *held* not to cancel lien of mortgage foreclosure decree. *Prudential Ins. Co. v. Prebyl* 295
2. Decree of foreclosure pursuant to order of referee in bankruptcy *held* a valid lien notwithstanding mortga-

gor's discharge in bankruptcy. *Prudential Ins. Co. v. Prebyl* 23
3. When the original judgment on which garnishee proceedings are based becomes ineffective by the debtor's adjudication in bankruptcy, the garnishee summons falls. *Savard v. Physicians Casualty Co*..... 627
4. If the court finds that garnishee proceedings attempt to hold funds within four months prior to the judgment debtor's adjudication in bankruptcy and makes no order affecting the garnishee, the garnishee is released. *Savard v. Physicians Casualty Co*..... 627

Banks and Banking.

1. A statute providing for a guaranty fund by assessments against state banks, enacted under police power, must be related to some public purpose and must not be arbitrary and unreasonable. *Hubbell Bank v. Bryan*.. 51
2. Depositors' final settlement fund act *held* not valid as an exercise of police power. *Hubbell Bank v. Bryan*.... 51
3. Intent to deceive is an essential element of the offense of feloniously making a false statement of the bank's assets by a bank officer. *Foreman v. State*..... 74
4. In a prosecution against a bank officer for making false entries, intent to deceive must be proved beyond a reasonable doubt. *Foreman v. State*..... 74
5. An instruction that false statements of a bank officer and book entries proved intent to deceive a bank examiner *held* erroneous. *Foreman v. State*..... 74
6. Evidence that a bank officer made false statements and book entries *held* not to estop him from denying intent to deceive bank examiners. *Foreman v. State*..... 74
7. Receiver of insolvent bank holds assets subject to preexisting liens. *Wells v. Farmers State Bank of Overton* 386
8. Priority of depositors' lien on assets of insolvent state bank is fixed by status at time of adjudication of insolvency. *Wells v. Farmers State Bank of Overton*..... 386
9. Assets of an insolvent state bank are a trust fund for payment of debts. *State, ex rel. Sorensen, v. Nebraska State Bank* 449
10. Liquidation of an insolvent bank in equity is a judicial proceeding. *State, ex rel. Sorensen, v. Nebraska State Bank* 449
11. Where the district court decrees liquidation of a state bank, the decree should place the assets in the hands of a receiver, who acts under orders of court. *State, ex rel. Sorensen, v. Nebraska State Bank*..... 449

12. A bank is a public instrumentality created for a public purpose. *State, ex rel. Sorensen, v. Nebraska State Bank* 449
13. Courts should so administer affairs of insolvent banks as to minimize losses. *State, ex rel. Sorensen, v. Nebraska State Bank* 449
14. The district court may authorize receiver of insolvent state bank to borrow money from the reconstruction finance corporation and to pledge the bank's assets as security. *State, ex rel. Sorensen, v. Nebraska State Bank* 449
15. Bank receiving deposit of funds of school district treasurer, who was also managing officer of the bank, holds the funds as trustee. *Lincoln Nat. Bank & Trust Co. v. School District* 538
16. In dealings between a bank and school district, knowledge of managing officer of the bank acquired as treasurer of the school district will be imputed to the bank. *Lincoln Nat. Bank & Trust Co. v. School District* 538
17. Payment of mortgage to officer of bank *held* not a preferential claim against assets on bank's insolvency, where payment did not increase the assets. *State, ex rel. Sorensen, v. Citizens State Bank* 562
18. Money paid to a bank in payment of a specific debt and converted to its own use *held* a trust fund, payable in full from bank's assets on insolvency. *State, ex rel. Sorensen, v. Citizens State Bank* 562
19. A deposit in the ordinary course of business is presumed to be a general deposit. *State, ex rel. Sorensen, v. Citizens Bank* 575
20. A general deposit creates the relation of debtor and creditor between the bank and the depositor. *State, ex rel. Sorensen, v. Citizens Bank* 575
21. Deposit *held* general deposit and not a trust fund. *State, ex rel. Sorensen, v. Citizens Bank* 575
22. Generally, a receiver cannot open closed bank transactions. *Luikart v. Hunt* 642
23. Where officers of an insolvent bank disposed of assets in anticipation of receivership, the receiver may question the transactions. *Luikart v. Hunt* 642
24. A depositor to whom an insolvent bank assigned a note and mortgage in exchange for depositor's certificate of deposit, *held* charged with notice of fraud, subjecting his title to question. *Luikart v. Hunt* 642
25. Items sent to a bank for collection and proceeds thereof are held in trust for the owner. *State, ex rel. Sorensen,*

v. Newman Grove State Bank 667
State, ex rel. Sorensen, v. Farmers State Bank 693
26. The trust resulting where items are sent to a bank for collection is executed when the owner requests and accepts exchange of the bank. *State, ex rel. Sorensen, v. Newman Grove State Bank* 667
27. A letter transmitting a collection item to a bank with instruction to forward draft in payment *held* a request for exchange of the bank and terminated the trust relationship when the draft was issued. *State, ex rel. Sorensen, v. Newman Grove State Bank* 667
28. Where collecting bank's attempt to remit by draft fails because of bank's insolvency, the trust ~~character of the~~ fund is not destroyed, in absence of request for or agreement to take draft in payment. *State, ex rel. Sorensen, v. Farmers State Bank* 693
29. Check or draft ordinarily does not discharge an obligation, unless paid. *State, ex rel. Sorensen, v. Farmers State Bank* 693
30. Whether bank which fails after collecting an item is a debtor or trustee depends on the parties' intention. *State, ex rel. Sorensen, v. Farmers State Bank* 693
31. Failure of purchaser to tender valueless bank stock *held* not to preclude recovery on contract of indemnity from loss. *Cox v. Cox* 706
32. Before money in an insolvent bank may be recovered as a trust fund, claimant must establish that it was not simply a general deposit. *State, ex rel. Sorensen, v. Citizens Bank* 717
33. It is not essential to the offense of making a false statement with intent to deceive a bank examiner that the statement be made in the presence of two bank directors. *Flannigan v. State* 748
34. Decree establishing a trust fund payable from assets of an insolvent state bank bears interest at 7 per cent. per annum from date of decree. *State, ex rel. Spillman, v. First State Bank* 786
35. All parties whose interests were affected by default of bank officer *held* entitled to the same rights as if the officer had performed his duty. *State, ex rel. Sorensen, v. Citizens State Bank* 846
36. Where a bank officer wrongfully credits funds of a depositor to a corporation of which he is manager, his knowledge will be imputed to the bank. *State, ex rel. Sorensen, v. Citizens State Bank* 846

37. False entries will not relieve a bank from liability to a depositor, where the bank has knowledge of the facts. *State, ex rel. Sorensen, v. Citizens State Bank* 846
38. A general deposit creates relationship of debtor and creditor. *State, ex rel. Sorensen, v. Citizens State Bank* 846

Bills and Notes.

1. In action on note, evidence *held* to sustain defense of payment. *Village of Cedar Bluffs v. Knutzen* 446
2. Indorsement of note as administrator *held* not to make administrator personally liable as indorser. *Carter v. Carrell* 542
3. Rule that failure of consideration for note is defense to action thereon by payee against maker may apply to action on note executed by husband to wife. *Yost v. Yost* 608
4. In action by payee against maker of note, plaintiff is not a "holder in due course." *Yost v. Yost* 608
5. Discharge from liability on note is sufficient consideration for renewal note. *Stroud v. Payne* 612
6. Consideration for note is consideration for renewal note. *Stroud v. Payne* 612
7. Whether an accommodation maker signed a note for accommodation of payee, or for accommodation of third party, *held* question for jury. *Luikart v. Meierjurgen* 816

Brokers.

1. Broker's contract to procure exchange of land is not governed by statute requiring broker's contract for sale of land to be in writing. *Dunn v. Snell* 560
2. A principal cannot defeat a broker's right to compensation for procuring customer for an exchange of land by revoking his authority pending negotiations. *Dunn v. Snell* 560
3. Though a broker's agency may be revoked at any time before sale, revocation must be in good faith and will not be permitted to defeat broker's compensation for services rendered. *Dunn v. Snell* 560

Carriers.

