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REPORTS OF CASES

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM, 1935, AND JANUARY TERM, 1936

VOLUME CXXX

HENRY P. STODDART
OFFICIAL REPORTER

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

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1935

PEARLE B. WILSON, APPELLANT, V. CARL E. NELSON, ADMINISTRATOR, ET AL., APPELLEES.

FILED NOVEMBER 22, 1935. No. 29372.

Specific Performance. "If one party to a contract cannot enforce substantial performance, a court of equity will not decree specific performance at the instance of the other party. The right to specific performance must be mutual and reciprocal." *Moore v. Markel*, 112 Neb. 743, 201 N. W. 147.

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

Baker, Lower & Sheehan and *Charles F. Stroman,* for appellant.

Kirkpatrick, Good & Dougherty and *O. S. Gilmore, contra.*

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

GOSS, C. J.

Plaintiff appeals from a decree dismissing her petition in equity, after issues were made up and a trial was had upon the merits. The cause is here for trial *de novo.*

This action was begun in the district court by the filing of a petition on March 27, 1933, after Nels Nelson had died on February 18, 1932. It makes the administrator

of the estate of Nels Nelson, deceased, and Nelson's children parties defendant, and claims to seek specific performance of a written and pleaded contract, alleged to have been made by Nels Nelson with plaintiff on May 3, 1929, in contemplation of their marriage, to be consummated on October 16, 1929, "or sooner if he has completed the terms of this contract." Plaintiff alleges that Nels Nelson breached the contract before the stated wedding day by refusing to marry her, and alleges conveyances by him to his children of certain real estate owned by him and coming under the terms of the contract. She accordingly prays that defendants be required to convey such real estate to plaintiff, or, if they cannot do so as to any of it, then, in lieu thereof, plaintiff be given a decree for the value of such real estate not so conveyed. The prayer further asks for a cancelation of mortgages upon plaintiff's property, described in the contract as to be paid by Nelson, or, in lieu thereof, that plaintiff be given a money judgment for their amount with interest and taxes; and finally the petitioner prays that all the personal property left by deceased be assigned to plaintiff, or, in lieu thereof, that she be given judgment for its value.

The contract was written in pencil, by plaintiff, in a small memorandum notebook. It appears to be attested by two witnesses, but was not acknowledged before any officer.

In the marriage contract between the parties, they agreed on October 16, 1929, as their wedding day, or sooner if he had completed the terms of the contract; Nelson agreed to pay off, on or before October 16, 1929, two mortgages on two city lots owned by plaintiff together with interest and taxes; to give to her his described home "together with entire household contents," and convey the home to her by warranty deed; to give her the choice of a described business property or the sum of $10,000 in cash, whichever she chose, on or before October 16, 1929; to give her one-fourth of a described 160-acre farm; to retain jointly for Nelson and plaintiff a 40-acre tract, the same

to be hers unconditionally if he precede her in death; all the balance of his real and personal property to be held jointly by the parties and to be hers unconditionally after his death. Pearle B. Wilson agreed to take the best of care of Nels Nelson personally and to look after his business interests to the best of her ability, to accompany him on any trips desired, and to be a faithful and devoted wife throughout his entire life; if he preceded her in death, to see that he was given a burial befitting one of his personal and financial standing.

Defendants' answers admitted the status of the administrator and children, pleaded that plaintiff's cause of action did not survive Nels Nelson but abated at his death, pleaded that the contract is void for want of consideration, pleaded that plaintiff duly filed her claim in the county court for damages for breach of the identical contract, upon which issues were joined, and that the county court entered judgment against claimant, disallowing the claim and dismissing it; that such judgment is unreversed and unmodified and is *res adjudicata;* pleaded that, by such action, plaintiff elected her remedy at law and is barred from pursuing any other or further remedy at law or in equity in any other tribunal. Defendants also generally denied all allegations of the petition not otherwise admitted.

The reply denies all allegations not admitted; pleads that plaintiff duly appealed from the judgment of the county court but, while the appeal was still pending in the district court, dismissed said claim or "*action* (italics ours) * * * without prejudice to a new action;" plaintiff alleges that the county court had no jurisdiction of the action, and alleges that its findings and judgment are of no effect.

Among other points, defendants argue that the remedy of specific performance of the contract is not available to plaintiff because there was no mutuality of remedy. A perusal of the contract shows that Nels Nelson agreed to marry plaintiff and to give her his property. In consideration therefor plaintiff agreed to marry him. If, therefore, plaintiff were in default and were to be sued for specific

performance by Nels Nelson, the action for specific performance would not lie, but the action, if any, would be for damages for breach of her promise to marry him. So, if Nels Nelson breached a promise to marry plaintiff and to give her the property he contracted to give her, plaintiff's sole remedy is for damages for breach of contract and not for specific performance.

If cases could be found, which we doubt, it would be unnecessary to cite them to support the principle that a suit for specific performance will not lie to compel one to marry another. It is abhorrent to public policy to force a man or woman, under penalty of contempt of court, to enter into a marriage that is objectionable. Nels Nelson could never have brought suit in his lifetime for specific performance of the marriage contract, if plaintiff had declined to fulfil her promise of marriage. This demonstrates the convincing lack of mutuality of remedy in the contract.

In *Moore v. Markel,* 112 Neb. 743, 201 N. W. 147, we held: "If one party to a contract cannot enforce substantial performance, a court of equity will not decree specific performance at the instance of the other party. The right to specific performance must be mutual and reciprocal."

To the same effect is *Rudolph v. Andrew Murphy & Son,* 121 Neb. 612, 237 N. W. 659. See, also, *Hoctor-Johnston Co. v. Billings,* 65 Neb. 214, 91 N. W. 183; 58 C. J. 866; 65 A. L. R. 45, annotation.

We are of the opinion that, on account of the lack of mutuality of the contract, the remedy of specific performance is not available to plaintiff. Our decision is based solely on this ground. Other questions are argued, but our conclusion makes it unnecessary to discuss them. The judgment of the district court is

AFFIRMED.

PATRICIA TIGHE, APPELLEE, V. INTERSTATE TRANSIT LINES, APPELLANT.

FILED NOVEMBER 22, 1935. No. 29626.

1. **Trial.** It is erroneous to submit to the jury a material issue upon which there is no evidence.
2. **Pleading:** DEFENSES: CONSISTENCY. More than one defense may be interposed to the same cause of action, provided they are not inconsistent with each other; they are not inconsistent unless the proof of one necessarily disproves the other.

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

Dressler & Neely and *H. J. Lutz,* for appellant.

Mossman, Anderson & Meissner and *John A. McKenzie, contra.*

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

GOSS, C. J.

This is the second appearance of this case here. *Tighe v. Interstate Transit Lines,* 127 Neb. 633, 256 N. W. 319.

On this trial Patricia Tighe obtained another judgment against defendant for damages for personal injuries alleged to have been caused by the negligence of defendant while she was riding in a bus owned and operated by Interstate Transit Lines. Defendant appealed.

Defendant's answer set up a release signed and delivered by plaintiff. The reply sought avoidance of the release on two grounds: First, that it was secured by fraud and deceit of defendant; and, second, that it was "obtained under a mutual mistake of fact had by each of the parties as to injuries unknown and also as to the severity of certain injuries which the plaintiff had received." In the cause formerly reviewed, the district court had instructed the jury on the issue of mutual mistake but gave no instruction on the issue of fraud. Appellant

assigned error because the court instructed the jury on the issue of mutual mistake but was here held to be estopped because it had requested an instruction on the subject of mutual mistake which, though in terms refused, yet invited an instruction on the subject. Appellant's assignment that the court erred in not instructing the jury on the pleaded and litigated issue of fraud and deceit in obtaining the release was held good and the cause was reversed for that prejudicial error. The pleadings appear to be the same on this trial as in the former one. The evidence appears to be substantially the same.

The petition alleged six acts of negligence. One was: "In that the operator of said bus had been kept so long on duty that he was sleepy and unfit to drive said bus at the time of said accident, said driver having been on duty as a driver for approximately eleven hours."

In stating to the jury the issues the court used the exact language above quoted as one of the claims of negligence (all of which were given in the instruction); and in a later instruction told the jury, in substance, that if plaintiff established the fact by a clear preponderance of the evidence that she was injured and more or less permanently impaired because of "the claims of her petition, or one or more of them, that are stated to you as her claims," then she would be entitled to a verdict.

Appellant stated in its brief and in the oral argument that there was absolutely no evidence that the operator of the car was sleepy and that the bus was overturned because of any such condition of the driver. In plaintiff's brief and oral argument there was no help given us on this particular subject. The only witness called to the stand to prove negligence in the operation of the bus was plaintiff. We do not find that she made any reference to the driver's unfitness because of loss of sleep. The driver of the bus testified that he slept from shortly after noon, started his trip of 268 miles to Belle Plains, Iowa, at 9 o'clock that night and the accident happened at 6:30 the next morning. The effect of his testimony is to negative the idea that he

was sleepy. He was not cross-examined. So this charge of negligence had no evidence to support it.

The court refused an instruction, tendered by defendant, that there was no competent evidence to support such charge of negligence and that the jury should disregard it in arriving at their verdict. It is well settled that it is erroneous to submit to the jury a material issue upon which there is no evidence. *Zancanella v. Omaha & C. B. Street R. Co.*, 93 Neb. 774, 142 N. W. 190; *First Nat. Bank v. Brown*, 81 Neb. 669, 116 N. W. 685; *Parker v. Wells*, 68 Neb. 647, 94 N. W. 717. The submission of such a charge of negligence without evidence to support it and with the instruction of the court that, if they found any of the charges of negligence true, they might render a verdict for plaintiff, led the jury to believe there was evidence to support this charge. For aught we know this may have been the charge of negligence on which the jury fixed liability on defendant. The instruction was prejudicially erroneous.

Defendant asserts error in that the trial court overruled its motion to require plaintiff to elect whether she would seek to avoid the release pleaded in defendant's answer on the ground that the release was obtained by a mutual mistake of fact, or on the ground that it was obtained by false and fraudulent representations; and that the court erred in submitting to the jury the issue as to a mutual mistake of the parties in the matter of the release.

Plaintiff argues that the trial court was directed by the opinion and mandate in the former hearing to submit to the jury the issues on both mutual mistake and fraud. But the opinion on the former appearance of *Tighe v. Interstate Transit Lines* did not in terms go so far as that. In literal effect it merely held defendant estopped, by reason of its act of requesting an instruction on mutual mistake, from objecting to that subject as an issue on that trial. On this trial the facts as to proceedings are quite different on that subject. On this trial defendant has consistently maintained its right to present here the question as to whether plaintiff may have both subjects of mutual mistake and fraud submitted to the jury.

The plea of the reply in seeking to avoid the release on the two grounds is in the nature of a defense. The rule is that more than one defense may be interposed to the same cause of action, provided they are not inconsistent with each other; they are not inconsistent unless the proof of one necessarily disproves the other. *Blodgett v. McMurtry*, 39 Neb. 210, 57 N. W. 985; *People's Nat. Bank v. Geisthardt*, 55 Neb. 232, 75 N. W. 582; *Hilmer v. Western Travelers Accident Ass'n*, 86 Neb. 285, 125 N. W. 535; *Ford & Isbell Lumber Co. v. Cady Lumber Co.*, 94 Neb. 87, 142 N. W. 300; *Maier v. Romatzki*, 95 Neb. 76, 144 N. W. 1036; *Schellpeper v. Sporn*, 112 Neb. 192, 198 N. W. 1012.

Whether two defenses are inconsistent depends upon the facts of each particular case, to which the test is to be applied, to determine whether the proof of one issue disproves the other. In the instant case the release was secured from plaintiff by a claim agent. He made representations as to the extent of her injuries and as to the likelihood of their permanency, based upon what he either believed to be the facts or, knowing better, fraudulently represented to be the facts. His representations were detailed to the jury in the evidence. Whether they were true or false and whether he believed his representations to be true or knew them to be false were all matters to be decided by the jury, in order for them to determine whether the release was executed under a mutual mistake of the parties or because of fraudulent representations of defendant for whom the claim agent was acting and who was bound by what he said and did.

Defendant cites *Seymour v. Chicago & N. W. R. Co.*, 181 Ia. 218, 164 N. W. 352, and *Malloy v. Chicago G. W. R. Co.*, 185 Ia. 346, 170 N. W. 481, as authority that it is impossible to sustain a charge of "deliberate fraud" and also that there was a mutual mistake as grounds of avoiding a contract of release and settlement. In both cases plaintiff had a directed verdict. The first case held, in syllabus 8, "A trial in the lower court on the theory of *deliberate fraud* will not be reviewed on appeal on the theory of an *honest*

mutual mistake;" and, in syllabus 9, "Defenses which are not merely inconsistent with but *destructive* of each other are not allowable." In the body of the opinion it is stated that the statute permits inconsistent defenses but further says that permission does not allow defenses which are not merely inconsistent with but destructive of each other; that it is impossible to sustain a charge of deliberate fraud and also that there was an honest mutual mistake. The judgment was affirmed. In the second case it was held that statements by the company physician that plaintiff was all right and could go to work were statements of a present fact and even if unintentionally untrue were sufficient to avoid a release entered into in reliance upon the statements; and that inconsistency in pleading both fraud and mutual mistake may not be urged for the first time on appeal. The judgment was reversed. We do not find these cases necessarily contrary to our holdings. Even if they might be considered so, we would not feel bound to follow them unless they were qualified by our holdings that the test is whether the proof of one issue necessarily disproves the other.

Assuming that the proofs are the same on the issue of mutual mistake as on fraud, that is to say, that the jury might conclude from the proofs either that plaintiff and defendant made an honest mutual mistake in respect of the release or that defendant made what amounted to legally fraudulent representations to secure that release, it would result in injustice if the jury reached a conclusion that had no allegation in plaintiff's petition to support that conclusion. To take the position that plaintiff must elect which issue she will use might result in just that situation. We refuse to do this. There was no error under the state of facts existing here in submitting to the jury the issue of mutual mistake and the issue of fraud in the matter of the release.

There was a serious conflict of evidence as to whether plaintiff's chief injuries were not received in some other way, at some other time than when defendant's bus overturned. No doubt she was hurt there to some extent and

was entitled to some damages for her injuries. There was sufficient evidence to go to the jury.

For the reasons set forth the judgment is

REVERSED.

IN RE ESTATE OF HENRY MOWINKEL.
LASSETTA SPECKLES, APPELLANT, V. GEORGE O. MOWINKEL, EXECUTOR, APPELLEE.

FILED NOVEMBER 22, 1935. No. 29364.

Trusts. While, as a general rule, a family settlement may provide for disbursement of the estate of testator in a manner at variance with his will, a valid, unexecuted testamentary trust cannot thus be modified or destroyed.

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

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

Nickerson & Nickerson, contra.

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

ROSE, J.

This is a controversy over the distribution of $5,000 belonging to the estate of Henry Mowinkel, Sr., who executed his will June 21, 1930, and died September 22, 1932. The will was probated October 17, 1932, and George O. Mowinkel was appointed executor. Testator left surviving him his widow, Margareta Mowinkel, and eight adult children, his only heirs at law. The sons were Fritz Mowinkel, George O. Mowinkel, and Henry M. Mowinkel. The daughters were Christine Jungjohann, Jettie Voss, Dora Delfs, Lillian Schneider, and Lassetta Speckles.