1. A carrier of live stock is not an insurer of arrival of trains on schedule time. *Burtis v. Chicago, B. & Q. R. Co.* 534
2. A carrier, to avoid liability for loss from material delay in transportation of live stock, must show that the

delay arose from some cause other than its negligence. *Burtis v. Chicago, B. & Q. R. Co.* 534
3. A carrier is not liable for loss or depreciation in value of live stock due to time consumed in transportation thereof, if the stock is transported within the time provided by regular schedule. *Burtis v. Chicago, B. & Q. R. Co.* 534

Chattel Mortgages.
1. Disposition of mortgaged chattels without written consent of mortgagee is a statutory crime. *Fiehn v. State.* 16
2. In a prosecution for selling mortgaged chattels without written consent of mortgagee, accused may show as a defense that value of chattels was turned over to mortgagee or that the debt was paid. *Fiehn v. State.* 16
3. Tender *held* insufficient as defense to prosecution for selling mortgaged property. *Fiehn v. State.* 16
4. As between the parties, an agreement to execute a mortgage on crops not planted may be enforced in equity. *First Nat. Bank v. Young.* 598
5. Filing of a chattel mortgage on unplanted crops is not constructive notice of mortgagee's equitable rights. *First Nat. Bank v. Young.* 598
6. A mortgagee with notice of rights of another to a prior chattel mortgage is not a mortgagee in good faith. *First Nat. Bank v. Young.* 598
7. Mortgagee in good faith defined. *First Nat. Bank v. Young* 598
8. An oral chattel mortgage is good as between the parties thereto, and is invalid only as to creditors and subsequent purchasers in good faith. *First Nat. Bank v. Young* 598
9. A chattel mortgage does not pass title to the mortgagee. *National Bond & Investment Co. v. Haas.* 631
10. A mortgagor covenanting to keep a mortgaged automobile in first class condition must keep it in repair. *National Bond & Investment Co. v. Haas.* 631
11. Lien of artisan on automobile *held* superior to lien of chattel mortgage. *National Bond & Investment Co. v. Haas* 631

Commerce.
To recover under the federal statute, a railroad employee at time of injury must have been engaged in interstate transportation, or related work. *McDermott v. Chicago & N. W. R. Co.* 727

Constitutional Law.

1. A statute authorizing assessments against state banks for payment of losses in banks closed prior to its enactment *held* unconstitutional. *Hubbell Bank v. Bryan*.. 51
2. Public purpose necessary to support exercise of police power is not imparted into a legislative act merely because it supersedes an act which had such public purpose. *Hubbell Bank v. Bryan*..... 51
3. A statute enacted under police power, although valid when made, may become confiscatory by reason of later events. *Hubbell Bank v. Bryan*..... 51
4. Enforcement of the depositors' guaranty fund law having become, in effect, a taking of private property exclusively for a private purpose, the law cannot be sustained as a constitutional exercise of police power. *Hubbell Bank v. Bryan*..... 51
5. Assessments under the depositors' guaranty fund law *held* invalid as taking property of state banks without due process of law. *Hubbell Bank v. Bryan*..... 51
6. Constitutionality of statute will not be determined unless necessary to proper disposition of pending case. *Banning v. Marsh*..... 207
7. Statute authorizing city to condemn public utility property *held* not a special act regulating practice of courts. *City of Mitchell v. Western Public Service Co*..... 248
8. Statute authorizing city to condemn public utility property *held* not to constitute the board of appraisers a court. *City of Mitchell v. Western Public Service Co*..... 248
9. Authorizing appraisers to apportion costs, and requiring a cost bond and payment for transcript as condition of appeal, *held* not to render unconstitutional statute authorizing city to condemn public utility property. *City of Mitchell v. Western Public Service Co*..... 248
10. Landowners *held* estopped by laches to question validity of law under which lands were transferred to a high school district, as basis for restraining collection of taxes. *Peterson v. School District*..... 393
11. Under the Constitution, district courts have equity jurisdiction which may be exercised without legislative enactment. *State, ex rel. Sorensen, v. Nebraska State Bank*..... 449
12. Complaint that regulations promulgated under legislative authority by a state board are unreasonable should be made in first instance to the board. *Petersen Baking Co. v. Bryan*..... 464

13. Primarily, the legislature is judge of necessities for police regulation, and courts can interfere only when regulation exceeds reasonable exercise of authority. *Petersen Baking Co. v. Bryan* 464
14. Mere inconvenience to those conducting a business subject to police regulation does not vitiate exercise of the power. *Petersen Baking Co. v. Bryan* 464
15. Statute fixing standard weights of bread loaves which authorized the secretary of agriculture to fix reasonable excess tolerances *held* not invalid as delegation of legislative power. *Petersen Baking Co. v. Bryan* 464
16. Statute establishing a standard loaf of bread, and authorizing reasonable excess tolerances to be fixed by the secretary of agriculture, *held* valid. *Petersen Baking Co. v. Bryan* 464
17. Statute regulating traffic in tobacco *held* constitutional. *Nash-Finch Co. v. Beal* 835

Contempt.

1. A proceeding for contempt of court is in the nature of a criminal prosecution, and judgment is reviewable as in criminal cases. *McCauley v. State* 102
2. Courts are charged with the duty of guarding their proceedings against everything which interferes with orderly administration of justice. *McCauley v. State* 102
3. Sentence of six months in jail and fine of $250 for contempt of court in attempting to bribe a juror *held* not excessive. *McCauley v. State* 102
4. "Direct contempts" are those committed in the presence of the court while in session, while "constructive contempts" consist of those not committed in the presence of the court. *Maryott v. State* 274
5. Contempt proceedings to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders are "criminal contempts." *Maryott v. State* 274
6. Contempt proceedings to enforce rights or to administer remedies to which the court has decreed the parties entitled are "civil contempts." *Maryott v. State* 274
7. Rules of procedure in proceedings for criminal contempt are inapplicable to proceedings for civil contempt. *Maryott v. State* 274
8. Proceedings for civil contempt need not be by information in the name of the state. *Maryott v. State* 274
9. Wilful disobedience of order to pay alimony constitutes civil contempt. *Maryott v. State* 274

10. Husband *held* not in contempt for failure to pay alimony. *Maryott v. State* 274
11. The common-law power of courts to punish for constructive contempts is confirmed by statute in Nebraska. *Kopp v. State* 363
12. In absence of statute, a preliminary examination on charge of constructive contempt is not necessary. *Kopp v. State* 363
13. Accused's right to a day before being required to answer an indictment may be waived. *Kopp v. State* 363
14. Silence of record raises presumption that accused waived right to day before answering indictment. *Kopp v. State* 363
15. Striking defendant's motion in arrest of judgment, after hearing thereon, *held* not error, where motion was without merit. *Kopp v. State* 363
16. Silence of record raises presumption that accused was informed he had been found guilty, before sentence was pronounced. *Kopp v. State* 363

Contracts.

1. One may not maintain an action on a contract to which he is not a party, unless the contract was made for his benefit or for the benefit of a class in which he is included. *Swift Lumber & Fuel Co. v. Hock* 30
2. In passing on the validity of an alleged usurious contract, the court may consider the contract in the aspect in which the parties understood, treated and partially performed it as valid. *Grand Island Finance Co. v. Fowler* 514
3. An express contract requires mutual meeting of minds and an intention to contract and is established by proof of intention. *Vandenburg v. Center Township* 790

Corporations.

1. Officers of a corporation are proper parties defendant in a suit for fraud based on transactions conducted by officers. *Ashby v. Peters* 131
2. Where a buyer contracts with a seller as a corporation, he is estopped to deny its corporate existence. *Societe Titanor v. Paxton & Vierling Iron Works* 570
3. A corporation cannot repudiate a contract of which it receives and retains the benefits. *Federal Trust Co. v. Damron* 655

Costs.

The court may fix attorney's fees without calling witnesses, where acquainted with the facts. *City of Scottsbluff v. Southern Surety Co.* 260

Courts.

1. A former decision of the supreme court of the United States sustaining the validity of the bank guaranty law *held* not to preclude a subsequent suit to test the validity of assessments thereunder in the light of later actual experience. *Hubbell Bank v. Bryan* 51
2. The district court may permit amendments to pleadings in cases appealed from municipal court. *Baxter v. Maccabees* 160
3. County courts possess exclusive original jurisdiction in probate matters, and in settlement and distribution of estates of decedents. *Carter v. Carrell* 542
4. Recess between meetings of court during term *held* not "vacation;" and decree not void as rendered in vacation. *Wallace v. Clements* 691

Creditors' Suit.

A judgment creditor seeking relief by creditor's bill may be required to exhaust property on which he has a specific lien before resorting to property on which he subsequently acquires a lien by a decree canceling debtor's fraudulent conveyance. *Lincoln Trust Co. v. Sweeney* 686

Criminal Law.

1. Harmless errors are not ground for reversal of conviction. *Shaffer v. State* 7
2. Where accused denied previous conviction of felony, the record of previous conviction, though pending upon proceedings in error to review conviction, *held* admissible. *Shaffer v. State* 7
3. Temporary absence of trial judge from courtroom during parts of arguments to jury *held* not prejudicial. *Shaffer v. State* 7
4. Errors relied on for reversal on review of a criminal case must be specifically set forth and discussed in the brief. *Shaffer v. State* 7
5. Failure to instruct jury concerning presumption of innocence *held* not reversible error, in absence of request, and where the subject of reasonable doubt was fully covered in instructions given. *Fiehn v. State* 16

6. Controverted issues of fact, where the evidence is conflicting, are for the jury. *Fiehn v. State* 16
7. Evidence tending to prove an alibi does not destroy sufficiency of state's evidence, but only presents conflicting evidence on question of fact. *Duffey v. State* 23
8. Newly discovered evidence, to warrant a new trial, must be competent, material, and credible, and such as would probably change the result, and which was not discoverable before trial in the exercise of due dilligence. *Duffey v. State* 23
9. After the jury have retired to deliberate, a witness' testimony may be read to them at their request in open court in presence of defendant and his attorney. *Duffey v. State* 23
10. Where accused consented to his attorney leaving courtroom before jury returned verdict, attorney's absence when testimony of witness was read to jury *held* not prejudicial. *Duffey v. State* 23
11. Where intent to deceive is an essential element of a felony, existence thereof is a question for the jury. *Foreman v. State* 74
12. An argumentative instruction singling out the state's evidence on the issue of felonious intent to deceive *held* erroneous. *Foreman v. State* 74
13. In a prosecution for intoxication, and driving a motor vehicle while intoxicated, photographs of wrecked automobile *held* properly excluded. *Rhodes v. State* 147
14. A verdict of guilty on conflicting evidence will not be set aside unless clearly wrong. *Lee v. State* 165
15. An appeal for conviction, based altogether upon the evidence, however fervent, is not an abuse of the privilege of advocacy. *Lee v. State* 165
16. It is the duty of the prosecuting attorney to comment on the conduct and credibility of accused's witnesses, based on evidence. *Lee v. State* 165
17. Remarks of county attorney made in answer to arguments of accused's counsel *held* not prejudicial. *Lee v. State* 165
18. Motion for new trial not part of transcript cannot be considered. *Lee v. State* 165
19. The supreme court will not consider evidence not contained in the bill of exceptions, although physically appended to such bill. *Lee v. State* 165
20. In prosecution for bank robbery, denial of motion of accused for new trial *held* not abuse of discretion. *Lee v. State* 165

21. Accused's right to counsel may be waived. *Smythe v. State* 267
22. Accused *held* to have waived right to counsel. *Smythe v. State* 267
23. Being put on trial under a defective information *held* not jeopardy. *MacDonald v. State* 332
24. Objection to prosecutor's argument should be made at the time, and a record must be made then. *Benton v. State* 485
25. Objection to argument made for first time on motion for new trial upon showing by affidavit of defendant's attorney *held* too late. *Benton v. State* 485
26. Accused may examine a state witness as to prejudice. *Flannigan v. State* 748
27. Accused is entitled to a fair and impartial trial. *Flannigan v. State* 748
28. Conviction may rest on the testimony of an accomplice considered with other evidence. *Barnes v. State* 826
29. Generally, refusing a cautionary instruction as to the testimony of a sheriff or his deputies is not error. *Barnes v. State* 826
30. Statute providing that abettor may be prosecuted as principal *held* not void for uncertainty. *Barnes v. State* 826

Damages.

1. Plaintiff may recover for medical and hospital expenses necessitated by injury, if he has paid or incurred liability therefor. *Yost v. Nelson* 33
2. In a personal injury action, evidence that plaintiff's brain was affected *held* admissible under the pleadings. *Yost v. Nelson* 33
3. Diminution of earning capacity is not necessarily measured by its diminution in the particular calling, or wages received at the time of injury. *Yost v. Nelson* 33
4. "Nominal damages" defined. *McGrew Machine Co. v. One Spring Alarm Clock Co* 93
5. Damages of $4,250 for personal injuries *held* not excessive. *Monasmith v. Cosden Oil Co* 327
6. Verdict of $10,000 for injuries resulting from an automobile accident *held* not excessive. *Smolinski v. Markel* 781
7. Verdict of $7,000 for injuries caused by being struck by automobile *held* not excessive. *Cotten v. Stolley* 855

Death.

1. In an action for death from kerosene explosion, evidence *held* insufficient to establish defendant's negligence. *Tegler v. Farmers Union Gas & Oil Co.* ... 336
2. Husband *held* not entitled to recover for medical services for wife. *Moran v. Moran* ... 379
3. An action for death of employee must be brought by the personal representative under Lord Campbell's act, and the compensation act merely relates to distribution of the proceeds. *Goeres v. Goeres* ... 720

Deeds.

1. Voluntary conveyance from parent to child creates no presumption of fraud or undue influence. *Broeker v. Day* ... 316
2. Where a parent, having other children, conveys his entire estate to child with whom he lives, the grantee must overcome the presumption of undue influence. *Broeker v. Day* ... 316
3. The burden of proving grantor's mental incapacity is on party alleging it. *Broeker v. Day* ... 316
4. Undue influence which will avoid a deed is an unlawful and fraudulent influence which controls the grantor's will. *Broeker v. Day* ... 316
5. Influence of affection of parent for child does not render voluntary deed to child voidable, unless influence has been used to control the will of the parent. *Broeker v. Day* ... 316
6. Undue influence cannot be established by merely showing opportunity for its exercise. *Broeker v. Day* ... 316
7. In suit among heirs to cancel deed, all parties *held* incompetent to testify to conversations with grantor, except where the opposing side had offered testimony relating thereto. *Broeker v. Day* ... 316
8. Wife of grantee *held* incompetent to testify to conversations between her husband and grantor. *Broeker v. Day* 316

Descent and Distribution.

1. A family agreement to settle an estate, if fairly made, should not be disturbed. *In re Estate of Raymond* ... 125
2. Where a vendor executed a contract for a deed, and died before executing the deed, the legal title vested in his heirs. *Bauermeister v. McDonald* ... 142
3. In adjudicating heirship, a child whose heart tones were heard in response to artificial respiration and pulsation of the umbilical cord was noticed after it was severed, *held* "alive" at birth. *In re Estate of Stuertz* ... 149

4. In adjudicating heirship, a child whose vital functions had not irrevocably ceased *held* "alive" at birth. *In re Estate of Stuertz* 149

Dismissal.

1. Where the answer specifically denies that plaintiff was a corporation, and no estoppel was pleaded and proved, plaintiff's failure to meet the issue authorized dismissal. *Retail Merchants Service v. Bauer & Co*..... 360
2. Where the court has announced at close of plaintiff's evidence that it will sustain a motion to dismiss, it is not an abuse of discretion to refuse to allow plaintiff to dismiss without prejudice. *Stungis v. Wavecrest Realty Co*..... 769

Divorce. SEE CONTEMPT, 4-10.

Decree awarding maintenance does not preclude suit for divorce based on matters occurring subsequent to decree for maintenance. *Mann v. Mann*..... 639

Drains.

1. A drainage district is liable for damage to crops caused by collecting surface water from another watershed, and failing to take care of such extra burden. *Compton v. Elkhorn Valley Drainage District*..... 299
2. In action against drainage district for damage to crops, plaintiff must establish amount of damage resulting from water diverted from another watershed. *Compton v. Elkhorn Valley Drainage District*..... 299
3. In action against drainage district for damage to crops, evidence *held* not to sustain judgment for plaintiff. *Compton v. Elkhorn Valley Drainage District*..... 299

Eminent Domain. SEE CONSTITUTIONAL LAW, 7-9.

1. Change of grade of highway to facilitate public travel will not give adjoining landowner right of action for additional damages. *Psota v. Sherman County*..... 154
2. The owner is entitled to the market value of land condemned as of date of appropriation, and special damages to the remainder. *Stuhr v. City of Grand Island*.... 285
3. Where land is condemned, the measure of damages to the remainder of the tract is the difference between the value thereof just before and just after the appropriation. *Stuhr v. City of Grand Island*..... 285
4. Where jury was waived on appeal to district court in condemnation proceedings, the party aggrieved by the

decision is not entitled to a trial *de novo* on appeal to the supreme court. *Missouri Valley Pipe Line Co. v. Neely* 293
5. The court's findings in a condemnation proceeding where jury was waived are equivalent to jury's verdict. *Missouri Valley Pipe Line Co. v. Neely* 293
6. Right of pipe line company to exercise power of eminent domain depends on compliance with statute. *Missouri Valley Pipe Line Co. v. Neely* 293
7. Award of $390 damages for right of way for pipe line sustained. *Missouri Valley Pipe Line Co. v. Neely* 293
8. Instruction that fair market value of real estate condemned was the cash consideration which one desiring to purchase would pay to the owner willing but not compelled to sell *held* not unfavorable to condemner. *Neldeberg v. City of Omaha* 511
9. The department of public works has authority to condemn land for highway purposes. *Newman v. Department of Public Works* 684
10. In condemnation of land for a highway, the measure of damages is the difference between the value immediately before and immediately after condemnation. *Newman v. Department of Public Works* 684

Equity.