The first, second, third and fourth bequests in that order were as follows: To the widow, $50 a month for life without otherwise sharing in the estate; to Christine Jung-

johann, $2,000; to Jettie Voss, $5,000; to Dora Delfs, $5,000. A copy of the fifth paragraph of the will follows:

"I direct that the sum of Five Thousand ($5,000) Dollars be set aside by my executor, and the interest accruing thereon during the lifetime of my daughter Lassetta Speckles shall be paid to her. In case her husband, Harry Speckles, be living at the time of her death, the interest on said Five Thousand Dollars shall be paid to him during the balance of his life. And at the death of both my daughter and her husband Harry, the said $5,000 shall be divided equally among my children then living, or their lawful issue by right of representation. At the option of my executor the said $5,000 may be invested in some sound investment approved by the court, but I would prefer that the investment be made with some reliable insurance company."

The husband of Lassetta Speckles died before testator. Prior to the order probating the will, the widow and all the children of testator, except Lassetta Speckles, assigned to the latter, by a formal written instrument, the estate in remainder under the fifth paragraph of the will and directed the executor by stipulation to turn over to her the $5,000. Lassetta Speckles, plaintiff herein, accepted the assignment, acquiesced in the family settlement as to the fifth paragraph of the will and applied to the county court for an order conforming to the agreed plan of distribution. The executor objected to the making of an order on him to pay the $5,000 to plaintiff on the ground that the heirs were without power to thus terminate her life estate and extinguish the testamentary trust, contrary to the terms of the will. The county court sustained the objections and plaintiff appealed to the district court where the judgment of the county court was affirmed. From the affirmance below she appealed to the supreme court.

Lassetta Speckles, plaintiff, in support of her assignments of error, argued the following propositions: The property interest of the other heirs in the $5,000 was a vested remainder which they had a right to alienate or

assign; that a unanimous family agreement or settlement may vary the provisions of the will; that the assignment to plaintiff and the family agreement or settlement merged the life estate and the estate in remainder, plaintiff acquiring both and being entitled to the immediate possession of the $5,000 in the hands of the executor.

For the purpose of determining the questions presented, it may be assumed that the interest of the remaindermen was a vested estate, under the principles announced in *Drury v. Hickinbotham,* 129 Neb. 499, 262 N. W. 37, and that, as a general rule, family agreements or settlements may provide for the distribution of testator's estate in a manner at variance with terms of the will. Cases supporting the general rule are cited in a note in 97 A. L. R. 469. It does not necessarily follow, however, that legatees may by means of a family agreement or settlement destroy or extinguish a testamentary trust created by will or transfer a present right of possession which they do not have. An exception to this general rule, or part of it, was recently stated by an annotator as follows:

"The beneficiaries under a will cannot, however, agree to modify or destroy a trust provision therein." 97 A. L. R. 471, citing *Farwell v. Carpenter,* 161 Ia. 257, 142 N. W. 227; *Davenport v. Sandeman,* 204 Ia. 927, 216 N. W. 55; *Re Noble,* 141 Kan. 432, 41 Pac. (2d) 1021, 97 A. L. R. 463; *Parker v. Broadus,* 128 Miss. 699, 91 So. 394; *Brady v. Hanson,* 123 N. Y. Supp. 645; *Madden v. Shallenberger,* 121 Ohio St. 401, 169 N. E. 450; *Cowie v. Strohmeyer,* 150 Wis. 401, 484, 136 N. W. 956, 137 N. W. 778.

This exception to the general rule is based on sound principles of public policy. A testator has a sacred right to dispose of his property by will and may do so without giving reasons for his bequests or for his restrictions thereon. For the purpose of the will, testator in the present instance had a lawful right to divide $5,000 into two estates—life estate and estate in remainder. His intention is perfectly clear. He created a testamentary trust. He specifically directed that $5,000 be set aside by his

executor, and that the interest thereon be paid to plaintiff, a daughter, during her life, the fund to be invested with the approval of the court. At her death, her husband having died before testator, the 5,000-dollar fund is to be divided equally among testator's children then living, or their lawful issue by right of representation. No legatee had, in the trust fund, any interest that did not come through the will. Under that instrument, the owner of the life estate, the owners of the estate in remainder and all the heirs combined had no right to immediate possession of the $5,000. The present right of possession was granted by the will to the executor, the trustee. As brother and remainderman he assigned his interest in the remainder to his disappointed and tearful sister, but as trustee he declined to abandon his trust under his father's will. Under it plaintiff was never to receive the $5,000. The assignment and the family settlement were futile attempts of the remaindermen to transfer to the owner of the life estate a present right of possession, which they never had, to terminate the life estate of plaintiff and to extinguish the testamentary trust, contrary to the plain letter of the will.

While, as a general rule, a family settlement may provide for disbursement of the estate of testator in a manner at variance with his will, a valid, unexecuted testamentary trust cannot thus be modified or destroyed. In these views of the law and the facts, both the county court and the district court reached the right conclusion.

AFFIRMED.

LOUIS MYERS, APPELLEE, V. HALL COUNTY, APPELLANT.

FILED NOVEMBER 22, 1935. No. 29387.

1. **Counties:** CLAIMS: DISALLOWANCE: APPEAL: JURISDICTION. The district court acquires jurisdiction by appeal from a county board's disallowance of a claim against the county, where claimant gives notice of appeal, furnishes an appeal bond and files in the office of the clerk of the district court a transcript

of the proceedings and order of the county board within the time allowed by law, though the petition on appeal is not filed until a later date.

2. **Appeal.** Where the district court, a court of general jurisdiction, entertains and exercises jurisdiction in a judicial proceeding properly brought before it, its power to do so may be presumed on appeal to the supreme court, unless the record for review affirmatively shows the contrary.
3. ———. Where the district court, on appeal by plaintiff from the county board, overrules a motion by defendant to strike the petition on appeal from the record and to enter a nonsuit, because the petition was not filed within the statutory period of 50 days, nor good cause for the delay shown, it will be presumed on appeal to the supreme court that good cause was shown, in absence of a record disclosing the contrary.
4. ———. In a court of general jurisdiction, where jurisdiction is exercised in proper proceedings, a presumption of its existence may be indulged on appeal to sustain a judgment in absence of a record showing the contrary, but nonexistence of jurisdiction will not be presumed to reverse a judgment.
5. ———. On appeal from the county board to the district court, the failure to verify the petition on appeal is not a jurisdictional defect.
6. ———. On appeal by defendant from a judgment of the district court in favor of plaintiff, the latter, who did not take a cross-appeal, is not entitled, in the supreme court, to an increase in his recovery in an action at law.

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

William P. Mullen, for appellant.

B. J. Cunningham, H. G. Wellensiek and *W. P. Lauritsen, contra.*

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

ROSE, J.

Louis Myers, plaintiff, presented to Hall county, defendant, a claim for damages caused by the dynamiting of trees along a highway in front of his residence. The claim consisted of the following items: Damage to walls, plaster

and ceiling of house, $326; damage to chimney and chimney wall, $100; permanent damage to house, $500; destruction of 14 trees of the value of $50 each, $700; damage to fence, $50; total, $1,676. The county board disallowed the claim and plaintiff appealed to the district court where he recovered a judgment for $400 on the verdict of a jury. Defendant appealed to the supreme court.

The principal point urged for a reversal of the judgment below is the failure of the district court to sustain a motion by defendant to strike from the record plaintiff's petition on appeal and enter a nonsuit on the ground that the petition was not filed within the legislative period of 50 days from the date of the county board's order disallowing the claim. Comp. St. 1929, sec. 21-1306.

The right of plaintiff to appeal to the district court from the county board's order disallowing his claim was granted by statute. Comp. St. 1929, sec. 26-119. The procedure on appeal from the county board is the same as on appeal from a justice of the peace. Comp. St. 1929, sec. 26-121. On appeal by a plaintiff from a justice of the peace, a nonsuit should be entered in the district court, if the petition on appeal is not filed within 50 days from the date of the order from which the appeal is taken, "unless the court, on good cause shown, shall otherwise order." Comp. St. 1929, sec. 21-1307. Plaintiff gave notice of appeal and furnished an appeal bond in compliance with law and filed in the office of the clerk of the district court within 30 days a transcript of the proceedings of the county board. The district court thus acquired jurisdiction. The record, however, shows that the county board disallowed the claim of plaintiff December 22, 1931, and that he did not file his petition on appeal until February 20, 1933, a delay of more than 50 days.

The contention of defendant is that the district court erred in overruling the motion to strike the petition from the files and in refusing to enter a nonsuit for the asserted reason that the record does not show "good cause" for the failure to file the petition within the statutory period. The

point is not well taken on the record presented for review, for the following reasons: The district court had, and in fact entertained and exercised, jurisdiction; overruled the motion to strike the petition from the files; ordered defendant to answer; required the parties to proceed to trial after the issues were joined by petition, answer and reply; submitted the issues to the jury and entered judgment on their verdict. The district court is, by law, a court of general jurisdiction. In a case in which it exercised jurisdiction, its power to do so may be presumed on appeal, in absence of a showing to the contrary in the record for review. Defendant brought up the judicial record. It does not affirmatively disclose that good cause for the delay in filing the petition was not shown. There is no bill of exceptions showing the proceedings upon the preliminary hearing of the motion to strike the petition from the files and enter a nonsuit. The bill of exceptions in the record is confined to the trial on the merits of the cause. Defendant, therefore, did not bring up a record disclosing an affirmative showing that good cause for the delay was not shown. A showing of good cause for the delay is implied by the rulings of the trial court. In a court of general jurisdiction, where jurisdiction is exercised in proper proceedings, a presumption of its existence may be indulged on appeal to sustain a judgment in absence of a record showing the contrary, but nonexistence of jurisdiction will not be presumed to reverse a judgment. For the reasons stated, the assignment of error raising the question considered is overruled.

The original petition on appeal is also challenged on the ground that it is not verified. That defect is not jurisdictional. An amended, verified petition was filed before trial. Defendant answered the petition on which the cause was tried. With the record in this condition, prejudicial error cannot be based on the failure of plaintiff to verify the original petition.

Instructions and the verdict are grouped for the purposes of a criticism which, upon investigation, is found to be without merit.

The judgment is fully sustained by the evidence. An error available to defendant for a reversal has not been found upon a critical examination of the record.

In the brief of plaintiff he calls himself a "cross-appellant" as well as an "appellee" and seeks relief in excess of the verdict, claiming interest thereon and treble damages allowable by statute for the loss of his trees. Plaintiff did not take a cross-appeal and is not entitled to an increase in his recovery on the appeal of defendant in an action at law. There being no reversible error available to either party, the judgment of the district court is

AFFIRMED.

GEORGE G. CRONKLETON, RECEIVER, APPELLEE, V. CHARLES G. LANE ET AL., APPELLANTS.

FILED NOVEMBER 22, 1935. No. 29393.

Judgment: VACATION AFTER TERM. A trial court may vacate a judgment rendered at a previous term only for reasons enumerated and within the time limited by statute. Comp. St. 1929, sec. 20-2001.

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

Raymond M. Tibbets, for appellants.

R. O. Canaday and *Stiner & Boslaugh, contra.*

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

DAY, J.

This is an appeal from an order of the district court denying the motion of the appellants to vacate a default judgment, so that they could defend the action on the merits. This motion was filed during the term, but no hearing was held thereon until after the expiration of the term of court. The only question for determination is the

power of the district court to vacate a judgment after the term of court has adjourned.

This identical question was recently presented to this court in *Lyman v. Dunn,* 125 Neb. 770, 252 N. W. 197. The question was fully discussed there, and the previous decisions of this court were reviewed as far as applicable. It is unnecessary to repeat here. A trial court may vacate a judgment rendered at an adjourned term only for reasons enumerated and within the time limited by statute. Comp. St. 1929, sec. 20-2001. The motion in this case does not set out any of the reasons of the statute. The conclusion of *Lyman v. Dunn, supra,* is controlling, and the trial court was without power to vacate the judgment under the circumstances in this case.

AFFIRMED.

STATE, EX REL. MARION E. BALL, RELATOR, V. GEORGE E. HALL, TREASURER OF THE STATE OF NEBRASKA, RESPONDENT.

FILED NOVEMBER 22, 1935. No. 29698.

1. **Mandamus.** The ministerial duties of a state officer, such as a treasurer, not involving judgment or discretion, may be enforced by mandamus.
2. ———. This is so because the question whether the writ of mandamus shall be granted or refused always depends upon the character of the act in question, and not upon the office held by the respondent.
3. **Evidence.** The journals of the two houses of the legislature, kept according to the Constitution, are the best evidence of what appears therein.
4. **Statutes:** PASSAGE. When the journals of both houses of the legislature and the signature of the governor each clearly show the passage of an act in a certain definite form, the undisputed mistake of an enrolling clerk will not be allowed to defeat the act.

Original proceeding in mandamus by the state, on relation of Marion E. Ball, to compel respondent, as state

treasurer, to countersign and pay an expense warrant. *Writ allowed.*

Good, Good & Kirkpatrick, for relator.

G. E. Price, contra.

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

PAINE, J.

This is an original action in mandamus, brought directly in this court by the relator to require the state treasurer to countersign and pay a warrant duly drawn by the state auditor and approved by the secretary of state.

This action involves the test of an act of the 1935 session of the Nebraska legislature in respect to the appropriation bill, being House Roll No. 381, entitled, "A Bill for an Act making appropriations for the State Government for the biennium ending June 30, 1937, and the conditions of payment thereof, and to declare an emergency;" and a portion thereof reads as follows:

"Section 9. Attorney General.

2	Salaries and Wages	$48,000.00
3	Maintenance (Office)	9,000.00
4	Litigation	20,000.00
5	Costs and Judgments	5,500.00
6	Protection of Irrigation Rights, North Platte District	55,000.00"

The last item in the above appropriation can be traced through the journals of both houses, and the alleged mistake is charged to be an error of the enrolling clerk in relation thereto. It appears from the journal of the House that, after some discussion, this last item was reduced to $45,000. The bill was engrossed, and in some way the enrolling clerk entered it at $10,000, instead of making a reduction of $10,000. The bill in this form went to the Senate, and the Senate decided that $45,000 might not be sufficient, and, while approving the original bill at $45,000, the Senate added $30,000, providing, however, that this

last $30,000 could only be expended by the joint action of the governor and the attorney general. The House refused to concur, and appointed a conference committee, then a second, and finally a third conference committee acted on this matter.

In this third conference committee, the Senate receded from insisting on the additional appropriation of $30,000, and inserted in lieu thereof $10,000, the same to be in addition to the $45,000 already concurred in by the Senate. Then, by a mistake of the enrolling clerk, the original item of $45,000 was made $10,000.

When this bill reached the office of the governor, the mistake was detected, and the governor inserted these words when he approved the bill, "Correction Section 10, line 5½, Protection of Irrigation Rights, North Platte District, $45,000;" and, as thus amended, the governor approved the bill (Laws 1935, ch. 177).

The respondent, State Treasurer Hall, insists in his brief and argument that the fact that the governor attempted to correct it before signing the bill is not sufficient to correct the record of an enrolled bill; in other words, that the state treasurer, as an administrative officer, is not allowed to reject an enrolled bill and pay out funds on the authority of the journals alone.