1. One seeking affirmative relief in a court of equity must do equity. *Federal Trust Co. v. Ireland* 369
2. In absence of statutory prohibitions, equitable remedies should be so administered as to give complete relief. *State, ex rel. Sorensen, v. Nebraska State Bank* 449
3. District courts, in the exercise of equity jurisdiction, may administer trusts. *State, ex rel. Sorensen, v. Nebraska State Bank* 449

Estoppel.

1. Action of city council in allowing city clerk compensation inhibited by statute, *held* not to estop city to sue on clerk's official bond. *City of Scottsbluff v. Southern Surety Co.* 260
2. Where a party gives a reason for his conduct and decision in a controversy, he cannot, after litigation begun, change his ground. *Hamblin v. Equitable Life Assurance Society* 841

Exceptions, Bill of.

1. A clerk has no power to settle and allow a bill of ex-

ceptions, except as authorized by statute. *Shaw v. Diers Bros. & Co.* 119
2. Authority of clerk to settle and allow a bill of exceptions when the trial judge is absent from district must appear by affidavit. *Shaw v. Diers Bros. & Co.* 119
3. Bill of exceptions quashed because not presented within time. *Shaw v. Diers Bros. & Co.* 119

Execution.

Statute requiring a judgment creditor to exhaust the principal debtor's property on execution before levying on sureties' property applies generally to judgments on supersedeas bonds. *Sonneman v. Dolan* 830

Executors and Administrators.

1. "Legally competent," in statute providing for appointment of executor, defined. *In re Estate of Blochowitz* 110
2. The probate court may exercise judicial discretion in determining whether a person nominated as executor is legally competent. *In re Estate of Blochowitz* 110
3. A person nominated as executor, whose duties would require him to prosecute on behalf of adversary litigants a suit which he would defend as an individual, *held* not "legally competent." *In re Estate of Blochowitz* 110
4. Though executor named in will is otherwise qualified, the county court may refuse to appoint him on ground that he is incapable or unsuitable to discharge the trust. *In re Estate of Cachelin* 556
5. A creditor of an estate whose claim has not been adjudicated cannot obtain removal of the executor for failure to pay the claim within the time limited for payment of claims by the county court. *In re Estate of Fuller* 591
6. An executor cannot be required to pay a claim against decedent's estate before it has been allowed by the county court. *In re Estate of Fuller* 591
7. An executor is not removable for failure to pay claims within the time limited by court, when there are no funds with which to pay claims. *In re Estate of Fuller* .. 591

Evidence.

1. In a compensation case, cogent reasons that strengthen the opinion of an expert witness as to a scientific fact may determine the issue. *Flesch v. Phillips Petroleum Co.* 1
2. It will be presumed that public officers faithfully per-

formed official duties. *City of Scottsbluff v. Southern Surety Co.* 260
3. A grantor who has capacity to understand what he is doing, the nature and extent of his property, and to decide intelligently whether he desires to make conveyance, is capable of executing a deed. *Broeker v. Day*.... 316
4. It is presumed that an official oil inspector did his duty, and that kerosene inspected meets official test. *Tegler v. Farmers Union Gas & Oil Co.*..... 336
5. Cogent reasons and circumstances which strengthen expert opinion as to a scientific fact in issue may determine the issue. *Montgomery v. Milldale Farm & Live Stock Improvement Co.* 347
6. No proof is required as to the existence of a fact admitted by the pleadings. *Faulhaber v. Griswold*..... 357
7. Husband *held* competent to testify as to value of wife's services. *Moran v. Moran*..... 379
8. In an action for malpractice against an osteopathic physician, testimony of a physician of another school of practice *held* properly received, where the practice was the same. *Bellheimer v. Rerucha*..... 399
9. In an action for personal injuries, where the injuries are permanent, mortality tables are admissible. *Lyons v. Joseph* 442
10. Mortality tables *held* admissible on question of probable duration of life. *Litwiller v. Graff*..... 460
11. Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference. *Lebs v. Mutual Benefit Health & Accident Ass'n*..... 491
12. Legislative journals are the best evidence as to whether an act has been properly passed, and journal entries are conclusive as to facts therein disclosed. *Day v. Walker* 500
13. Party alleging death by suicide must prove it; the mere fact of death in an unknown manner creating no legal presumption of suicide. *De Bruler v. City of Bayard*.... 566
14. Presumption against suicide does not control where there is substantial proof from which rational consideration may reach the conclusion of suicide. *De Bruler v. City of Bayard*..... 566
15. Parol evidence *held* inadmissible to contradict written records showing passage of city ordinance. *Herzoff v. City of Omaha* 785
16. Defense that note was given for accommodation of plain-

tiff and without consideration may be established by parol evidence. *Luikart v. Meierjurgen* 816
17. Plaintiff's failure to call a witness does not raise presumption that his testimony would be adverse to plaintiff, in absence of showing that the witness is available, or that he is not as accessible to defendant as to plaintiff. *Large v. Johnson* 821
18. Secondary evidence received without objection is competent proof of fact in issue, though primary evidence is available. *Cotten v. Stolley* 855

False Pretenses.

1. An information for obtaining money by false pretenses need not allege specifically that complainant suffered actual loss. *MacDonald v. State* 332
2. A charge, in an information for obtaining money by false pretenses, that accused received a sum of money is equivalent to a charge that he obtained money. *MacDonald v. State* 332

Food.

Making or selling bread *held* a business subject to police regulation. *Petersen Baking Co. v. Bryan* 464

Forgery.

In prosecution for forgery, evidence must show that defendant signed the name of another to instrument without authority. *Lunsford v. State* 529

Fraud.

The purchaser is entitled to rely on representations on the face of the bond as to the security, unless he has actual knowledge to the contrary. *Ashby v. Peters* 131

Fraudulent Conveyances.

1. Conveyance to wife to secure a preexisting *bona fide* debt is not fraudulent as to husband's other creditors, if made without fraudulent purpose. *Winslow State Bank v. Westlin* 224
2. Evidence *held* to establish that chattel mortgage was given in good faith by defendant to his wife as security for money advanced. *Winslow State Bank v. Westlin* 224
3. A deed by father to son is presumptively fraudulent as to existing creditor. *Lincoln Trust Co. v. Sweeney* 686
4. In suit to cancel deed from parent to son, the presumption is that an unmarried son, while living with parents,

is performing duties as member of family without parents' liability for compensation. *Lincoln Trust Co. v. Sweeney* 686
5. A debtor should pay existing obligations before conveying property for future services or support. *Lincoln Trust Co. v. Sweeney* 686
6. Judgment creditor may have fraudulent deed set aside, though debtor has other land of sufficient value to pay debt. *Lincoln Trust Co. v. Sweeney* 686
7. Generally, equity will not aid a fraudulent grantor to recover from his grantee property or its proceeds transferred in fraud of creditors. *Goodman-Buckley Trust Co. v. Poulos* 697
8. If grantor suing to recover land fraudulently conveyed can make out his case without disclosing fraud, grantee cannot defeat recovery by showing fraud in which he participated. *Goodman-Buckley Trust Co. v. Poulos* 697
9. Where an administrator suing to recover land could not establish his case without proving fraudulent conveyance to defraud creditors, he could not recover; there being no unpaid creditors of the estate. *Goodman-Buckley Trust Co. v. Poulos* 697

Garnishment.

A garnishee is governed as to garnisheed funds by the court's orders. *Savard v. Physicians Casualty Co* 627

Homicide. SEE AUTOMOBILES, 6, 17-23, 25, 26.

Husband and Wife.

1. In absence of ground for divorce or cause for separation, public policy requires a wife to continue the marriage relation. *Yost v. Yost* 608
2. A wife who leaves her husband for just cause may exact pecuniary consideration for resuming the marriage relation. *Yost v. Yost* 608
3. A wife's performance of exceptional duties beyond those imposed by the marriage relation may be sufficient consideration for a pecuniary promise of the husband. *Yost v. Yost* 608
4. A wife who leaves her husband without just cause cannot make resumption of the marriage relation a valid consideration for husband's execution of note to her. *Yost v. Yost* 608
5. Husband's right to continuation of marriage relation

is presumed, in absence of evidence to the contrary. *Yost v. Yost* 608
6. An antenuptial agreement *held* not a valid consideration for a note executed to induce a faithless wife to resume the marriage relation. *Yost v. Yost* 608
7. In suit for alienation of affections, evidence *held* insufficient to sustain decree of plaintiff. *Weber v. Weber* 878

Indictment and Information.
1. Information for cattle stealing, alleging the offense substantially in the language of the statute, *held* sufficient. *Shaffer v. State* 7
2. Complaint charging transportation of liquor for sale charges transporting liquor with the minuteness necessary to sustain a conviction of the lesser crime. *Hunter v. State* 27
3. Exact words of statute need not be used in an information. *MacDonald v. State* 332
4. It is better pleading in drawing an information to use words of the statute. *MacDonald v. State* 332

Insane Persons.
1. Finding of incapacity authorizing appointment of a guardian will not ordinarily be disturbed. *Hall v. Hall* 798
2. Where a person has insufficient mental capacity to protect his property and is guided by others, a guardian should be appointed. *Hall v. Hall* 798

Insurance.
1. Where evidence disclosed insured had hernia before accident, *held* recovery could not be had under policy precluding recovery for disability caused by hernia. *Masters v. Metropolitan Casualty Ins. Co* 242
2. In suit on official bond, surety is liable for interest from date of breach. *City of Scottsbluff v. Southern Surety Co* 260
3. Reasonable attorney's fees may be taxed as costs in favor of obligee recovering on an official bond. *City of Scottsbluff v. Southern Surety Co* 260
4. Information acquired by an insurance agent *held* imputed to insurer. *Rubinson v. North American Accident Ins. Co* 269
5. Retention of benefits obtained by agent *held* to constitute ratification by insurer of agent's acts. *Rubinson v. North American Accident Ins. Co* 269

6. Reformation of accident policy to conform to understanding of agent and insured allowed. *Rubinson v. North American Accident Ins. Co.* 269
7. Where insured was injured during the life of an accident policy, subsequent nonpayment of premiums *held* not to relieve insurer of liability. *Wilson v. National Life & Accident Ins. Co.* 470
8. In an action for death benefits, testimony of witness, who could not read, as to contents of note *held* insufficient to sustain finding that deceased committed suicide. *Lebs v. Mutual Benefit Health & Accident Ass'n* 491
9. Provisions in a fraternal insurance policy will be given a reasonable construction, and with a view to avoiding a forfeiture. *Brinton v. Grand Lodge, A. O. U. W.* 680
10. Evidence *held* to sustain finding of total permanent disability within terms of contract. *Brinton v. Grand Lodge, A. O. U. W.* 680
11. The rule that the same person may not act for insurer and insured does not apply unless the dual agency requires incompatible duties. *Fadden v. Sun Ins. Office* 712
12. In a suit to reform an insurance policy for mistake, evidence of intention is admissible. *Fadden v. Sun Ins. Office* 712
13. Mistake in identity of property is not ground for reformation of insurance policy. *Fadden v. Sun Ins. Office* 712
14. Generally, when there is no mistake as to identity of property insured, equity will grant reformation. *Fadden v. Sun Ins. Office* 712
15. Additional insurance procured without knowledge of insured does not constitute violation of clause making other insurance ground for forfeiture. *Noel v. National Union Fire Ins. Co.* 734
16. Generally, a contract of insurance is governed by the laws of the state where made. *Noel v. National Union Fire Ins. Co.* 734
17. Insurer's retention of past-due premiums, with knowledge of the facts, without objection until after death of insured, *held* waiver of forfeiture. *Peterson v. Cosmopolitan Old Line Life Ins. Co.* 792
18. In cases of doubt, an insurance contract will be liberally construed in favor of insured. *Hamblin v. Equitable Life Assurance Society* 841
19. "Total disability," within policy in suit, *held* to exist when injured party is unable to perform substantially

duties of a given occupation. *Hamblin v. Equitable Life Assurance Society* 841
20. Evidence *held* to sustain finding of total disability. *Hamblin v. Equitable Life Assurance Society* 841
21. Assistant cashier of insurance company *held* agent of company. *Barrett v. Northwestern Mutual Life Ins. Co.* 864
22. Insurer's denial of liability or acts inducing insured to omit to file required proof operate as a waiver thereof. *Barrett v. Northwestern Mutual Life Ins. Co.* 864
23. A policyholder deceived by insurer's agent as to degree of physical disability necessary to invoke total disability rider waiving premiums may recover premiums paid during disability. *Barrett v. Northwestern Mutual Life Ins. Co.* 864

Judgment.
1. General verdict in action based on several causes of action and counterclaims *held* sufficient. *McGrew Machine Co. v. One Spring Alarm Clock Co.* 93
2. Where vendor died before executing deed to land under contract, the lien of a judgment against an heir *held* to attach to the share of the unpaid purchase money on the share of the contract devised to the heir. *Lauermeister v. McDonald* 142
3. District courts may vacate or modify judgments during the term. *Lacey v. Citizens Lumber & Supply Co.* 813
4. Generally, a default judgment should be set aside on application promptly made at the same term, together with tender of an answer disclosing a meritorious defense, but on reasonable terms. *Lacey v. Citizens Lumber & Supply Co.* 813
5. A question litigated between the same parties is *res judicata*. *Moffitt v. Reed* 410
6. The doctrine of *res judicata* is that a question once determined on the merits is forever settled, as to the litigants and those in privity with them. *State, ex rel. Sorensen, v. Nemaha County Bank* 883
7. Decree adjudging school district funds in insolvent bank a general deposit, and not trust funds, *held* conclusive on school treasurer, who brought the suit, and also on the school district. *State, ex rel. Sorensen, v. Nemaha County Bank* 883

Judicial Sales.
1. A judicial sale of realty will not be set aside for in-

adequacy of price, unless it is so gross as to show fraud or mistake. *Lougee v. Matters* 223
2. Whether bidding has been deterred or discouraged at a judicial sale, ordinarily, is a question of fact. *Travelers Ins. Co. v. Smith* 230
3. In absence of evidence, chilling of bidding at judicial sale will not be presumed because successful bidder added the words "plus costs" to his bid. *Travelers Ins. Co. v. Smith* 230

Jury.
1. Failure to provide for jury trial in act authorizing city to condemn public utility property *held* not to render act unconstitutional. *City of Mitchell v. Western Public Service Co* 248
2. Failure to interrogate a juror on his *voir dire* as to his competency and to challenge for that cause constitutes a waiver of his incompetency. *Flannigan v. State* 748

Justices of the Peace.
1. Statute providing for change of venue from justice of the peace *held* inapplicable to county court. *Johnson v. Mays* 407
2. General appearance of defendant *held* to confer jurisdiction on justice of the peace of case improperly transferred from county court. *Johnson v. Mays* 407

Landlord and Tenant.
1. Suit by son for specific performance of contract to convey land after mother's death *held* consistent with his tenancy during her lifetime. *Bergfield v. Bergfield* 67
2. Agreement between lessee and third party *held* to constitute third party assignee of lease and liable for the rent. *Kimball v. Hardy* 80

Libel and Slander.
1. In an action for slander, an instruction as to proof of words charged *held* not error where there was no material difference between pleading and proof. *Hall v. Vakiner* 741
2. In an action for slander, the amount of damages recoverable is largely in the jury's discretion. *Hall v. Vakiner* 741
3. Generally, unless a verdict for slander is clearly wrong,

it will not be set aside as excessive or reduced by remittitur. *Hall v. Vakiner* 741
4. Verdict of $1,750 *held* not excessive. *Hall v. Vakiner* 741

Licenses.
1. In fixing a license fee as an incident of statutory regulation, the legislature has greater latitude than in authorizing an inspection fee. *Nash-Finch Co. v. Beal* 835
2. A license fee for the privilege of trafficking in tobacco is not a tax on property. *Nash-Finch Co. v. Beal* 835
3. Failure to prosecute violators of statute regulating traffic in tobacco does not render void provision for a reasonable license fee. *Nash-Finch Co. v. Beal* 835
4. A statute requiring a dealer in tobacco to pay a license fee is not invalid because methods of enforcement are not prescribed therein. *Nash-Finch Co. v Beal* 835
5. The legislature has considerable latitude in fixing a license fee by a regulatory statute enacted under police power and courts will not declare such legislation void unless it is shown to be unreasonable. *Nash-Finch Co. v. Beal* 835
6. In testing the validity of a regulatory statute, the enrichment of school funds by license fees and payment of expenses of licenses and regulations out of tax money are not generally material factors. *Nash-Finch Co. v. Beal* 835
7. Statute regulating traffic in tobacco *held* to require each dealer to procure license for each place of business, whether wholesale or retail. *Nash-Finch Co. v. Beal* 835
8. Statute regulating traffic in tobacco *held* reasonable as to classification. *Nash-Finch Co. v. Beal* 835

Life Estates.
Conveyance by life tenant does not enable remaindermen to declare a forfeiture. *Moffitt v. Reed* 410

Limitation of Actions
1. In determining whether liability on note is barred by payment, actual time of payment controls. *In re Estate of Zehner* 426
2. Parol evidence is admissible to prove that makers of note authorized payments thereon by a corporation, of which they were stockholders and directors. *Stroud v. Payne* 612

3. Interest payments on note made by a third party under oral authority from makers *held* valid. *Stroud v. Payne* 612
4. Parol evidence is admissible to prove a contemporaneous oral agreement by makers of note that a third party should make interest payments. *Stroud v. Payne* 612
5. Voluntary payment on note by maker, or one by him authorized, arrests running of statute of limitations. *Stroud v. Payne* 612

Mandamus.