There is abundant authority to support the proposition that the ministerial acts of a state officer, such as a treasurer, not involving judgment or discretion, may be enforced by mandamus.

This is so because the question whether the writ of mandamus shall be granted or refused always depends upon the character of the act in question, and not upon the office held by the respondent. 18 R. C. L. 192, sec. 116, and cases there cited; *Riley v. Carter,* 165 Okla. 262, 25 Pac. (2d) 666, 88 A. L. R. 1018; *State v. Carter,* 167 Okla. 32, 27 Pac. (2d) 617, 91 A. L. R. 1497; *State v. Bryan,* 102 Neb. 506, 167 N. W. 783. Or, as stated by Chief Justice Marshall in *Marbury v. Madison,* 1 Cranch (U. S.) 137: "It is not by the office of the person to whom the writ is directed, but

the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined."

The litigation now presented to this court can be stripped of all details and stated in the form of two questions: (1) Was this $45,000 appropriation made by the legislature? (2) Was the action of the legislature, as shown by the journal of the House and the journal of the Senate, the true evidence of what had been done, or was the enrolled bill the evidence of the action taken?

The first case arising in this state of a similar nature was *State v. McLelland,* 18 Neb. 236, 25 N. W. 77. This was an application for mandamus to compel the county clerk of Nance county to give notice of an election for register of deeds on November 3, 1885. An act had been passed by the last preceding legislature that a county was entitled to a register of deeds when the number of inhabitants reached 15,000. In the bill as enrolled, by an error the number given was 1,500. Judge Maxwell, in denying the writ, discussed many of the early cases, viz.: *Clare v. State of Iowa,* 5 Ia. 509; *Duncombe v. Prindle,* 12 Ia. 1; *Green v. Weller,* 32 Miss. 650; *Evans v. Browne,* 30 Ind. 514; *People v. Devlin,* 33 N. Y. 269; *Legg v. Mayor,* 42 Md. 203; *Spangler v. Jacoby,* 14 Ill. 297.

In citing *Purdy v. People,* 4 Hill (N. Y.) 384, Judge Maxwell says that in England the law-making power is omnipotent, as the British Constitution itself is a creature of parliament, but in the United States every act may be tested by the Constitution and declared void if not in conformity with its requirements.

Our court appeared to follow the case of *Gardner v. Collector,* 6 Wall. (U. S.) 499, and held that the certificate of a presiding officer that a bill had passed was only *prima facie* evidence of that fact, and, if the journals disclosed that a bill had not actually passed, the presumption would be overthrown and the act declared invalid.

This court had a second register of deeds case before it in *State v. Robinson,* 20 Neb. 96, 29 N. W. 246, and followed the former decision.

These matters were discussed by this court in *State v. Moore,* 37 Neb. 13, 55 N. W. 299, which was an action involving the validity of a legislative appropriation for 1893. This decision is closely in point with the case at bar. Briefly, it involved a general appropriation bill carrying an item of $15,000 for the expense of impeachment proceedings, which was duly passed by both houses, but by an error of the enrolling clerk the $15,000 was changed to $25,000, in which form it was signed by the presiding officers of both houses and approved by the governor. It was held that the bill appropriated only $15,000 for the purpose specified.

In *Webster v. City of Hastings,* 59 Neb. 563, 81 N. W. 510, Judge Sullivan said: "The journals, being the records of legislative proceedings kept in obedience to the command of the Constitution, are considered the best evidence of what affirmatively appears in them regarding the enactment of laws." And further: "If the entries found in the journals explicitly and unequivocally contradict the evidence furnished by the enrolled bill, the former will prevail." See *State v. Frank,* 60 Neb. 327, 83 N. W. 74; *State v. Mickey,* 73 Neb. 281, 102 N. W. 679.

From an examination of the record in this case and the authorities cited hereinabove, this court states the law to be that, when the journals of both houses of the legislature and the signature of the governor each clearly show the passage of an act in a certain definite form, the undisputed mistake of an enrolling clerk will not be allowed to defeat the act.

It is found that the relator performed certain services for the state of Nebraska in gaging the North Platte stream at Douglas, Torrington, Alcova, and Bridgeport, as directed by R. H. Willis, chief engineer in charge thereof; that a proper voucher for $52.07 for subsistence, lodging, and automobile hire, taxi, and carfare in connection therewith was duly certified by William H. Wright, attorney general, examined by the state auditor, and approved by the secretary of state, and that a warrant, drawn by the state auditor

upon the appropriation herein discussed, was approved by the secretary of state and presented to the state treasurer, who refused to countersign said warrant or to pay the relator the amount thereof out of the appropriation aforesaid.

There being no other fund out of which relator's just claim may be paid, the court finds the relator is without adequate remedy except by a writ of mandamus, as prayed by him, and the writ is allowed.

WRIT ALLOWED.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, APPELLANT, V. WALTER G. HARROLD ET AL., APPELLEES.

FILED DECEMBER 6, 1935. No. 29388.

1. **Contracts:** RESCISSION: MENTAL CAPACITY: BURDEN OF PROOF. "Where it is sought to cancel an instrument for the want of mental capacity of the grantor to make it, the burden of proof is on the one who alleges the mental incapacity." *Keedick v. Brogan*, 116 Neb. 339, 217 N. W. 583.
2. **Deeds:** EXECUTION: MENTAL CAPACITY. "In determining the mental capacity of the grantor to execute an instrument, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of the property dealt with and what he proposed to do with it, and had the capacity to decide intelligently whether or not he intended to make the conveyance, it cannot be said that he was incompetent to execute the instrument." *Keedick v. Brogan*, 116 Neb. 339, 217 N. W. 583.

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

Wells, Martin, Lane & Offutt and *Miller & Blackledge*, for appellant.

N. P. McDonald, E. L. Randall, H. M. Wilson and *H. Halderson, contra.*

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

GOSS, C. J.

In this suit to foreclose a mortgage the trial court decreed that Henry Harrold, the maker, was incompetent when he executed the notes and mortgage. The decree allowed plaintiff a lien for taxes, but canceled the mortgage. Plaintiff appealed from the decree as to the mortgage. Defendants did not cross appeal.

Henry Harrold, owner of 160 acres, and his wife, Eliza Harrold, on July 12, 1929, mortgaged the farm for $2,000 to the Omaha National Company, which sold and assigned the note and mortgage to plaintiff. Desiring to increase the loan, the Harrolds, on January 4, 1930, made another note and mortgage on the same land for $4,750 in favor of the Omaha National Company. This mortgage was duly assigned to plaintiff and the $2,000 mortgage was released. Plaintiff sought foreclosure of the $4,750 mortgage. Confronted by pleas in the answers of defendants that for more than a year before the date of the last named mortgage Henry Harrold was incompetent to understand the terms of any contract, plaintiff's amended petition set up the $2,000 mortgage and asked, if the court found against it on the larger mortgage, that it be allowed a lien, by subrogation, on account of the $2,000 mortgage.

The answers set up not only the plea we have sketched, but alleged, briefly stated, that the consideration was never paid or traced to Henry Harrold. In their brief the appellees say: "Any other issues are only incidental to this main issue, which is as follows: Was Henry Harrold incompetent at the time of the execution of the mortgages in question?"

It will aid if we state, in advance, the applicable rules: (1) Where it is sought to cancel an instrument for the want of mental capacity of the grantor to make it, the burden of proof is on the one who alleges the mental incapacity. (2) In determining the mental capacity of the grantor to execute an instrument, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the

nature and extent of the property dealt with and what he proposed to do with it, and had the capacity to decide intelligently whether or not he intended to make the conveyance, it cannot be said that he was incompetent to execute the instrument. *Brugman v. Brugman,* 93 Neb. 408, 140 N. W. 781; *Keedick v. Brogan,* 116 Neb. 339, 217 N. W. 583; *Broeker v. Day,* 124 Neb. 316, 246 N. W. 490.

We derive from the evidence that Henry Harrold was born in England December 21, 1844. He died September 8, 1930, and therefore was about 85 years old when the mortgages in question were made. He was a man of good mind, strong will, kindly, and of few words. He was hard of hearing and his eyesight was poor. Eliza Harrold was born April 20, 1852, and died November 4, 1930. Her qualities evidently well complemented those of her husband. For years they had lived in Kearney in a residence owned by her and which she was opposed to mortgaging. Henry Harrold had two or possibly three "strokes;" the evidence is hazy as to the exact number. The first was in October, 1927, the last was evidently in November, 1928. After the first one Mrs. Harrold looked after the drawing of checks to pay household bills and expenses. Some time after that Edith Johnson, a married daughter, was given a power of attorney and for a time looked after the financial affairs of her parents. This arrangement probably grew out of a petition to have Henry Harrold placed under guardianship, which, after a hearing, was denied (to which we attach no evidential value in deciding this present issue). In the spring of 1929 Harry J. Harrold superseded Edith Johnson in handling the business affairs of his father and mother.

Both mortgages were secured through L. T. Osborn, a real estate agent of Gibbon. Early in July, 1929, Harry J. Harrold approached the agent in his office and talked about the loan. On July 6, 1929, the agent went with Harry to the home of his parents and received an application for a $2,000 loan on the farm. There were present Harry J. Harrold, Gordon Harrold (another son), Henry

Harrold and Eliza Harrold. Henry Harrold suggested a mortgage for $2,000 on 80 acres, but Mr. Osborn explained that the company would not be so likely to grant so low a rate of interest on 80 acres as on the whole 160, so Mr. and Mrs. Harrold consented to make the application for a mortgage on the whole farm. The application was so made out and on account of his eyesight Henry Harrold instructed his son Harry to sign it for him. The application was sent in to the Omaha National Company and in a few days the prepared notes and mortgage were received for execution. They were signed by Henry Harrold and Eliza Harrold. The same parties were present as when the application was signed. The mortgage was read and explained to them. They sat up at the table and signed the notes, the coupons and the mortgage, Mrs. Harrold signing first and Mr. Harrold above her name. After the money was received the Harrolds signed a receipt for it.

On December 26, 1929, Henry Harrold signed an application to the Omaha National Company for the $4,750 loan. The evidence shows a note for that sum with 10 interest coupons and a mortgage on the farm, all signed in the handwriting of Henry Harrold and Eliza Harrold. The notes and coupons were also signed by Harry J. Harrold and Gordon Harrold. These two also signed the mortgage by mistake and the mortgage was returned and a new one executed with their names omitted. This was executed with the same people present as before, except that Gordon was not there. The conversation and the acts of Henry Harrold at the time of the execution of these notes and mortgage in foreclosure convey no idea that he did not understand just what he was doing. He was rather feeble physically, but he was dressed on all the occasions. Mr. Osborn testified that he was competent. Mrs. Harrold and Gordon Harrold were dead at the time of the trial.

The trial court consciously admitted a great deal of incompetent evidence in the belief that it did no harm in an equity case and that it could be sifted out by the court

before reaching a decision. However, there was considerable competent evidence, but perhaps on the borderline, going to the physical condition of Henry Harrold from time to time. One having been stricken as he was might have periods when his mind and memory would not be operative so as to qualify him for a business transaction like this, and yet he at other times would be fully conscious of his farm, of his need for money to pay family expenses, and of what he was doing when he made a mortgage to raise money to be used for that purpose. Lack of control of bodily functions such as existed and were put in evidence by defendants does not necessarily indicate mental infirmity so as to defeat a mortgage made under circumstances indicating that Mr. Harrold well knew just what he was doing. Mr. Osborn testified that he was competent when he signed both sets of notes and mortgages. Other witnesses presented by defendants testified otherwise, but we think their opinions were based upon his physical condition rather than upon his mental capacity. At any rate, they did not know his mental condition at the time he performed the acts in question here.

Appellees having conceded that the issue is one of incompetency, we have purposely omitted a discussion of other issues raised by the pleadings. There is no suggestion in the evidence charging either the Omaha National Company or John Hancock Mutual Life Insurance Company with bad faith or practice in any particular. Defendants have failed to sustain the burden of proof laid upon them by law. Plaintiff furnished the consideration; it was receipted for by Henry Harrold and, at least so far as plaintiff knew, went for his uses. The evidence does not clearly show otherwise. The decree was right in entering judgment for plaintiff for the amount due on its tax liens and for judgment against Harry J. Harrold, who signed the mortgage note. The judgment is reversed, with directions to enter a decree of foreclosure also for the amount due on the $4,750 mortgage.

REVERSED, WITH DIRECTIONS.

ROSE, J., took no part in the decision.

BERTHA A. CONKLIN, APPELLANT, V. LINCOLN TRACTION COMPANY, APPELLEE.

FILED DECEMBER 6, 1935. No. 29403.

1. **Municipal Corporations:** STREET IMPROVEMENTS: DANGER SIGNALS. Where the necessary work of improving or repairing public pavements on streets and sidewalks is in open progress in broad daylight, watchmen, barriers and signals for the protection of the public are not required, since existing conditions at such a time give their own notice of danger, if any.
2. ———: ———. "The duty ordinarily resting upon a city to maintain its streets and sidewalks in a reasonably safe condition for travel in the ordinary mode is remitted during the time occupied in making repairs or improvements." *City of Lincoln v. Calvert*, 39 Neb. 305, 58 N. W. 115.
3. **Trial:** PEREMPTORY INSTRUCTION. Where the evidence in an action at law is insufficient to support a verdict in favor of plaintiff, a peremptory instruction in favor of defendant is not erroneous.

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

Matschullat, Matschullat & White, for appellant.

Flansburg, Lee & Sheldahl, contra.

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

ROSE, J.

This is an action to recover $2,950 in damages for alleged negligence resulting in personal injuries to plaintiff on November 18, 1933, while she was attempting to cross the street-car track of defendant at Twelfth and O streets in the city of Lincoln.

Defendant denied the negligence charged in the petition and pleaded that the injury to plaintiff, if any, was solely the result of her own negligence. The reply to the answer was a general denial.

After plaintiff adduced her evidence, the district court

sustained a motion by defendant to direct a verdict against her. From a dismissal of the action she appealed.

The sufficiency of the evidence to make a *prima facie* case in favor of plaintiff is the question presented by the appeal.

When plaintiff was injured, defendant was engaged in the work of elevating its street railway track on Twelfth street to correspond to a change in the surface of O street where those streets intersect each other at right angles. Twelfth street extends north and south with defendant's street-car track in the center. The pavement was torn up in Twelfth street between the rails of the street-car track in the direct line of the sidewalk on the north side of O street. Bricks, concrete and other rubbish from excavations had been piled outside the rails on both sides of the street-car track, but through the débris there was a lane east and west two feet or more in width. Plaintiff, in approaching the place where she was injured, walked westward on the sidewalk on the north side of O street, started across Twelfth street in a direct line westward, arrived at the lane across the street-car track, stepped over the east rail which stood above the level of the street, attempted to cross on ties, fell and struck her left knee on the west rail and was injured.

The import of the petition is that the injuries to plaintiff were due to negligent and careless construction and maintenance in the making of the improvement. In substance, the petition alleges as negligence: Failure to provide and maintain a safe and proper passage-way for pedestrians; maintenance of an excavation in the lane of pedestrian traffic; leaving a loose tie above the excavation; creating a pitfall beneath the level of the street and beneath the rails and ties of the street-car track; disregard of defendant's duty as to barrier, signal, sign, watchman, temporary walk or other means for the protection of pedestrians at the place of danger.

Plaintiff testified to the absence of watchmen, barriers and signals of danger at the scene of the accident, but evidence of this nature did not prove actionable negligence

of defendant. Where the necessary work of improving or repairing public pavements on streets and sidewalks is in open progress in broad daylight, watchmen, barriers and signals for the protection of the public are not required, since existing conditions at such a time give their own notice of danger, if any. *McCarthy v. City of Boston,* 266 Mass. 262, 165 N. E. 123; *Morton v. Inhabitants of Frankfort,* 55 Me. 46; *City of Rock Island v. Gingles,* 217 Ill. 185, 75 N. E. 468; *Hunter v. City of Montesano,* 60 Wash. 489, 111 Pac. 571. Cases applying a different rule where pedestrians without fault are exposed at night to dangers in streets and sidewalks in absence of lights, barriers or other warnings are not in point.

It was argued nevertheless that there was a negligently created hidden danger at the street-car track, which caused the injuries. Plaintiff testified there were crowds at or near the crossing and that pedestrians were in front of her in the lane and others behind her. She was asked to explain what happened as she crossed the track, and answered as a witness:

"Well, as I got right near the tracks, and was going right after the ones that were crossing over, just as I stepped over the first rail I noticed, I put my foot down on the tie and I noticed there was a deep excavation right there, and rather than step down into it I put my right foot on that tie, and I put my right foot on the tie next to it on the north and stepped ahead, and just as I stepped on it my foot slipped off and away from me and I fell down against the farther rail."

She testified further, in substance: One tie was loose and moved when stepped on; did not notice the excavation until she stepped over the east rail onto the tie with her left foot; ballast between the ties had been removed; excavation or hole perhaps four inches or more below the loose tie; did not know tie was loose when she stepped on it; bricks and mortar on both sides of the track; workman on west rail with blowtorch, engaged in welding. There was also testimony that other workmen were on

duty at the crossing. Plaintiff was corroborated by other witnesses in her testimony to the effect that there was an excavation or hole under a loose tie. The evidence shows clearly that plaintiff observed in advance the conditions as they existed at the place of the injury, with the exception of the excavation or hole and loose tie, and that she could have crossed Twelfth street on the pavement about 10 feet farther north, where there was no excavation or obstruction of any kind. The public improvement in the street had been required by the city of Lincoln and was progressing under direction of the city engineer. The evidence adduced by plaintiff herself presents a typical case for the application of the following general principle of law:

"The duty ordinarily resting upon a city to maintain its streets and sidewalks in a reasonably safe condition for travel in the ordinary mode is remitted during the time occupied in making repairs or improvements." *City of Lincoln v. Calvert,* 39 Neb. 305, 58 N. W. 115. See, also, *City of South Omaha v. Burke,* 3 Neb. (Unof.) 309, 91 N. W. 562.

Plaintiff did not prove in her favor an exception to the general rule stated. There is nothing to show that the excavation was not reasonably necessary to the work in hand or that there was any delay in completing the task. The injury was not caused by any sudden, affirmative act of negligence on the part of defendant. Plaintiff's daughter and others crossed in safety. An eminent court recently said:

"The conditions were the necessary incidents of the reconstruction and repair of the way. While that was in progress the obligation to keep the way in a condition reasonably safe and convenient for travel was suspended. Any one who used the way in daylight did so at his own risk. The work going on was sufficient notice to travelers. The lack of knowledge in regard to it on the part of an uninformed traveler does not revive the liability." *McCarthy v. City of Boston,* 266 Mass. 262, 165 N. E. 123.

The conclusion is that the evidence, in the light most favorable to plaintiff, would not sustain a verdict in her favor. There was therefore no error in the peremptory instruction in favor of defendant.

AFFIRMED.

MARY J. COE, APPELLEE, CROSS-APPELLEE, V. J. M. TALCOTT, APPELLANT, CROSS-APPELLEE: KATHERINE F. SHEAN, CROSS-APPELLANT.

FILED DECEMBER 6, 1935. No. 29392.

1. **Mortgages.** Evidence examined and *held* not to sustain the charge that the mortgage was obtained by fraud.
2. **Acknowledgment.** "A certificate of acknowledgment of a deed or mortgage, in proper form, can be impeached only by clear, convincing, and satisfactory proof that the certificate is false and fraudulent." *Phillips v. Bishop*, 35 Neb. 487, 53 N. W. 375.

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

Mulvihill & Gilson, for appellant Talcott.

Weaver & Giller, for cross-appellant Shean.

Walter G. Badham, for appellee Coe.

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

GOOD, J.

This is an action for the cancelation of a mortgage for $1,600 on sublot 2 of lot 2, Porter Place addition to the city of Plattsmouth, Nebraska. The mortgage in question bears date September 3, 1929, and purports to be executed by Clarence M. Coe and his wife, Mary J., to J. M. Talcott and Frank R. Dehner. For some time prior to that date Coe and wife, as joint tenants, held legal title to the lot in question and occupied the premises as their homestead. The action was brought against J. M. Talcott, Frank

R. Dehner and Katherine F. Shean. Defendant Shean claims to be the owner under assignment from the mortgagees.

Cancelation was sought on the ground that the mortgage had been procured by fraud and had not been acknowledged by either of the Coes, and for the latter reason, it was alleged, the mortgage was void. Talcott answered, denying that the mortgage was obtained by fraud, and alleged that it was duly executed and acknowledged before a notary public by both Coe and wife. Defendant Shean filed answer and cross-petition, alleging that she was the owner and holder of the mortgage and note for $1,600 secured thereby, and prayed foreclosure.

Prior to the trial Clarence M. Coe departed this life, and Mary J. Coe became the sole owner of the legal title to the mortgaged premises. She filed replies to the answer of defendant Talcott and the answer and cross-petition of defendant Shean, in which she denied that either she or Clarence M. Coe had signed the note for $1,600, which the mortgage purported to secure, and alleged that, if their signatures appeared thereon, they were obtained by some device or fraud unknown to her, and alleged that at the time the note and mortgage were purported to have been executed Coe and wife were indebted to Dehner and Talcott in the sum of $800 and no more. At the trial the case was dismissed as to defendant Dehner. Trial of the issues resulted in a decree finding generally for plaintiff, canceling the mortgage and dismissing the cross-petition of defendant Shean. Defendant Talcott and defendant and cross-petitioner Shean have appealed.

Dehner and Talcott were sons-in-law of the Coes. There is a conflict in much of the evidence relating to the pertinent facts. The following facts are fairly reflected from the record, without substantial dispute:

Coe and wife owned and lived on a farm in Iowa which they were about to lose unless certain payments could be made. Talcott advanced money to the Coes with which to make the payments. A little later it was found that

other money would have to be advanced to save the farm, and Talcott advanced that money to the Coes. Then the Coes, aided by Talcott, traded the farm in Iowa for one in Missouri. An additional fund was required to finance the Coes in their new home which was advanced by Talcott. Dehner then took over a half interest in the obligation of the Coes. A mortgage in favor of Talcott and Dehner for $1,400 was executed by the Coes upon the Missouri farm. Additional money had to be advanced for the purpose of making certain improvements on the Missouri farm, which money Coe and Dehner apparently furnished. Later the Missouri farm was traded for the house and lot in Plattsmouth.

In the exchange of the Missouri property for the house and lot in Plattsmouth, the Coes received a second mortgage upon the Missouri land for $800, which was assigned to Talcott and Dehner as a credit upon the amount owing to them. It appears that some expense was incurred in effecting the transfer of the property in Missouri for that in Nebraska; that some improvements and repairs had to be made upon the Nebraska property, and that Talcott and Dehner advanced the funds for this purpose. As to the amount that was due at the time the note and mortgage were executed there was a difference in the testimony.

Mrs. Coe first testified that there was only $800 due, but later testified: "Well, I wouldn't say that it wasn't nor I wouldn't say that it was for the $1,600." Mrs. Dehner testified that there was only $800 due, but the source of her information is not disclosed, and it appears to be her conclusion rather than any actual knowledge that she had. Mr. Dehner was called as a witness for plaintiff, but did not testify as to the amount due himself and Talcott from the Coes. Talcott testified as to the time and amounts of the several advancements made, and produced a memorandum showing where the amount had been computed, which was slightly in excess of $1,600, due at the time the note and mortgage in controversy were executed. He testified that he made the mortgage for $1,600. His

evidence appears straightforward, and in a number of instances documents were produced which corroborate his testimony.

Mrs. Coe acknowledged the signatures of herself and husband on the 1,600-dollar note, but did not know when or how she came to sign the same, according to her testimony. Her testimony in some instances is contradictory; in other instances it shows that her memory was defective to such an extent as to seriously affect the weight of her evidence.

The mortgage purports to be acknowledged before J. Leeka, a notary public. Mr. Leeka was a lawyer, and at the time had an office adjoining the office of Mr. Talcott in the same building in Omaha. He testified that the acknowledgments were taken before him; that Mr. Coe signed and acknowledged the mortgage in his office; that on the following day he went with Mr. Talcott to the Talcotts' home where Mrs. Coe was, and that she there signed and acknowledged the mortgage before him. Mrs. Coe admitted that the instrument was signed at the home of the Talcotts. She admitted her signature and that of her husband to the note for $1,600, and also their signatures to the mortgage, but denied that Mr. Leeka had taken her acknowledgment to the mortgage. Talcott also testified that Mr. Coe acknowledged the mortgage before Leeka in Leeka's office. Mrs. Talcott testified that she was present when Mrs. Coe signed the mortgage, and that she acknowledged the same before Leeka. Mrs. Coe further testified that the instrument, when she signed it, was a blank piece of paper, with nothing thereon, while Mrs. Talcott testified that, while she did not read it, she did know that it was a filled-out instrument. It may also be observed that Mr. Dehner, who seems to have been friendly to the plaintiff in this controversy and who was a witness, testified that he signed and acknowledged the assignment of the mortgage to defendant Shean.

Section 20-1925, Comp. St. 1929, reads: "In all appeals from the district court to the supreme court in suits in equity, wherein review of some or all of the findings of fact

of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

We have, however, frequently held that in this class of cases the court, in reaching its own conclusions, will consider the fact, where the evidence is in conflict, that the trial court saw the witnesses and had an opportunity to observe their manner of testifying. Notwithstanding this rule, we are convinced, from a consideration of all the testimony, that the charge that the note and mortgage were obtained by fraud is not sustained by a preponderance of the evidence.

With reference to the acknowledgment, the rule of law is: "A certificate of acknowledgment of a deed or mortgage, in proper form, can be impeached only by clear, convincing, and satisfactory proof that the certificate is false and fraudulent." *Phillips v. Bishop*, 35 Neb. 487, 53 N. W. 375. Instead of the evidence being clear, convincing, and satisfactory that the certificate is false, the preponderance of the evidence, in the instant case, seems to be to the contrary.

We are of the opinion that the trial court erred in finding that the mortgage in question was obtained by fraud, and that it was not duly acknowledged.

The judgment of the district court is reversed, and the cause remanded, with directions to enter a decree in conformity with this opinion, and to enter a decree of foreclosure of the mortgage in favor of cross-petitioner Shean.

REVERSED.

MABEL D. MORSE, APPELLEE, V. GENERAL AMERICAN LIFE INSURANCE COMPANY, APPELLANT.

FILED DECEMBER 6, 1935. No. 29404.

1. **Insurance:** POLICY: CONSTRUCTION. If any uncertainties or ambiguities appear in an insurance policy which may be solved by either one of two reasonable constructions, the one that is more favorable to the insured and which will give life, force and effect to the policy should be adopted.
2. **Contracts:** CONSTRUCTION. Contracts must receive a reasonable construction, so as to give effect to the intention of the parties thereto and carry out, rather than defeat, the purpose for which they were executed.
3. **Insurance:** POLICY: CONSTRUCTION. Where a life insurance company, without new application and without new medical examination, issues a new policy of insurance to one of its policyholders upon his request for a reduction in the amount of his insurance, as of the date of the original policy, and for the sole purpose of reducing the amount of insurance to be carried, and where the new policy contains terms identical with those of the former policy, except as to the amount of insurance and premium, and such policy is given the same number and date as the original policy and is based upon the request of the insured for reduced amount of insurance, his original application and his original medical examination, such new policy is but a continuation of the former policy in a reduced amount and the date of the old, and not of the new, policy governs in determining the applicability of a suicide provision in such policy.

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

Loren H. Laughlin, Allen May and *J. R. Burcham,* for appellant.

Waldo Wintersteen and *Cook & Cook, contra.*

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

GOOD, J.

Plaintiff sued to recover upon a policy of life insurance. Defendant pleaded that the policy contained a provision that the company should not be liable, except for premiums

paid, in the event that insured should commit suicide within one year from the date of the policy, and alleged that the insured had committed suicide within one year. Plaintiff had judgment, and defendant has appealed.

The cause was determined upon a demurrer to the defendant's answer. The pleadings reflect the following pertinent facts: November 6, 1923, the Missouri State Life Insurance Company issued to plaintiff's husband, Harry S. Morse, a 20-payment life policy for $2,000, which contained a clause providing that, in the event assured committed suicide within one year from the date of the policy, the recovery should be limited to the premiums paid. In 1933 the Missouri State Life Insurance Company transferred all of its assets to the defendant, and the latter assumed all the obligations of the former company. Morse paid his premiums to the former company up to and including the year 1933, when he sent to defendant a request in the following form:

"Missouri State Life Insurance Company
"Home Office, Saint Louis

"General American Life Insurance Company.

Policy No. 465333

"I hereby request the Missouri State Life Insurance Company to change the above numbered policy as follows:

"Reduce to $1,000 as of original date of issue with outstanding loan of $242.00.

"I elect the automatic premium loan option.

"This is supplemental to the application on which the policy herein referred to was issued, and it is understood that this forms a part of the contract in the same manner as said application.

"Dated at Fremont, Nebr., this 6 day of December, 1933.

"Harry S. Morse, Insured."

The defendant took up the old policy for $2,000 and issued a new policy for $1,000. The form of the new policy was identical with that of the old, save that the amount of the insurance was stated to be $1,000 and the premium was reduced to one-half that provided in the original policy.

To this policy were attached the application for the original insurance, including original medical examination, and the above request. The new policy issued contained this recital:

"This insurance is granted in consideration of the application herefor and of the payment in advance of Thirty-nine and 82/100 Dollars being the premium for the first year's insurance under this policy ending on the 6th day of November, 1924. The insurance will be continued thereafter upon the payment of the * * * annual premium of Thirty-nine and 82/100 Dollars, on or before the sixth day of November in every year during the continuance of this policy, until premiums for twenty policy years, including the first, have been paid.

"In witness whereof, the General American Life Insurance Company, successor to the Missouri State Life Insurance Company has caused this policy to be signed by its President and its Secretary, and to be duly attested by its Registrar, this 27th day of December, 1933, subject to our assumption certificate dated September 7th, 1933."