1. Decree requiring drainage district to levy special assessment to pay damage from flooding *held* not sustained. *State, ex rel. Compton, v. Elkhorn Valley Drainage District* 305
2. The writ of mandamus cannot control judicial discretion. *State, ex rel. Cuming County Farm Bureau, v. Tighe* 578
3. Mandamus does not lie where there is adequate remedy at law. *State, ex rel. Cuming County Farm Bureau, v. Tighe* 578
4. In passing upon petition for appropriation for farm bureau, county board's determination is quasi judicial, not subject to collateral attack by mandamus; those aggrieved having adequate remedy at law. *State, ex rel. Cuming County Farm Bureau, v. Tighe* 578

Master and Servant.

1. A workman who because of injury is unable to perform any substantial amount of labor is totally disabled within the workmen's compensation law. *Flesch v. Phillips Petroleum Co* 1
2. Evidence *held* to establish that total disability resulted from accidental injury. *Flesch v. Phillips Petroleum Co.* 1
3. Notice of compensation claim given within six months from time employee acquires knowledge of a compensable disability *held* sufficient. *Flesch v. Phillips Petroleum Co* 1
4. Claimant, under the workmen's compensation law, must prove employment and accidental injury arising out of and in course of employment. *Pensick v. Boehm* 28
5. An accident causing compensable injury must be one arising out of and in course of employment. *Pensick v. Boehm* 28

6. Action for compensation *held* maintainable in Nebraska. *Stone v. Thomson Co.* ... 181
7. Employee *held* not precluded from recovering additional compensation where his injuries were latent. *Stone v. Thomson Co.* ... 181
8. Whether one is an employee or an independent contractor must be determined from the facts of the particular case. *Standish v. Larsen-Merryweather Co.* 197
9. Owner of truck, engaged by a contractor furnishing gravel for county highway, *held* to be an employee. *Standish v. Larsen-Merryweather Co.* ... 197
10. A county letting contract for graveling a highway, without requiring contractor to insure employees, *held* jointly liable with contractor for injury to latter's employee. *Standish v. Larsen-Merryweather Co.* ... 197
11. An injury, to be compensable, must be reasonably incident to the employment. *Bergantzel v. Union Transfer Co.* ... 200
12. Injury to employee *held* not to arise out of, or in the course of, his employment. *Bergantzel v. Union Transfer Co.* ... 200
13. Proceedings for compensation *held* maintainable under the Nebraska compensation law. *Esau v. Smith Bros.* 217
14. Failure to hold Kansas compensation law applicable, under the facts, *held* not to violate the full faith and credit clause of the federal Constitution. *Esau v. Smith Bros.* ... 217
15. Mother *held* to be a partial dependent of fatally injured employee. *Esau v. Smith Bros.* ... 217
16. Death resulting from heat prostration *held* a compensable injury arising out of employment. *Herbert v. State* ... 312
17. "Heat prostration" is a compensable accident, if the workman is subjected to a greater hazard from heat than that to which the public generally is subject. *Herbert v. State* ... 312
18. Evidence *held* not to sustain finding that employee sustained a heat stroke arising out of his employment. *Uribe v. Woods Bros. Construction Co.* ... 243
19. The workmen's compensation law is liberally construed to give effect to its purposes. *Montgomery v. Milldale Farm & Live Stock Improvement Co.* ... 347
20. Proceeding to recover compensation for a latent progressive permanent injury *held* not barred, where claim was made within six months from discovering nature of in-

jury. *Montgomery v. Milldale Farm & Live Stock Improvement Co.* 347
21. Compensation will not be denied on the ground that employment is casual and not in the usual course of the employer's trade or business, unless both conditions exist. *Sentor v. City of Lincoln* 403
22. Performance of a legal duty is part of business of city, within the workmen's compensation law. *Sentor v. City of Lincoln* 403
23. Injury received while employee is engaged in work incidental to his employment arises out of and in the course of his employment. *Sentor v. City of Lincoln* 403
24. Injury to city employee after reporting for work *held* to arise out of employment. *Sentor v. City of Lincoln* 403
25. One employed to drive an automobile from a distant state *held* an "independent contractor," not within the workmen's compensation law. *State Automobile Ins. Ass'n v. Pickett* 481
26. In fixing compensation, evidence *held* to show employee's wage was a stated hourly wage for time he worked. *Fredrickson Milling Co. v. Faser* 531
27. Compensation claimant has the burden to prove that the employee met death by an accident arising in the course of employment. *De Bruler v. City of Bayard* 566
28. Within the statute barring compensation claims if not made within six months, a latent accidental injury occurs when its true nature is discovered. *Clary v. R. S. Proudfit Co.* 582
29. Timely notice to or knowledge of a foreman, required to report accidents to his employer, that a workman has been accidentally injured is sufficient notice to the employer. *Clary v. R. S. Proudfit Co* 582
30. To recover under the federal statute, the injured employee must establish that both he and the carrier were engaged in interstate transportation at time of injury. *McDermott v. Chicago & N. W. R. Co* 727
31. Applicant for compensation must prove that injury was caused by an accident arising out of and in course of employment. *Kuhtnick v. Carey* 762
32. Compensation award must be based on sufficient evidence showing that claimant incurred disability arising out of and in course of employment. *Kuhtnick v. Carey* 762
33. Action for additional compensation *held* barred. *Kurtz v. Sunderland Bros. Co* 776
34. Evidence *held* not to establish contract of employment. *Vandenburg v. Center Township* 790

35. Whether a farm hand was contributorily negligent in not seeing that hold-back straps were not attached to neckyoke *held* question for jury. *Large v. Johnson*..... 821
36. An employee assumes only risks arising from appliances and materials used by him, or from the manner in which the work is conducted, when the risks are known or are apparent to persons of his experience and understanding. *Large v. Johnson*..... 821
37. An employee does not assume risk of dangers due to the employer's negligence. *Large v. Johnson*..... 821

Mechanics' Liens.

Trade fixtures permanently affixed to realty *held* subject to mechanics' liens, unaffected by conditional sale contract. *Geer Co. v. Wolcott*..... 306

Mortgages.

1. Evidence *held* to establish that purported assignment of mortgage was not signed by assignor. *Wright v. Wilds*..... 11
2. A "subsequent incumbrancer," within the statute limiting the period of constructive notice, is one who acquires his incumbrance after the statute has run against the prior recorded incumbrance. *O'Connor v. Power*..... 113
3. Subsequent mortgage *held* a prior lien to an earlier mortgage, because of failure of holder of earlier mortgage to record extension of his mortgage within a year, as required by ch. 64, Laws 1925. *O'Connor v. Power*.... 113
4. Payment of interest by mortgagee to prior lienors *held* not voluntary in sense that it discharged liability of debtor. *Allyn v. Dreher*..... 342
5. Funds in hands of receiver of mortgagor are subject to order of court. *Wells v. Farmers State Bank of Overton* 386
6. Error in computing interest on debt is not ground for setting aside foreclosure sale, where a stay was taken, and error was not prejudicial. *Federal Land Bank v. Arthur*..... 496
7. Petition to set aside foreclosure decree after term denied. *Federal Land Bank v. Arthur*..... 496
8. Mere inadequacy of price will not preclude confirmation of foreclosure sale, unless the inadequacy constitutes evidence of fraud. *Nelsen v. Doll*..... 523
9. An order confirming foreclosure sale will not be disturbed, unless subsequent sale would realize a greater price. *Nelsen v. Doll*..... 523

10. While the mortgagee may generally assert the invalidity of a prior mortgage valid between the parties, yet, in absence of intervening equities, he is estopped to question its validity when his mortgage recites that it is given subject to the prior mortgage. *O'Connor v. Power* 594
11. Inadequacy of price will prevent confirmation of foreclosure sale, if sufficient to shock conscience of court or to amount to fraud. *Crews v. Alberts* 671
12. The trial court must determine, by unrestricted means, whether foreclosure sale price is adequate or whether more could be realized at a subsequent sale. *Crews v. Alberts* 671
13. Time for filing request for stay of order of foreclosure sale cannot be extended beyond 20 days from rendition of decree. *Columbus Land, Loan & Bldg. Ass'n v. Phillips* 672
14. Mere inadequacy of price will not preclude confirmation of a foreclosure sale, unless the inadequacy is so great as to evidence fraud. *Wallace v. Clements* 691
15. Where execution and delivery of mortgage are admitted by pleadings, holder's right of recovery is presumed. *Western Securities Co. v. Naughton* 702
16. Assignment is best evidence of ownership of assigned mortgage. *Western Securities Co. v. Naughton* 702
17. Plaintiff's testimony that plaintiff is owner of notes and mortgages *held* sufficient proof of plaintiff's ownership. *Western Securities Co. v. Naughton* 702

Municipal Corporations.