The assumption certificate referred to was the assumption of risk when the defendant took over the assets of the Missouri State Life Insurance Company. The number of the original policy was 465333. The same number was given to the new policy. The new policy contained the following indorsement:

"Home Office St. Louis
"Number 465333
"20-Payment Life Policy
"Annual Dividend; Life Income and Waiver of Premium Disability
"$1,000
"Insurance on the Life of Harry S. Morse
"Annual Premium $39.82
"Date Nov. 6th, 1923."

Defendant contends that an entirely new policy was issued on the 27th day of December, 1933, and that, the insured having committed suicide within one year from

that date, there could be no recovery upon the policy except for the amount of the premiums paid upon that particular policy. Plaintiff contends that, although a new policy in form was issued to the insured, it was the intention and understanding of both parties that it was a continuation of the old policy to the extent of $1,000, and that the suicide clause had no operation, since the insured did not commit suicide until more than ten years after the issuance of the original policy.

It may be observed that the record shows that the insured was 35 years of age at the time the first policy was issued. The age given in the new policy is stated at 35 years. The new policy was not issued until more than ten years after the issuance of the first; yet the premium remained the same for the same amount of insurance. There was no new medical examination; there was no application for a new policy; the date of the premium payment was made to correspond with that of the old policy, to wit: November 6, instead of December 27, the date of the issuance of the new policy.

Counsel for the respective parties have cited us to many cases dealing with somewhat similar situations. None of them is expressly in point; nor have we been able to find any case where the facts were, in all respects, similar to those involved in the instant case. Defendant relies to a considerable extent upon the case of *Gans v. Aetna Life Ins. Co.*, 214 N. Y. 326, 108 N. E. 443, and plaintiff relies to a considerable extent upon the later case of *Silliman v. International Life Ins. Co.*, 131 Tenn. 303, 174 S. W. 1131. The facts in the instant case differ to such an extent from the facts in those cases that we do not consider that either is a precedent to be followed in this case.

We think that the instant case must be ruled by certain well-settled principles of law, one of which is: If any uncertainties or ambiguities appear in an insurance policy which may be solved by either one of two reasonable constructions, the one that is the more favorable to the insured and which will give life, force and effect to the policy should

be adopted. Another is that contracts must receive a reasonable construction so as to give effect to the intention of the parties thereto and carry out, rather than defeat, the purpose for which they were executed.

In the instant case, it is clear that the insured made no application for a new policy. What he requested was modification of his old policy. The modification desired was a reduction in the amount of the policy by one-half, and likewise a reduction by one-half of the premium which he would be required to pay. His request was for that and nothing more. Defendant, in attempting to comply with that request, instead of placing a rider or an indorsement upon the policy stating the modification, issued a new policy in the precise form of the old policy. The new policy shows on its face that it was to operate as a continuation of the old policy but in a reduced amount, because it recites the date as November 6, 1923; it recites the age of the assured as 35 years. The date given was the date of the original policy; the age of assured was his age at the time the original policy was issued. Clearly, if it was an entirely new policy, the premium rate would be higher when issued ten years later and when the insured was ten years older; yet the premium remained the same. No new medical examination was required; no new application by assured was required. The original application and the request for reduction in the amount of the insurance were each attached to the new policy. If it was an entirely new policy and not dependent upon the original application, there would be no reason for attaching the original application thereto. Moreover, if it was an entirely new policy, the defendant would be violating section 44-802, Comp. St. 1929, which provides that no life insurance company, doing business in this state, shall enter into any contract of insurance upon lives within this state without having previously made, or caused to be made, a prescribed medical examination of the assured by a legally qualified and practicing physician. We prefer to believe that the defendant acted in good faith and did not intend to violate this statute.

Under all the circumstances disclosed, we are impelled to the view that it was the intention of the parties that the new policy should operate as an extension of the old policy to the amount of $1,000. We think that the effect of what was done is precisely the same as if the defendant had attached to the old policy a rider, reciting that the amount of the insurance and the premium were each reduced one-half. Clearly, that is what was done by the issuance of a new policy. The date of the effective insurance was November, 1923, and not December, 1933. The insured did not commit suicide until more than ten years after the issuance of the original policy. The suicide clause constitutes no defense.

The judgment of the district court is right and is

AFFIRMED.

EDMOND SHINEFLEW V. STATE OF NEBRASKA.

FILED DECEMBER 6, 1935. No. 29530.

Rape: TRIAL: EXCLUSION OF EVIDENCE. A note, written during the hours of an alleged assault to commit rape, by the prosecutrix to the defendant, who was temporarily absent from the room, which note disclosed a close intimacy between the parties, was competent evidence, and it was prejudicial error for the court to reject it.

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

Thomas E. Dunbar and *Varro E. Tyler,* for plaintiff in error.

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

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

PAINE, J.

This is an error proceeding, in which the plaintiff in

error, hereinafter called the defendant, was convicted of an assault with intent to commit rape. The jury deliberated some 63 hours before reaching their verdict. The defendant was sentenced to the penitentiary for a term of not less than three years nor more than five years.

The prosecutrix was 17 years of age, but previous chastity was not alleged nor proved. The evidence of the prosecution is to the effect that on January 26, 1935, prosecutrix met the defendant near the Overland theatre in the business district of Nebraska City; that he said he wished to speak to her, and they stepped into an alley, and he put a gag in her mouth and some instrument at her back, and told her he would "blow her insides out" if she did not obey him; that he ordered her to cross Seventh street, a street well lighted with electroliers, and also another street, at about 7:30 on Saturday evening, with many people on the streets, and that they passed a book-store that was well lighted, and continued up an alley, which was also lighted in the center of the block, and thus he compelled her to go to his home, where he fastened the door shut with a punch driven in by a hammer, the door being old and the lock out of repair. She testified that he knocked her down with his fist for the purpose of committing rape upon her, and that she struggled with him, and that this struggle continued for five and a half hours. That some time after midnight he sent her over to her home, which was just across the street.

When she reached home, her father called a doctor, who arrived about 1:30 a. m., and found that her breasts were red and that there were some marks on her hips, and some abrasions along her lips, and that her ears were red, and a marked tenderness in the right temporal region of her head. The doctor was asked what she said in regard to attempted rape, and his answer was: "I asked her about that and she said there was no rape or attempted rape and so I took her word for it."

The evidence discloses that prosecutrix had been employed to care for the defendant's home during the absence

of his wife, who with their four young children had been visiting relatives at Parsons, Kansas; that prosecutrix had started by washing and cleaning up his house on the Monday after his wife left; and that the two families had visited and played cards and were friendly. On the other hand, the wife of the defendant testified that she did not visit them, and that the prosecutrix came over to defendant's home every afternoon, and in answer to a question testified as follows: "Yes; I told her I knew she was hanging after my husband and I told her there is plenty of single men without picking on a married man with four children;" and that they had fussed about this continuously for the last two weeks before she went away on her trip.

The defendant testified that he met the prosecutrix by appointment near the theatre and they attended the first show, and then went to his home, arriving about 10 o'clock; that about 11 o'clock he dropped down on the bed and went to sleep, and did not wake up until the sheriff came to arrest him after 1:00 a. m. The sheriff testified that he found defendant dressed except for his coat and vest, and saw no signs of disorder. The defendant positively denies that on the night in question he had any instrument of any kind or any weapon in his possession, and that he had never owned a pistol or revolver in his life.

For the defendant, a reputable witness testified that he was sitting in his automobile, with his wife and mother, in front of the Overland theatre, and saw the defendant and prosecutrix walk up to the ticket window, where defendant bought tickets for the first show, and a second witness testified that he saw them leave the theatre together at 9:30 p. m. A middle-aged lady testified that her home was in the middle of the same block, near the home of the defendant, and that between 9:30 and 10 o'clock on the night in question she saw the defendant and the prosecutrix crossing the yard up to the defendant's back door, and defendant spoke to her and said she was working late, as she was out in her yard getting some clothes off of the line, and that they were just walking along side by side, and that she

heard no unusual disturbance or noise in the defendant's home that night.

Forty-two errors are set out in the defendant's motion for a new trial. The principal error alleged is in the refusal of the court to admit in evidence exhibit No. 11. The defendant testified that, when they returned from the picture show and reached the door of his house, he told her to go on over home, but she wanted to come in with him, which she did. He testifies that he went out to the toilet and when he came back she had written on both sides of a long envelope, which appears to have come to him from Montgomery-Ward, being postmarked January 22, 1935, and which was lying there handy, and this envelope, with her writing on it, is identified as exhibit 11. Defendant testifies that she handed it to him that night about 11 o'clock as he came back into the house, and that it is in her handwriting. Exhibit 11 was the most loving kind of a note, asking him to kiss and make up. The defendant testifies that, immediately after reading this exhibit No. 11, he said to her: "A. I told her I didn't want her over there no more and wanted her to go home, and she said, 'I won't go home until morning.'"

The record discloses as follows: "Mr. Dunbar: The defendant offers exhibit No. 11, identified by the defendant, Edmond Shineflew, for the purpose of showing the character, by the particular act, course of life and conduct, inconsistent with purity." To which offer the county attorney objected as follows: "To which the state objects for the reason it is incompetent, irrelevant and immaterial, and for the further reason this is not a complaint for statutory rape; that it is a complaint for attempted rape and the age or previous chastity or state of mind of the prosecutrix, Marguerite Conn, is immaterial." The court sustained the objection and refused to allow exhibit No. 11 to be received in evidence.

Exhibit No. 11, if written after they had been together in this room for more than an hour that night, was proper to show her mental attitude toward the defendant at that

time, and it was further competent as tending to negative the alleged use of force by the defendant and the resistance thereto of the prosecutrix. The refusal to receive this exhibit No. 11 in evidence was prejudicial error.

The judgment and sentence are hereby reversed, and the cause remanded for further proceedings.

REVERSED.

ARTHUR ALBERS, APPELLEE, V. JOHN KIPP, APPELLANT.

FILED DECEMBER 6, 1935. No. 29581.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY. If an injury results from doing some act, even for the employer's benefit, at a place and in a manner not contemplated by the parties, it does not arise out of the employment.
2. ———: ———: ———. If an employee is injured while using a dangerous instrument, without permission of its owner, for a purpose for which it was not designed, outside the place of his employment, the employer is not liable therefor, unless it can be shown to have been used with the acquiescence, or at least with the knowledge, of the employer.
3. ———: ———: ———. Injury to employee does not arise out of his employment where, without the knowledge or direction of the employer, he is voluntarily performing work, not contemplated by the contract of employment, in a place where his duties do not, at the time, require his presence, and with an appliance not furnished by the employer and which was used without his employer's knowledge or consent, notwithstanding the work may have been beneficial to the employer.
4. ———: ———: ———. This rule applies even if the use of the hand tool furnished by the employer may be more inconvenient than a power machine which can be found on near-by premises.

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

Tibbets, Canaday & Hewitt, for appellant.

James D. Conway and *W. M. Whelan, contra.*

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

PAINE, J.

This is an action under the workmen's compensation law. From an award by the compensation commissioner, appeal was taken to the district court, which approved said award. From the judgment of the district court, it was brought to this court on appeal by the defendant.

The appellee, Arthur Albers, 39 years of age, had been caretaker of the Kipp Building in Hastings, Nebraska, for more than two years at the time of the accident. He washed windows and cleaned the rooms and offices in this three-story building, and, in addition, repaired locks and windows, built partitions, took care of some of the plumbing repairs, and did the painting that was necessary, and collected the rents. He devoted all of his time to working for John Kipp, the owner of the building, for in his spare time he had built corncribs and hog houses for a farm belonging to the owner of the building.

The Democrat Printing Company occupied the basement floor with its workshop, and had its offices on the first floor. Other tenants in the building were Fred Moe, Dr. Schaufelberger, Dr. Brown, Attorney C. E. Bruckman, and several others. The building was constructed of brick.

The appellee, of his own volition, made several window shields out of boards to keep the dust out of the rooms. The accident occurred when he was sawing a board to make one of these window shields for Dr. Schaufelberger's room, and to saw it more quickly he had gone into the rear room of the Democrat Printing Company and used a power-saw which was owned by the Democrat Printing Company, and installed for cutting metal. Appellee's hand slipped, and his thumb was cut completely off. He was taken to the hospital, where the wound was dressed, after which he continued to work at the building until the following June, at his regular wages of $14 a week.

The printing company took care of its own janitor work

in the workroom in the basement, where the power-saw was located, and the appellee had no duties calling him there except at occasional intervals when he washed the windows in that room.

The appellant testified that he would be around the building about twice a week to discuss the work with the janitor; that he did not know that window shields were being made, and would not have had them if he had known it, for they were made of rough boards that he would not have in a pig house. He testified that he furnished any tools requested, and that there were two hand-saws there for the janitor to use; that appellant never knew there was a power-saw in the workroom of his tenant, or that his janitor used it.

William Maltman, publisher of the Hastings Democrat, testified that his power-saw was in the pressroom, and that the janitor had no occasion to be in that room except to wash windows, and that the janitor had never asked his permission to use this saw, and that signs on the doors of the pressroom read, "For employees only."

The appellee, on the other hand, testified that he showed one of these window shields in a toilet to the appellant, and he thought it was a good thing. He further claimed that the foreman of the printing company never objected to his using this power-saw.

The appellant sets out as errors that the court erred in holding that the injury arose in the course of the appellee's employment, and further erred in refusing to reduce the amount of the appellee's award by deducting therefrom a set-off alleged by the appellant.

Section 48-101, Comp. St. 1929, provides: "When personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the actual or lawful imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer, provided the employee was himself not wilfully negligent at the time of receiving such injury."

It is admitted that, if an injury arises out of employment which occurs while the employee is engaged in performing

some labor and in performing it in a manner that could reasonably be foreseen when the employment contract was made, recovery may be had.

But, on the other hand, if the injury results from doing some act, even for the employer's benefit, not within the contemplation of the parties to the employment contract, or in doing an act at a place and in a manner not contemplated in the employment contract, it does not arise out of the employment within the contemplation of the workmen's compensation law.

The appellee was engaged on his own initiative in making a window shield out of a rough board, without the knowledge of his employer, and without being requested to make same by the tenant. And, further, he could have cut out the shield with one of the saws furnished by his employer, although it might have taken more time to do it. Further, the appellee was in a place where his duties did not call him, and was using a dangerous instrument, without permission of its owner, and, in addition, was using such power-saw, designed only to cut lead and other metals, for the purpose of cutting a rough board. Such use of such dangerous appliance, in such a place, at a time when no duty required his presence there, was outside of and beyond the scope of his employment, and for an injury occurring at such time and place the employer is not liable.

"Where an appliance is used for a purpose for which it was not intended, there can be no recovery unless it is shown that it was so used with the acquiescence or at least with the knowledge of the employer." 39 C. J. 848.

Where a watchman fell into a chute while asleep and was killed, it was held that his injury was not received as a natural incident of his work. It is said he was injured by performing an act not induced by his employer nor authorized by him. *Matter of Gifford v. Patterson, Inc.*, 222 N. Y. 4, 117 N. E. 946. See *United Disposal & Recovery Co. v. Industrial Commission,* 291 Ill. 480, 126 N. E. 183.

It has been held in many English cases that, under the doctrine of *volenti non fit injuria,* a workman voluntarily

absolves his master from the old common-law duty to carry on his business with such appliances as not to expose his employee to unreasonable risk, when that workman, without the knowledge of the master, uses machinery or tools more dangerous than that furnished by the master, and without the master's consent.

"Where the proximate cause of the injury is the adoption by the servant of a dangerous method of work where a safe method has been provided by the master, there can be no recovery for the resulting injury." 39 C. J. 844.

"If a servant knows or is charged with knowledge of the fact that appliances have been furnished for his use by an employer, it is the duty of the servant to use such appliances for prosecution of his work, and where proper appliances have been furnished him and he is injured by reason of his failure to use them, he cannot recover." 39 C. J. 845.

The rule applies although the use of the tool furnished may be inconvenient, and although the employee is afraid he may not be able to get out enough work to satisfy his employer if he uses same.

"Where a workman, employed to do work by hand, tried to rig up a time-saving device by throwing a rope over a revolving shaft, and was injured in so doing, it was held that the accident did not arise out of and in the course of the employment." 1 Schneider, Workmen's Compensation Law (2d ed.) 937.

While not exactly in point, yet a large number of Nebraska cases on compensation were reviewed in *McNaught v. Standard Oil Co.*, 128 Neb. 517, 259 N. W. 517, in which it was held that, if the employee left the place where his duties were to be performed to engage in a personal objective not incidental to his employment, in the doing of which he was injured, then his accident did not arise out of and in the course of his employment.

A portion of section 48-152, Comp. St. 1929, defining the meaning of the clause, "Personal injuries arising out of and in the course of employment," reads: "It is hereby declared: Not to cover workmen except while engaged in,

on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury." The appellee was injured while in a place where he should not have been at the time of the accident.

Under the clear terms of the statute, as interpreted by many decisions of this and other courts, the judgment for the appellee is

REVERSED.

JAMES DOBRY V. STATE OF NEBRASKA.

FILED DECEMBER 6, 1935. No. 29358.

1. **Criminal Law:** APPOINTMENT OF ASSISTANT COUNSEL. An application, made under the provisions of section 26-904, Comp. St. 1929, for the appointment of counsel to assist in the prosecution of a criminal case is addressed to the sound discretion of the trial court, and in the absence of a showing that there was an abuse of the court's discretion, error cannot be predicated thereon.
2. ———: REJECTION OF EVIDENCE. An offer of evidence, in a prosecution for murder, to show that a third person might have had a motive for killing the deceased is properly rejected where there is no evidence to connect such third person with the crime.
3. ———: EXPERT WITNESSES. Persons called to testify as witnesses skilled in ballistics are considered expert witnesses under the law of this state.
4. ———: ———: CAUTIONARY INSTRUCTION. A defendant in a prosecution for murder is not entitled to have a cautionary instruction given regarding the credibility of witnesses called as experts on ballistics on the theory that they fall under the same classification as private detectives and informers.
5. ———: ———. A witness skilled in ballistics may be permitted to testify that, in his opinion, the revolver in the possession of defendant at the time of the homicide fired the bullet taken from the body of the deceased, his opinion being the result of a comparison of markings on that bullet with those found on bullets fired by the witness through the revolver, the tests upon which he based his observations and formed his opinion being minutely described to the jury.

6. ———: ———: CREDIBILITY: QUESTION FOR JURY. The credibility of a witness skilled in ballistics and the weight to be given to his evidence are matters peculiarly within the province of the jury to determine.
7. ———: MISCONDUCT OF PROSECUTOR. Defendant in a criminal prosecution may not predicate error on the misconduct of the prosecuting attorney, known to him before the submission of the cause to the jury, when he does not ask for a mistrial but does procure the court to give an instruction to the jury to disregard such misconduct. He is not thus permitted to continue the trial, take chances on a favorable verdict and then complain in the event the verdict is adverse.
8. ———: ARGUMENT. It is not error for counsel for the state to refer to the defendant in a murder case as a murderer and an assassin, when such conclusions are reasonable and legitimate deductions to be drawn from the evidence.
9. Evidence examined and *held* to sustain a conviction of murder in the first degree.

ERROR to the district court for Colfax county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

O'Sullivan & Southard and *Frank C. Charvat,* for plaintiff in error.

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

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

CARTER, J.

The plaintiff in error, who will be referred to herein as the defendant, was convicted in the district court for Colfax county of first degree murder and sentenced to life imprisonment in the penitentiary. From the overruling of his motion for a new trial, the defendant prosecutes error to this court.

The evidence in this case shows that the defendant was a farmer living about nine miles north of Schuyler. He was 70 years of age at the time in question and had lived on the farm by himself since his wife died six or seven years before. Adolph Dobry, a son of the defendant, lived

across the road and approximately two blocks east. In addition to Adolph Dobry's family, one Katherine Vondra was boarding and rooming at the Adolph Dobry home and teaching in the country school near-by. The deceased, William Henesh, had been keeping company with Katherine Vondra for some time and it was shown to be his custom to take her back and forth to and from her home in Schuyler over the week ends. William Henesh was about 36 years of age and was employed in the power plant at Schuyler on night work. The record shows that on Sunday, January 28, 1934, the deceased took Katherine Vondra to the Adolph Dobry home at about 8:15 in the evening, after which he immediately left in order to go to work. At about 8:30 the automobile of the deceased was seen on fire off of the main highway and within two miles of the home of the defendant. About 20 minutes later, Henry Jonas and Joe Bohac, farmers living near-by, investigated and found the blazing body of the deceased behind the steering wheel of the burning car. The next day it was discovered by an examination of the body that deceased had been shot through the heart, the bullet lodging in the spine.

The testimony of Katherine Vondra was to the effect that she was 29 years of age and had taught school in the district where the defendant lived for four years. She testified that the defendant took her back and forth from her home to the Adolph Dobry home during the last two months of the second year she taught, and during the school year of 1933. She also testified that the defendant proposed marriage to her in the spring of 1933 and that she refused him. She further testified that on September 17, 1933, defendant offered her the sum of $5,000 if she would marry him. On a subsequent occasion, she says that defendant told her that Henesh was no good, that he was deaf and that she would have to support him if she married him. She also testified that, on or about January 17, 1934, defendant inquired of her if she had married Henesh as yet, and that she answered him in the negative; that defendant then said, "If you hear of something terrible happening,

don't be surprised." Many other conversations with defendant were detailed relative to her marrying Henesh and the possibility of her marrying the defendant, which we will not discuss in detail. Practically all the evidence given by Katherine Vondra was denied by the defendant.

The record also shows by the evidence of Clement Dudek, a hardware dealer in Schuyler, that on January 19, 1934, the defendant came into his store and obtained a revolver and nine cartridges. Dudek saw defendant on January 22, 1934, at which time defendant said he was taking a trip and would pay for the use of the gun. On January 30, 1934, two days after the murder of William Henesh, the defendant brought the gun back, saying that he had returned from his trip on the preceding Saturday but had been unable to bring the gun back because of illness. He also stated that he did not want any one to see him return the gun. Dudek testified that no shells were returned with the gun.

The state produced the evidence of ballistic experts to the effect that the bullet found in the body of William Henesh was fired from the gun which the defendant obtained from the witness Dudek. The defendant produced the evidence of an expert to the effect that, in his opinion, the evidence bullet could not have been fired from the gun in question.

The testimony of the defendant was to the effect that he was home at the time the murder was committed; that he had nothing to do with it and did not know of its occurrence until two days later; that he did get the gun in question from Dudek to defend himself from possible holdup, the fear of which had been brought about by a previous attempt to hold him up; that he did not tell any one about having the gun, not even his son, although he practiced shooting with it and retained it for more than a week; that he did not have any of the conversations with the witness Katherine Vondra that she testified to, and that they were all untrue.

It was shown in the record that the statements made by

the defendant, while an investigation of the crime was being conducted, differed in many respects with the testimony he gave on the stand. This is the testimony, in substance, upon which the jury found the defendant guilty.

The defendant first contends that the trial court erred in overruling the objections filed to the appointment of Joseph C. Cook as assistant prosecutor. The record shows that L. F. Otradovsky, the county attorney of Colfax county, testified that relatives of the deceased did talk to him with reference to obtaining assistant counsel to prosecute the case. He further testified that he exercised his own judgment in recommending Cook and suggested his appointment to the court upon his own initiative. Cook testified that he had not known the relatives of the deceased prior to the inquest, that Colfax county alone was paying for his services, and that the matter of a civil action had never been mentioned by the relatives of the deceased. We are unable to find anything in the evidence produced in support of the objections which shows that the appointment of Cook in any way prejudiced the rights of the defendant. The approval of the suggested appointment by the county attorney was addressed to the sound discretion of the trial judge, and an abuse of that discretion not appearing from the record, error cannot be predicated thereon. *Barr v. State,* 114 Neb. 853, 211 N. W. 188.

The defendant next contends that the trial court erred in not admitting certain evidence to the effect that the deceased generally carried a gun, that he was known to carry large sums of money on his person, and that the deceased had stated that certain persons unknown to him were "after him to take his life." The statements in question were alleged to have been made by the deceased more than a year prior to the death of William Henesh. We are inclined to the view that such statements were too remote in time even if they might otherwise be competent. As to their competency, we believe the rule to be that statements made by a deceased to a witness that third persons, unknown to him, had threatened his life are inadmissible as

hearsay. The evidence in the case at bar was wholly circumstantial, and it cannot be denied that defendant had the right to produce any competent evidence that another committed the crime. But, in the absence of any evidence to connect a third person with the crime, proof of a motive on the part of a third person to kill the deceased was not admissible to exculpate the defendant. In *Wallace v. State,* 46 Tex. Cr. Rep. 341, 81 S. W. 966, the court said: "We do not believe it was competent for the appellant to prove that deceased, Austin, had certain enemies, and that he was apprehensive of harm from them. The evidence was too remote; the rule being that, before testimony of this character is admissible, the evidence must tend at least in some degree to show that such other person did the killing. The mere fact that other parties may have entertained feelings of hostility or ill will or had made threats against deceased, will not be sufficient." To the same effect are *Commonwealth v. Kosh,* 305 Pa. St. 146, 157 Atl. 479; *State v. Patrick,* 48 N. Car. 443; *Goodlett v. State,* 136 Ala. 39, 33 So. 892. We therefore conclude that the trial court rightfully rejected the testimony complained of. There was no competent evidence in the record tending to connect any third person with the crime, and, in the absence thereof, the proposed testimony of defendant would at most create a bare conjecture.

Defendant contends that the trial court erred in refusing to give a requested instruction dealing with the credibility to be given to the testimony of police officers, detectives or others employed to detect crime. The only witnesses to whom the instruction could apply were R. H. McDonald and Calvin H. Goddard, called by the state as expert witnesses for the purpose of proving that the bullet found in the body of the deceased was fired from the gun that defendant had in his possession at the time of the murder. We know of no cases that hold that expert witnesses, hired to give technical evidence to a jury, are within the scope of the rule for which defendant contends. The purpose of a rule requiring the trial court to instruct, upon request, relative

to the credibility and weight to be given to the evidence of private detectives and informers is to protect the person charged with crime from the overzealous efforts of such persons in obtaining evidence, especially when they are paid only for the results of their labors. We know of no reason why an expert, testifying as to his technical knowledge of a subject involved in the litigation, should be placed within the scope of such a rule. The trial court rightfully refused to give the proffered instruction.

The defendant complains that the evidence was not sufficient to sustain the verdict. While the evidence is circumstantial, there can be no question as to its sufficiency to sustain the verdict. It would be impossible for us to detail all the evidence pointing to the defendant as the perpetrator of the crime. We have carefully read the record, and we doubt if any jury, conscientious in their efforts to find the facts and apply the law thereto, could come to any other conclusion. The defendant contends that the crime was a two-man job and that the defendant could not have committed the murder by himself. The jury apparently discarded this theory of the defense and, the evidence thereon being far from convincing, the finding of the jury is conclusive on that point. Defendant also contends that the evidence of the expert produced by him to prove that the evidence bullet was not fired from the gun in the possession of the defendant at the time of the murder and the many photographs and other exhibits produced by him conclusively establish the fact that the bullet was not fired from the gun in possession of the defendant and are sufficient to absolve him from the crime. To this we cannot agree. The evidence of a witness skilled in ballistics is ordinarily technical in its nature, and the conclusion drawn is an opinion based upon that technical knowledge.

The credibility of each witness produced as one skilled in ballistics and the weight to be given to his testimony are matters that are clearly within the province of the jury to determine. It cannot be said that any one of these skilled witnesses is, as a matter of law, entitled to have his opinion

treated as a conclusively established fact. This is a matter that is within the province of the jury and, they having arrived at a conclusion upon contradictory evidence, their finding will not be disturbed. In the case of *Evans v. Commonwealth,* 230 Ky. 411, 19 S. W. (2d) 1091, 66 A. L. R. 360, the testimony of witnesses skilled in ballistics is well considered. In that case the testimony of Calvin H. Goddard, a witness skilled in ballistics, was set out at length and its competency upheld by the supreme court of Kentucky. Goddard was a witness in the case at bar and his testimony was along the same lines as therein detailed, so much so that we consider the case of *Evans v. Commonwealth, supra,* authority for the submission of such evidence to the jury for their consideration as to its weight and credibility.

The defendant further complains of the conduct of the assistant prosecutor in his closing argument to the jury. The record discloses that, in several parts of his closing argument, the assistant prosecutor made remarks to the jury to the effect that, to clear the defendant, they must convince you that Katherine Vondra is a liar and a perjurer, that the sheriff is a liar and a perjurer, and that other witnesses deliberately falsified. Complaint is also made of the statements of the assistant prosecutor designating the defendant as a murderer, in the following language: "If they succeed in turning a murderer loose in the face of this evidence * * * then let the very walls of this courthouse fall. I again say to you twelve men, shall you make it unsafe for the assassin to do his business in your county?" Objections to these statements were duly made and overruled by the trial court. Counsel for defendant did not move for a mistrial on the ground of the misconduct of the assistant, but did request an instruction with reference thereto, which was given by the court. This instruction is as follows: "You are instructed that it is not necessary for you in order to arrive at a verdict of not guilty in this case to find any witness or witnesses guilty of perjury and such an argument should not be indulged in by you in

arriving at a verdict in this case, as no such question or questions is or are involved in this inquiry."

We are of the opinion that the objections made by the defense should have been sustained by the trial court. The conduct of the assistant prosecutor, in the respects noted, was anything but commendable. The question is whether, in the light of the instructions given by the trial court, the conduct of the assistant prosecutor was such as to require a retrial of this case. This court has held that trial judges and public prosecutors are charged with the duty of conducting criminal trials in such a manner that the accused may have a fair and impartial trial, uninfluenced by prejudice, passion and public clamor. *Cooper v. State,* 120 Neb. 598, 234 N. W. 406. To this we might add that every officer of the court is charged with the duty of conducting criminal trials in such a manner that both the state and the accused may have a fair and impartial trial, uninfluenced by prejudice, passion and public clamor.