1. A city may employ special counsel when the city attorney is absent, ill, or disqualified. *City of Scottsbluff v. Southern Surety Co.* 260
2. Where a city clerk issues to himself extra compensation inhibited by statute, the surety on his official bond is liable. *City of Scottsbluff v. Southern Surety Co* 260
3. A property owner who neglects to pursue statutory remedy for review of special assessment cannot, in a collateral proceeding, attack the validity of the assessment, except for fraud, a fundamental defect, or want of jurisdiction. *Wead v. City of Omaha* 474
4. Taxpayer watching progress of a street improvement cannot enjoin payment of warrants issued in payment for the improvement. *Tidd v. Kirkham* 605

Negligence.

1. Driver and person riding in an automobile *held* not en-

gaged in a joint enterprise. *Yost v. Nelson* 33
Mick v. Oberle 433
2. The duty which a merchant owes customers with respect to safety of premises applies particularly to that part used for business. *Collins v. Sprague's Benson Pharmacy* 210
3. Duty of owner of store to licensee stated. *Collins v. Sprague's Benson Pharmacy* 210
4. Leaving an unlighted vehicle on highway, on dark night, without warning, constitutes gross negligence, within the comparative negligence statute. *Monasmith v. Cosden Oil Co.* 327
5. Whether a motorist was guilty of more than slight negligence in failing to see an automobile, parked without lights, in time to avoid collision *held* question for jury. *Monasmith v. Cosden Oil Co.* 327
6. Questions of negligence and contributory negligence are for the jury. *Sgroi v. Yellow Cab & Baggage Co.* 525
7. Under comparative negligence statute, plaintiff's recovery should be reduced in proportion that his negligence contributed to the injury. *Sgroi v. Yellow Cab & Baggage Co.* 525
8. Existence of gross negligence must be determined from circumstances in each case. *Morris v. Erskine* 754
9. Gross negligence is question for jury. *Morris v. Erskine* 754
10. The owner must maintain a public bathing resort in a reasonably safe condition. *Stungis v. Wavecrest Realty Co.* 769
11. Where there is no specific allegation of contributory negligence, the character of the plea will be determined by its effect. *Large v. Johnson* 821
12. Contributory negligence is an affirmative defense which pleader must prove. *Cotten v. Stolley* 855

New Trial.

1. Permitting husband to testify against wife in a civil suit *held* not ground for new trial, in view of the testimony. *Yost v. Yost* 608
2. Statement by counsel, though not properly reflecting the evidence, *held* not to require a new trial, where the court admonished the jury. *Yost v. Yost* 608

Parties.

1. Error in beginning action in name of person not appointed administratrix may be corrected by an amended petition filed after appointment. *Bellheimer v. Rerucha* 399

2. Application to have one who has no financial interest in litigation made a party to the suit should be denied. *Hamblin v. Equitable Life Assurance Society* 841

Perpetuities.

The rule against perpetuities applies only to estates which may not become vested within a life or lives in being and twenty-one years, together with the period of gestation. *Gillan v. Wilson* 893

Physicians and Surgeons.

In action for malpractice, evidence *held* to sustain verdict for plaintiff. *Bellheimer v. Rerucha* 399

Pleading.

1. Laches and estoppel must be pleaded to be available as a defense. *Scheschy v. Binkley* 87
2. Where plaintiff filed petition for wrongful death before appointment as administratrix, and, after appointment and before answer, filed an amended petition to which defendant answered, practice *held* proper. *Bellheimer v. Rerucha* 399
3. In a suit for rescission of a contract of exchange of property and for damages, amendment to petition seeking recovery of damages only *held* not to state a new cause of action. *Richards v. Goldstein* 438
4. A general demurrer to an answer admits truth of all facts well pleaded. *Carter v. Carrell* 542
5. A petition showing right to some relief *held* good as against a demurrer *ore tenus*. *Paup v. American Telephone & Telegraph Co.* 550
6. A petition may be verified by an attorney, if plaintiff is absent from the county. *Clary v. R. S. Proudfit Co.* 582

Principal and Agent.

When the facts are undisputed, question whether agent had requisite authority to bind principal is a question of law. *Fadden v. Sun Ins. Office* 712

Property.

A lease for more than one year is not real estate save for purposes of conveyancing. *Ashby v. Peters* 131

Quo Warranto.

1. Statutory requirement that town officers shall subscribe to an oath and file a certificate thereof *held* mandatory

and applicable to road overseer. *State, ex rel. Luckey, v. Weber* 84
2. Neglect of road overseer to subscribe to a statutory oath may be deemed as refusal to serve. *State, ex rel. Luckey, v. Weber* 84

Receivers.

A receiver is not personally liable for acts done in pursuance of order of court. *Wells v. Farmers State Bank of Overton* 386

Release.

1. Release of a claim may be avoided if executed in reliance on misrepresentations as to the nature or extent of injuries, amounting to fraud. *Baumann v. Hutchinson*.. 188
2. Where a releasee communicates to releasor the opinion of releasor's physician, he must repeat the opinion with entire correctness. *Baumann v. Hutchinson* 188
3. False representations *held* ground for rescission of a release. *Baumann v. Hutchinson* 188
4. When the amount received in settlement is grossly inadequate to compensate for injuries, that fact may be considered as tending to show fraud in procuring a release. *Baumann v. Hutchinson* 188

Schools and School Districts.

1. Demand upon officers is necessary before taxpayer can maintain suit for recovery of funds for school district. *Scheschy v. Binkley* 87
2. School district is liable for reasonable value of materials and supplies retained under unenforceable contract with school officers. *Scheschy v. Binkley* 87
3. Taxpayer must act with reasonable promptness to prevent school district's unlawful expenditure. *Scheschy v. Binkley* 87
4. A "practicable traveled road," within statute providing allowance for transportation of school children, is one maintained by the public, in contradistinction to a private road. *Peterson v. School District* 352
5. School district warrants are not negotiable, and purchaser takes them subject to defenses. *Lincoln Nat. Bank & Trust Co. v. School District* 538
6. Where a bank purchases warrants of school district through its managing officer, who, as treasurer of school district, wrongfully registers them for payment, the

school district is entitled to offset its claim against the bank. *Lincoln Nat. Bank & Trust Co. v. School District* 538
7. Where school district funds have been deposited in a bank, the officer making the deposit, or his successor in office, in his official capacity, is a proper party to sue for their recovery. *State, ex rel. Sorensen, v. Nemaha County Bank* 883
8. Where school district treasurer, who was bookkeeper for trust company, deposited school funds to company's credit in a bank, trust company *held* not liable for subsequent misappropriation of the funds in absence of knowledge of the misappropriation. *American Surety Co. v. First Trust Co.* 874
9. Where school district treasurer, who was bookkeeper for trust company, made entries on its records showing deposits of school funds to its credit in a bank and withdrawal of part thereof, inference that he acted for trust company with its knowledge may be overcome by direct evidence showing want of authority, and that neither the trust company nor any officer thereof knew of the transactions. *American Surety Co. v. First Trust Co.*..... 874

Set-Off and Counterclaim.

What constitutes a set-off, stated. *Continental Nat. Bank v. Wilkinson* 675

Statutes.

1. A statute without an emergency clause does not become operative until three calendar months after adjournment of the legislature which enacted it. *Bainter v. Appel* 40
2. A provision expressing legislative intent as to separability of various parts of a statute is merely an aid to judicial interpretation. *Hubbell Bank v. Bryan*..... 51
3. The cardinal rule in construction of statutes is to ascertain the legislative intent. *Hubbell Bank v. Bryan*..... 51
4. Title of act relating to time of commencing civil actions for recovery of title or possession of real estate *held* sufficient. *O'Connor v. Power*..... 113
5. Statute authorizing city to condemn public utility property *held* to contain only one subject clearly expressed in its title. *City of Mitchell v. Western Public Service Co.* 248
6. In construing a statute, the court will endeavor to ascertain the legislative intent. *Peterson v. School District*.... 352
7. In voting, the legislature may use any system which

gives publicity to the member's vote and provides for recording it in the journal. *Day v. Walker* 500
8. The purpose of the Constitution requiring that legislators' votes shall be *viva voce* is to give publicity to voting. *Day v. Walker* 500
9. Electric roll call device *held* to comply with constitutional requirement as to voting *viva voce*. *Day v. Walker* 500
10. In construing a statute, the court should ascertain the legislative intent, and, if lawful, give effect thereto. *Smith v. State* 587
11. Language of penal statute against operating motor vehicles "while under the influence of intoxicating liquor," *held* not broader than language of title, "while in a state of intoxication." *Smith v. State* 587

Subrogation.