In the case at bar, the question for the jury to determine was which of the witnesses were telling the truth. The very nature of the evidence was such that it could not all be true. The proper choice of words in an extemporaneous argument to a jury is not always within the immediate comprehension of counsel. To argue that a witness is or is not telling the truth is considered proper argument, but to argue that a witness is a liar and a perjurer, while often accomplishing the same result, is quite often objected to as improper. We fail to see why one is any more objectionable than the other from a legal standpoint. Of course, if the jury got the idea from the argument that by acquitting the defendant they would thereby brand or convict Katherine Vondra and other witnesses as perjurers, it would certainly constitute prejudicial error. But in this case the court instructed the jury that such was not the case. Unless the error complained of was prejudicial to the rights of the defendant, the cause should not be reversed, particularly in view of section 29-2308, Comp. St. 1929, which is, in part, as follows: "No judgment shall be set aside, or new trial granted,

or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission, or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

In *Melcher v. State,* 109 Neb. 865, 192 N. W. 502, this court, in reference to this statute, said: "This statute was doubtless enacted for the very purpose of furnishing to this court express lawful authority to deny the reversal of a case for just such matters as are involved in the above complaints, where, after an examination of the entire case, it shall appear that no substantial miscarriage of justice has actually occurred. We have examined the whole case and are of the opinion, not only that no miscarriage of justice occurred in finding the defendant guilty as charged, but that a palpable miscarriage of justice would have occurred, had the jury found otherwise."

We conclude that the evidence of the state was ample to sustain the conviction of this defendant. We further conclude that the remarks of the assistant prosecutor, viewed in the light of the instruction given, did not mislead the jury in arriving at their verdict and that they constitute harmless error. We are also convinced that the jury arrived at the only logical conclusion possible in this case, and if a new trial were granted, the result would undoubtedly be the same. A defendant cannot be said to be entitled to a new trial because of a technical error in the record, where his guilt is established by the evidence, merely for the purpose of giving another jury an opportunity to err in its judgment to the advantage of the defendant. The error must be prejudicial to defendant's rights. We are not saying that defendant should have moved for a mistrial because of the misconduct of counsel for the state, in order to preserve the error, but nevertheless he did not do so. Instead, he requested an instruction informing the jury to disregard the alleged prejudicial statements. The defendant, having requested the instruction, cannot now complain

of the form in which it was drawn. He then proceeded to take his chances with the jury as to the outcome. After offering the instruction, with full knowledge of the nature of the errors intended to be corrected thereby, and which he deemed sufficient to accomplish that result, he now, after an unfavorable verdict, contends that it was so prejudicial that it could not be cured by instruction. While we agree that there are certain errors that cannot be cured by a court's instruction, yet where the defense assumes that the error may be corrected by instruction and requests one to that effect, which is given, instead of moving for a mistrial, and then proceeds to submit his case to the jury, he is not in a position to urge error. Under this situation, he has waived his right to complain. He cannot proceed to go to the jury with the alleged error cured or attempted to be cured by an instruction he himself has tendered, and, upon obtaining an adverse verdict, set up that the error was not cured, in order to obtain a second chance before the jury.

With reference to the alleged misconduct of the assistant prosecutor in referring to the defendant as a murderer and an assassin, we are of the opinion that it was not prejudicial error under the situation as it existed in this case. The statements hereinbefore quoted followed a general summation of the evidence and are conclusions that could readily be inferred from the facts. There was no personal belief expressed that the defendant was a murderer or assassin. From the facts previously detailed it was fairly deducible that the defendant was a murderer and assassin. Under such circumstances, the prosecutor may state conclusions which are predicated upon the evidence. This does not mean that such statements may not constitute error if made for purposes of vilification or vituperation. Such does not appear to have been the situation in the case at bar. In *Holt v. State,* 91 Ark. 576, 121 S. W. 1072, the court said: "Counsel for the state denounced the defendant in argument as an 'assassin and cold-blooded murderer.' The language, at most, could only have been accepted by the jury as the opinion of the zealous prosecutor from his view-

point of the evidence. The jury had heard all the evidence, and they were sworn to form their opinion from the evidence and the law applicable thereto. It is not probable that a sensible jury would mistake the denunciation of zealous counsel for proof in the case, and be misled thereby to appellant's prejudice. * * * From the standpoint of the state, such opinions as the prosecutor expressed were reasonable and legitimate deductions, to be drawn from the evidence." The statements in the case at bar fall within the rule therein expressed and we conclude that they do not constitute prejudicial error.

After a consideration of the whole case, we have concluded that no error prejudicial to the rights of the defendant appears in the record, and the judgment is therefore

AFFIRMED.

CARROLL LEWIS, ADMINISTRATOR, APPELLEE, V. CHARLES FORREST MCADAMS, APPELLANT.

FILED DECEMBER 6, 1935. No. 29409.

1. **Homestead.** Where a husband devises to his wife the fee title to real estate, which had been occupied by both during his lifetime as a homestead, and the wife subsequently occupies the same during the balance of her lifetime, at her death intestate, in the absence of a homestead interest therein in her own right by virtue of her being the head of a family, her heirs take the property under the inheritance statute subject to the debts of the wife which were incurred after her husband's decease.
2. ———. The words, "of such husband or wife," appearing in section 40-117, Comp. St. 1929, construed as referring to the deceased title-owning spouse.
3. ———. Upon the death of the spouse holding the fee title to the family homestead, the homestead vests under the provisions of section 40-117, Comp. St. 1929, in the surviving spouse for life. Their children, whether adults or minors, have no homestead rights therein.
4. **Disaffirmance.** The *dictum* quoted herein from the opinion in

Judson v. Creighton, 88 Neb. 37, 128 N. W. 651, and followed in *In re Estate of Freling*, 119 Neb. 605, 230 N. W. 443, is disaffirmed.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. Opinion on motion for rehearing. *Former opinion vacated and judgment of district court affirmed.*

William Niklaus and *John E. Mockett*, for appellant.

William G. Rutledge, F. C. Radke and *Clarence G. Miles, contra.*

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

CARTER, J.

This is an appeal from an order of the district court for Nemaha county granting a license to Carroll Lewis, as administrator of the estate of Florence N. McAdams, deceased, to sell certain real estate for the payment of debts of the deceased and the costs of the administration of her estate, which said realty was claimed to be exempt from the payment thereof under the provisions of the homestead law. From the adverse order thus entered, Charles Forrest McAdams brings the case to this court on appeal.

The record in this case shows that Otis F. McAdams died testate on November 13, 1917, leaving surviving his widow, Florence N. McAdams, and an adult son, Charles Forrest McAdams. On and prior to his death, Otis F. McAdams and Florence N. McAdams, his wife, occupied the premises involved in this suit as a homestead. Under the terms of the will of Otis F. McAdams, Florence N. McAdams was devised the fee title to the lands in controversy, which she occupied until her death on December 22, 1931. The administrator of her estate thereupon made application for license to sell the property to pay debts of Florence N. McAdams, incurred subsequent to her husband's death, and for the payment of the costs of the administration of

her estate. Charles Forrest McAdams, the only heir of Florence N. McAdams, filed his answer claiming the property in question to be exempt under the homestead law from the payment of these obligations. The trial court found that there was no homestead right remaining and ordered the property sold. The question for determination is the correctness of the ruling by the trial court.

That homestead rights are the creatures of legislative enactment and wholly unknown to the common law cannot be successfully disputed. While it is the rule that homestead statutes should be liberally construed to effect their benevolent purposes, the court should not by interpretation unduly extend their scope for the benefit of persons not expressly or by fair implication included in the list of their beneficiaries. We must therefore determine the correctness of the decision in the suit at bar from the homestead statute together with the interpretations that this court has put upon its provisions.

The homestead law of this state, in so far as it is applicable to this case, is as follows: "If the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife." Comp. St. 1929, sec. 40-117.

It was clearly the intention of the legislature in enacting the homestead law to protect the home of the survivor during his or her lifetime. The homestead interest of the surviving spouse in the homestead of the deceased title-owning spouse is a life estate only. Under the statute, the remainder descends by will or by inheritance free from the debts of the deceased title-owning spouse and the debts of the surviving spouse that were contracted prior to the

death of the title-owning spouse. Such was the holding of this court in *First Nat. Bank of Greenwood v. Reece,* 64 Neb. 292, 89 N. W. 804, wherein it is said: "The statute, in clear and express terms, provides that the surviving husband or wife shall continue to enjoy the benefit of the homestead exemption in cases where the title to the property stands in the name of the deceased spouse. Where the husband, being the owner of the fee of the homestead, dies, the statute is plain that the surviving wife is vested with a life estate therein, free and clear of all debts contracted by herself or her deceased husband prior to or at the time of his death, and it is equally plain that if the fee of the homestead is in the wife, and the husband survive her, he is vested with a life estate, divested of all debts of either contracted prior to her decease." See, also, *Durland v. Seiler,* 27 Neb. 33, 42 N. W. 741; *Cooley v. Jansen,* 54 Neb. 33, 74 N. W. 391. We conclude, therefore, that Florence N. McAdams became the owner of the life estate in the homestead property, under the provisions of the homestead act, and the title owner of the remainder by will, free from the debts of her husband and free from her own debts contracted prior to her husband's death. There is no provision in the homestead law that can be construed as exempting the homestead property from the debts of the survivor after the survivor's death, which were incurred subsequent to the death of the title-owning spouse. Florence N. McAdams, at her death, left surviving one adult son, who was of age at the time of his father's death. It is apparent therefore that Florence N. McAdams was not the head of a family after her husband's death and did not therefore have a homestead in her own right. The only homestead interest that she obtained from her deceased husband was a life estate. This, of course, terminated at her death and necessarily terminated the last vestige of a homestead in the property derived from her husband. She having no homestead interest in her own right, there was no homestead interest remaining. It has always been the rule in this state that the homestead law creates no homestead rights

in the children of a homestead owner, though they are beneficiaries of homestead legislation. *Weddle v. Specht,* 97 Neb. 693, 151 N. W. 160. Charles Forrest McAdams can therefore have no homestead interest of his own in the property. The trial court was right in holding that the homestead interest of Florence N. McAdams terminated at her death and that the property should be sold to pay the costs of administering her estate and her debts that she incurred after the death of Otis F. McAdams.

Appellant contends for a contrary rule and cites the cases of *Judson v. Creighton,* 88 Neb. 37, 128 N. W. 651, and *In re Estate of Freling,* 119 Neb. 605, 230 N. W. 443, in support thereof. In order to show that these two cases are not authority for the contention of the appellant in this case, it will be necessary for us to analyze them with care.

In *Judson v. Creighton, supra,* the opinion says: "The legislature has provided that the homestead shall descend free from all debts contracted by the husband or the wife, so that the heirs take title free from all claims of their decedent's creditors. The property, therefore, was not subject to sale for the satisfaction of DeJay Judson's debts. *Tindall v. Peterson,* 71 Neb. 160, 98 N. W. 688; *Bixby v. Jewell,* 72 Neb. 755, 101 N. W. 1026; *Brandon v. Jensen,* 74 Neb. 569, 104 N. W. 1054; *Holmes v. Mason,* 80 Neb. 448, 114 N. W. 606." This is a correct statement of the law. But, in the first paragraph of the syllabus, the court say: "Where a homestead is selected during the lifetime of both husband and wife, and after the death of one the survivor resides upon the premises during his or her life, the real estate is not subject to sale for the satisfaction of the debts of either, which are not a lien thereon, nor to pay the costs of administering the estate of such survivor; but, if the title-holding spouse dies intestate, the title descends to his or her heirs, whether direct or collateral, exempt from such debts." We submit that the syllabus quoted is broader than the opinion and not warranted by a reasonable construction of the homestead statute. The clause, "nor to pay the costs of administering the estate of such survivor," is

purely *dictum,* not necessary to a decision of that case and not supported by any logical interpretation of the homestead statute. The further statement, "the real estate is not subject to sale for the satisfaction of the debts of either" is not borne out by the statute, unless the words "existing at decedent's death" are added thereto. The confusion undoubtedly arose on the interpretation of the words, "of such husband or wife," appearing at the end of that portion of the homestead law quoted in this opinion. It is not questioned that the life estate and remainder are free from the debts of the decedent and surviving spouse existing at the time of decedent's death. The argument is also made that these words were intended to exempt the homestead property from the debts of the survivor incurred previous to or at the time of the death of the survivor as well. In our judgment this interpretation would require a strained construction of the statute. The words *"such husband or wife"* clearly indicate that only one of the two was meant, the alternative *or* being used to denote the deceased title-owning spouse whether *husband or wife.* (Italics ours.) The contention is made that *Judson v. Creighton, supra,* will have to be overruled if this construction is placed on the statute. We think not. The statements herein complained of in the opinion in *Judson v. Creighton, supra,* on this point are purely *dicta* and were not necessary to a decision. The question at issue in that case was correctly determined by the court on the facts presented, but the rights of the heirs of a surviving spouse in the homestead property were not involved in that case.

In the case of *In re Estate of Freling, supra,* the court cite the following statement from *Judson v. Creighton, supra*: "The real estate is not subject to sale for the satisfaction of the debts of either, which are not a lien thereon, nor to pay the costs of administering the estate of such survivor." As we have pointed out, that part of the opinion in the case of *Judson v. Creighton, supra,* is *dictum* and involved a point not before the court in that case. This case is therefore no better authority for appellant's contention

than is the case of *Judson v. Creighton* itself. The opinion in *In re Estate of Freling, supra,* shows that the surviving spouse had a minor son and could therefore have been the head of a family and entitled to a homestead in her own right. If such was the case, the court arrived at a proper conclusion although its reasoning may not have been supported by the authorities cited.

We conclude therefore that the *dictum* quoted in this opinion from the case of *Judson v. Creighton, supra,* and that part of the opinion in *In re Estate of Freling, supra,* citing the same statements from the opinion of *Judson v. Creighton, supra,* should be and are hereby disaffirmed.

We conclude that the trial court correctly granted the administrator a license to sell the real estate involved herein for the payment of the debts of Florence N. McAdams incurred after the decease of her husband, Otis F. McAdams, and for the costs of administering her estate. Our former opinion, appearing in 129 Neb. 490, 262 N. W. 7, reversing the judgment of the trial court, is vacated and the judgment is

AFFIRMED.

EBERLY, J., dissents.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1936

BLANCHE MCMANUS, APPELLEE, V. LENA FARRELL, APPELLANT: BESSIE JENKS ET AL., APPELLEES.

FILED JANUARY 2, 1936. No. 29379.

Wills: AGREEMENT FOR DISTRIBUTION OF ESTATE. Where a widow, in a written agreement which she enters into with the heirs, accepts valuable property rights, in addition to all the provisions made for her in the will of her deceased husband, she has, under the special facts proved in this case, waived her right to claim a homestead interest in addition thereto.

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

Lanigan & Lanigan and *Thomas F. Colfer*, for appellant.

Davis & Vogeltanz, contra.

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

PER CURIAM.

This is an action in partition, brought by the plaintiff, a daughter of George Farrell, deceased, against Lena Farrell, widow, and the two sisters and two brothers of the plaintiff and their respective spouses.

George Farrell died at his home in Greeley county, Nebraska, November 25, 1929. His last will was duly probated in the county court of Greeley county. The defend-

ant, Lena Farrell, was the second wife of George Farrell, and married him in 1909, and is not the mother of any of his five children. Lena Farrell and her husband resided on the southwest quarter of section 15-17-12 in Greeley county, Nebraska, as their homestead, and she has continued to reside there since his death. S. T. Grohosky, executor under said will, filed his final account and petition for settlement January 14, 1931.