1. Junior mortgagee paying a superior lien to protect his own lien may be subrogated therefor to rights of prior incumbrancer. *Allyn v. Dreher* 342
2. Junior mortgagee paying interest note to senior mortgagee denied subrogation. *Allyn v. Dreher* 342

Taxation.

In foreclosure of a tax lien, the burden of proof is upon plaintiff throughout the case. *Moffitt v. Reed* 410

Tender.

Acts insufficient to make a complete tender may protect rights under a contract, where a proper tender is impossible. *Cox v. Cox* 706

Torts.

1. Generally, no cause of action in tort can arise from breach of contractual duty, except as between parties to contract. *Tegler v. Farmers Union Gas & Oil Co.* 336
2. Right of action for tort may arise where a manufacturer or dealer puts an article on the market in a defective condition, which makes the article imminently dangerous to users. *Tegler v. Farmers Union Gas & Oil Co.* 336
3. A tort-feasor is liable for all consequences which naturally flow from his unlawful or negligent acts, although those results are brought about by the intervening agency of others. *Paup v. American Telephone & Telegraph Co.* 550

Trial. SEE APPEAL. CRIMINAL LAW.
1. Controverted issues of fact in a law action are for the jury. *Yost v. Nelson* 33
2. Where there is any testimony which will sustain a finding for the party having burden of proof, the supreme court cannot disregard it and direct a verdict against him. *Bainter v. Appel* 40
3. Exclusion of testimony does not constitute error, where no offer of proof was made and no showing that questions were material. *Bergfield v. Bergfield* 67
4. Court is not required to furnish forms of verdict to jury. *McGrew Machine Co. v. One Spring Alarm Clock Co* 93
5. Objections to form of verdict should be made before the jury is discharged. *McGrew Machine Co. v. One Spring Alarm Clock Co.* 93
6. A verdict in plaintiff's favor showing allowance of part of defendant's claim *held* sufficient. *McGrew Machine Co. v. One Spring Alarm Clock Co* 93
7. The court should not direct a verdict, unless the evidence is so clear upon every point that reasonable minds could reach only one conclusion. *Ashby v. Peters* 131
8. An instruction stating facts as pleaded, but omitting therefrom the words "it is alleged," is erroneous. *Wilch v. Western Asphalt Paving Corporation* 177
9. Error in an instruction consisting of an affirmative statement of fact which tends to confuse the jury is not cured by additional instructions. *Wilch v. Western Asphalt Paving Corporation* 177
10. Where the court fully instructed the jury on defendant's theory of the case, *held* not error to refuse additional instructions. *Baumann v. Hutchinson* 188
11. The court need not state the law of the case in a single instruction. *Baumann v. Hutchinson* 188
12. Instructions are sufficient if when considered as a whole they properly state the law. *Clausen v. Johnson* 280
13. Refusing requested instruction in substance similar to one given *held* not error. *Monasmith v. Cosden Oil Co* 327
14. Failure to define the words "gross" and "slight," as used in instruction on comparative negligence, *held* not error; the words being of common use. *Monasmith v. Cosden Oil Co.* 327
15. Where a witness estimates distance, and testifies to facts showing estimate is inaccurate, giving an instruction assuming estimated distance is correct is improper. *Monasmith v. Cosden Oil Co.* 327
16. Questions to jurors on *voir dire* and to defendant on

cross-examination, as to insurance, *held* permissible. *Bellheimer v. Rerucha* 399
17. Instructions should not submit to the jury elements of damages not embraced within the evidence adduced. *Mick v. Oberle* 433
18. In an action for personal injuries, it is error to submit the question of damages for loss of time, when there is no evidence of value of time lost. *Mick v. Oberle*..... 433
19. Where the evidence is insufficient to support a verdict for plaintiff, defendant's motion for directed verdict should be sustained. *Lebs v. Mutual Benefit Health & Accident Ass'n*..... 491
20. Instructions should submit only issues of fact supported by evidence. *Lebs v. Mutual Benefit Health & Accident Ass'n* 491
21. Trial judge may correct error of jury in computing interest. *Burtis v. Chicago, B. & Q. R. Co*..... 534
22. The jury are sole judges of credibility of witnesses and effect to be given testimony. *Interstate Airlines v. Arnold* 546
23. The trial court should not withdraw a case from the jury where disputed questions of fact are involved from which different minds might draw different conclusions. *Interstate Airlines v. Arnold* 546
24. Credibility of witnesses and weight of testimony are for the jury. *Newman v. Department of Public Works*..... 684
25. In action for employee's death, insurer's interest may be shown on cross-examination and, also, whether the attorneys were employed by insurer. *Goeres v. Goeres*..... 720
26. After plaintiff rests and defendant moves for a nonsuit, the court may permit a witness to be recalled and to testify that a slander was uttered in English as pleaded. *Hall v. Vakiner*..... 741
27. Giving an instruction on contributory negligence which the parties assumed was in issue is not reversible error. *Large v. Johnson*..... 821
28. Refusal to permit jury to view place of accident *held* not error, in absence of abuse of discretion. *Large v. Johnson* 821

Trusts.

1. Where a messenger, entrusted with a school warrant, cashed it at a bank, assets of bank could not be impressed with trust in favor of owner of warrant. *State, ex rel. Sorensen, v. Columbus State Bank*..... 231
2. Attorney acquiring, without consideration, title to

client's land, *held* trustee. *Federal Trust Co. v. Ireland* 369
3. A resulting trust arising out of wrongful act of a fiduciary is not affected by the statute of frauds. *Federal Trust Co. v. Ireland* 369
4. A recreant trustee, or those dealing with him with knowledge of the trust, cannot make profit out of trust property at expense of beneficial owner. *Federal Trust Co. v. Ireland* 369
5. A trustee cannot set up a claim of title in himself to trust property. *Federal Trust Co. v. Damron* 655

Usury.

1. An automobile dealer may in good faith sell an automobile on time for a price exceeding the cash price without tainting the transaction with usury. *Grand Island Finance Co. v. Fowler* 514
2. Where original purchase of automobile on credit was valid, it is immaterial, on question of usury, that finance company solicited contracts from automobile dealers and furnished schedules. *Grand Island Finance Co. v. Fowler* 514
3. Purchase of note at discount beyond legal interest does not render the transaction usurious. *Grand Island Finance Co. v. Fowler* 514
4. In replevin for an automobile for purpose of foreclosing a chattel mortgage, evidence *held* insufficient to establish defense of usury. *Grand Island Finance Co. v. Fowler* 514
5. To constitute usury, brokerage charge and interest for term of loan must exceed legal maximum. *Western Securities Co. v. Naughton* 702

Waters.

1. Furnishing water to inhabitants of a city for the purpose of health, convenience, and comfort is a "public use." *Olson v. City of Wahoo* 802
2. The law relating to underground waters flowing in channels is not applicable to percolating waters. *Olson v. City of Wahoo* 802
3. A landowner may appropriate subterranean waters found under his land, but his use thereof must be reasonable, and not injurious to others who have substantial rights in the waters. *Olson v. City of Wahoo* 802

Wills.

1. To create a testamentary trust, appropriate language indicating such intention must appear in the will. *Bauermeister v. McDonald* 142

2. Will *held* to devise a life estate to daughter, with remainder to her children. *Gillan v. Wilson* 893

Witnesses.

1. In action to foreclose mortgage where executor was made defendant, plaintiff's testimony relating to conversations with deceased *held* incompetent. *Wright v. Wilds* 11
2. Statute disqualifying witness from testifying to conversations with a deceased person does not apply where the conversation was between a third party and deceased. *Bergfield v. Bergfield* 67
3. Testimony relating to conversation between witness and deceased is inadmissible where the witness has a direct legal interest in the action. *Bergfield v. Bergfield* 67
4. Exclusion of communications alleged to have been made professionally to an attorney *held* not error. *Clausen v. Johnson* 280
5. A witness may be interrogated on cross-examination as to his employment by an insurance company financially interested in the case. *Lyons v. Joseph* 442
6. Evidence which directly tends to disprove material testimony of witness is admissible. *Benton v. State* 485
7. Plaintiff, by testifying in a personal injury suit as to her physical condition, waived privilege as to family physician who attended her after the accident. *Friesen v. Reimer* 620