In the petition for partition in the case at bar, it is set out that the 160-acre homestead was owned by the late George Farrell, and that his widow did not elect to take under the statute, but elected to take under the provisions of his last will and testament; that on January 30, 1930, all parties interested in said real estate entered into a written agreement, whereby the widow received all of the personal property together with all of the rents up to March 1, 1931, upon the 160 acres of land now claimed by her as a homestead, and in consideration thereof waived any statutory right or claim, and agreed to take under the will; that said agreement was duly filed in the county court of Greeley county in the estate proceedings.

A final decree of distribution was entered in the county court on February 19, 1931, which approved the agreement and set it out as a part of the final decree. The title to said real estate now claimed as a homestead was duly vested by the county court in said final decree in the widow and the three daughters, an undivided one-fourth interest therein going to each of said four parties, as provided in the will, and further vested certain personal property in the widow, together with all of the rentals for the year ending March 1, 1931, and said will and final decree are still in full force and effect.

The plaintiff charges that since March 1, 1931, the widow has remained upon said premises, and has assumed the exclusive handling of said real estate, without authorization from the other owners thereof, and has retained a portion of said real estate without paying any rental therefor, and has not accounted for the rentals for the years 1932 and

1933, and the prayer of said petition was for a judgment and decree confirming the shares of the parties and for a partition of the real estate according to their respective rights, and for the appointment of a referee to collect the rentals now in default, and that the widow be enjoined from selling, disposing, or encumbering her interest in said real estate.

The widow, for answer to the petition, admits that the late George Farrell was the owner and in possession of the homestead, and that his will was probated, and that she is his widow; admits that she accepted the provisions made for her in said last will, and waived the right to file a deed of election to take under the law; admits that she entered into the agreement marked exhibit C; admits that the decree of distribution was entered in the estate of the late George Farrell; admits that she has been looking after the said homestead property since March 1, 1931, and has retained possession thereof and has leased the same. She alleges that she has at all times claimed the homestead right in the home quarter, and that she has never abandoned, released, conveyed, or otherwise waived or surrendered her homestead right therein; that the plaintiff has no right to maintain an action for partition and sale of the homestead, and that she protests and objects to the partition thereof. Defendant also shows total receipts from 1931 to 1934 of $1,308.35 and total disbursements of $1,060.17, and alleges that she now holds a balance on hand of $248.18. She further charges that, on account of the depressed values of real estate, it would be unjust to order a partition, as it would be impossible to realize a fair value thereof, and asks that the relief be denied, and that she be decreed to have a homestead right in and to the quarter-section of land hereinabove described, without regard to its value, for the reason that the deceased left no debts. *Meisner v. Hill,* 92 Neb. 435, 138 N. W. 583.

By agreement of parties, the trial of said partition action was had in the district courtroom at Ord, Valley county, Nebraska, on May 28, 1934, before the late Ralph R. Horth,

district judge, and a judgment in partition was duly entered on July 11, 1934, finding that George Farrell was the owner and in possession of certain lands at the time of his death; that the widow was his second wife, and not the mother of his children; that she did not elect to take under the statute, but elected to take under the provisions of his last will; that all of the interested parties entered into an agreement on January 30, 1930, wherein the widow received certain items of personal property and one-fourth of the rental of the homestead quarter-section until March 1, 1931, the other three-fourths going to the three daughters, and in consideration thereof the widow duly waived certain statutory rights or claims.

It was further provided in said judgment in partition that said homestead had been vested by the final decree of the county court in the widow and the three daughters, share and share alike. It was further provided in said judgment in the district court that, by accepting the provisions and benefits of said agreement and all of the provisions made for her under the will which she had elected to take thereunder without any reservation of a claim of homestead, and because of other evidence introduced at the trial, said widow had waived any and all claim to a homestead in and to any of the real estate, and directed partition of the property, for which purpose James M. Lanigan and E. L. Vogeltanz were duly appointed referees to make partition of said real estate, and it was provided that the balance of $248.18, remaining on hand of the rentals collected, should be divided one-fourth to each of the owners of said property.

The appellant prosecutes her appeal to this court from that portion of the judgment in partition finding that she waived her homestead right in said real estate, and sets out that the trial judge erred in finding that she had relinquished, released, conveyed, abandoned, or waived her homestead right; that said widow was vested with a homestead right in said real estate, and that there was no specific waiver of said right in the agreement entered into

between the parties, nor in the decree on final account in the county court, and insists that there can be no such thing as an implied waiver of a homestead right under section 40-117, Comp. St. 1929, which provides for such homestead right.

In the agreement signed by the parties January 30, 1930, it is clearly stated that the widow would have been entitled under the laws of descent to an undivided one-fourth interest in both the real and personal property of the deceased, and also to a homestead right in the home quarter-section; "that as such surviving widow the said Lena Farrell may, under the laws of the state of Nebraska, reject the terms and provisions of said last will and testament and elect to take under the law instead of under said will."

This agreement which the widow signed then gives a detailed list of all the horses, cows, hogs, corn, oats, barley, wheat, one Buick car, etc., belonging to said estate, and gives it all to the widow instead of only a one-fourth part thereof, and then follows this paragraph:

"The party of the first part agrees to and hereby does accept the provisions made for her in the last will and testament of George Farrell, deceased, and hereby waives the right to file a deed of election to take under the law instead of under the will."

It appears that controversies had arisen between the heirs, and that the widow and children desired to settle such differences; the children's three-quarters share in the personal property was given to the widow and she gave up the homestead right in the home place.

The county court in its final decree followed the terms of the agreement signed by all the parties, and in accordance therewith passed title to the real estate, making no reservation of a homestead right in the widow. The county court had the jurisdiction to assign to her homestead rights in this property, and she took no appeal from its final decree. *Tyson v. Tyson,* 71 Neb. 438, 98 N. W. 1076; 34 C. J. 759; 15 R. C. L. 996, sec. 471.

Equitable conduct requires that one should make timely

assertion of his rights against another who he knows may be acting in innocence of his claim. *Criswell v. Criswell,* 101 Neb. 349, 163 N. W. 302. Courts of equity have inherent power to refuse relief when not to do so would work injustice in the particular case. *Folz v. Maxwell,* 100 Neb. 713, 161 N. W. 254.

Upon appeal to the district court, the finding of that court was that the widow, by electing in the agreement to take under the will, without any reservation of a claim of a homestead, and because of other evidence introduced, had waived all claim to a homestead right.

The law of homestead is wholly the creature of statute, and originated in Texas, and is called an American institution, according to an article in 3 Neb. Law Bulletin, 109, by Dean Foster. In chapter 7 of the same article, p. 402, it sets out that the homestead rights may be abandoned, and that there are also other methods of terminating homestead rights, and discusses its forfeiture under the specific terms of section 40-117, Comp. St. 1929, in case the surviving spouse wilfully failed to provide a home for the minor children, or by election to partition the homestead. It is also true that the homestead rights may be waived, and are extinguished by transfer of the homestead property.

Section 30-101, Comp. St. 1929, provides for homestead rights in real estate "which has not been lawfully devised." Where a widow, in a written agreement which she enters into with the heirs, accepts valuable property rights, in addition to all the provisions made for her in the will of her deceased husband, she has, under the special facts proved in this case, waived her right to claim a homestead interest in addition thereto.

In *Godman v. Converse,* 43 Neb. 463, 61 N. W. 756, it was held: "One who accepts benefits under a will must, as a rule, conform to all of its provisions and renounce every right inconsistent therewith."

The rights of the widow and heirs under the agreement they signed are clear, and provided definitely that she would not claim any homestead right. The county court

followed this finding in its decree, as did the district court. Finding no error in the record, the decree is hereby

AFFIRMED.

BUTLER COUNTY, APPELLANT, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLEE.

FILED JANUARY 2, 1936. No. 29459.

1. **Railroads.** The Nebraska state railway commission has jurisdiction over all crossings of highways outside of incorporated villages, towns and cities, across, over or under all railroads in Nebraska, and shall make such rules and regulations for the construction, repair and maintenance thereof as the commission shall deem adequate and sufficient for the protection and necessity of the public. Comp. St. 1929, sec. 75-220.
2. ———. No abuse of the discretion granted by the legislature to the commission appears in the records.

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

J. C. Hranac and *Ray E. Sabata,* for appellant.

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

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

GOSS, C. J.

After a full hearing, the state railway commission dismissed the complaint of the county of Butler against the Chicago & Northwestern Railway Company. The county appealed.

The company for years had maintained an underpass where its railroad crossed a public road. The complaint alleges the overhead railroad bridge obstructs the view of drivers of vehicles approaching it, that the lateral clearance between its supporting piers is so narrow that two vehicles cannot safely pass each other thereunder, that the

piers obstruct the drainage of surface water in its course along the sides of the highway, that about 50 feet east of the underpass is a private driveway leading into a farmyard, and that it is impossible for a driver going down the west slope of the highway to see a vehicle about to enter the highway from the driveway. Complainant prayed for an order directing defendant to abate the nuisance at once and to widen, at defendant's expense, the lateral clearance of the supporting piers so that there would be at least 28 feet between them.

Testimony of witnesses was taken upon the hearing, and the commission, in company with the county supervisors, county attorney and officers of the railroad company, personally viewed the underpass and its surroundings; also, at the request of complainant, the commission secured "the width of the underpass on federal highway No. 16 under the Union Pacific Railroad on West Center street, west of Omaha, between Wahoo and Omaha. This was obtained and it was found to be 18 feet. This underpass * * * is on a slight angle to the highway so that the view from either side of the highway is considerably narrower than the view to be obtained on the underpass in question;" that is, in this suit. The words above quoted were a part of the finding of the commission.

The evidence shows that the road on which the underpass complained of was located was neither a federal road nor a state road; it was approximately in the center of a valley and approached by a straight road, visible and dropping down the valley to it, for about 1,500 feet both from the west and the east; the road had not long been graded and it had been graveled for the first time shortly before the trial; the underpass had a lateral clearance of 17 feet and 3 inches, compared with 18 feet lateral clearance of the underpass on federal highway No. 16, which the commission was asked to consider. The underpass in suit is used by few people compared with that of No. 16; photographs in evidence show a sufficiently long view of the road, when approaching the underpass, to protect any one driving with

due care, and show that two vehicles so driven could easily pass at the point in question. The evidence shows that there was no danger of collision of a car on the highway and one coming out of the private driveway, 120 feet from the underpass, if both were being driven with due care.

The underpass was first built in 1913. In 1927 new creosote-treated piles were put in. It would cost approximately $4,500 to build an underpass with 28 feet clearance.

The railway commission heard and considered all the evidence and dismissed the complaint on the following conditions: That the railway company place red prism reflectors not less than 16 inches square on the piling on each side of the railroad on the right-hand side nearest the roadway, and suggested (as it had no power to order) that the county erect signs reading "Slow" and "Narrow Underpass" on the right-hand side of the road 300 feet east and 300 feet west.

The Nebraska state railway commission has jurisdiction over all crossings of highways outside of incorporated villages, towns and cities, across, over or under all railroads in Nebraska, and shall make such rules and regulations for the construction, repair and maintenance thereof as the commission shall deem adequate and sufficient for the protection and necessity of the public. Comp. St. 1929, sec. 75-220.

We find the order of the commission to be in accord with the evidence and the law. No abuse of the discretion granted by the legislature to the commission appears on the record.

The order of the commission is

AFFIRMED.

GUST L. JOHNSON, APPELLEE, V. FIRST TRUST COMPANY, APPELLANT.

FILED JANUARY 2, 1936. No. 29503.

1. **Statute of Frauds.** "An oral agreement, to be void under the first subdivision of section 36-202, Comp. St. 1929, must indicate

by its terms that it is not to be performed within one year from the making thereof." *Johnson v. First Trust Co.*, 125 Neb. 26, 248 N. W. 815.

2. **Appeal:** DIRECTION OF VERDICT. It is erroneous to direct a verdict for either party where the evidence on a material issue is conflicting.

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

Finlayson, Burke & McKie, for appellant.

Patrick & Smith and *O'Sullivan & Southard, contra.*

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

GOSS, C. J.

This is the second appearance of this case. *Johnson v. First Trust Co.*, 125 Neb. 26, 248 N. W. 815. There we reversed the judgment for defendant entered upon motion at the close of plaintiff's evidence. We held that "An oral agreement, to be void under the first subdivision of section 36-202, Comp. St. 1929, must indicate by its terms that it is not to be performed within one year from the making thereof."

The case was retried in the district court and submitted to a jury to determine whether, when defendant sold the bonds in suit to plaintiff, there was an oral agreement, not prohibited by the above cited statute of frauds, requiring defendant to repurchase the bonds at the time demanded. Defendant had moved for a directed verdict. The jury found for plaintiff and defendant appealed from the judgment rendered on the verdict.

The evidence was in conflict. This made it a question for the jury, which they decided in favor of plaintiff. It is fundamental that it is erroneous to direct a verdict for either party where the evidence on a material issue is conflicting. A former officer of defendant, who sold the bonds to plaintiff, testified that he told plaintiff he thought there would be no trouble in selling the bonds and that, if plaintiff

wanted some of the money before ten years, defendant would try to sell them for him. Plaintiff was not an artful witness. Portions of his testimony may be selected from which a jury might infer that he would have been satisfied with five-year bonds or with the ten-year bonds purchased by him if they would be cashed by defendant within five years, but, on the other hand, there is ample testimony by him that, when he took the ten-year bonds, he was promised by the officer through whom he bought them that at any time he wanted the money the trust company would repurchase the bonds. The jury, as triers of fact, might have found differently from the evidence. It was, under the well-settled rule, peculiarly a question for the jury. Their decision is binding upon us.

The judgment of the district court is

AFFIRMED.

HOYT BROTHERS, INC., APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED JANUARY 2, 1936. No. 29408.

1. **Licenses.** A municipal license fee and an occupation tax, imposed as a right to transact the business of soliciting orders for future delivery of ordinary merchandise manufactured by a corporation engaged in both interstate and intrastate commerce, must be reasonable and not so high and confiscatory as to prohibit such business, though defined by ordinance as "peddling."
2. **Injunction.** In a proper case, a court of equity may exercise jurisdiction to prevent a multiplicity of prosecutions to collect confiscatory fines for violations of city ordinances where their continued enforcement to recover penalties will interfere with the transaction of commercial business lawful in itself and result in irreparable injury.

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

W. A. Ehlers, for appellant.

Loren H. Laughlin and *H. B. Porterfield, contra.*

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

ROSE, J.

This is a suit in equity for an injunction to prevent Max Kier, city attorney of Lincoln, and William C. Condit, chief of police of Lincoln, from interfering with agents of plaintiff in soliciting in Lincoln orders for ordinary merchandise for future delivery. In violation of two city ordinances forbidding peddling without a license and without payment of an occupation tax, two agents of plaintiff solicited orders for merchandise for future delivery and were prosecuted and fined therefor. Continued prosecutions were threatened. The ordinances defined the taking of orders for present or future delivery of merchandise as "peddling." The petition alleged the ordinances were void on the ground, among others, that they were unreasonable and confiscatory, amounting to a prohibition of the lawful business in which plaintiff is engaged. Upon a trial of the cause, the district court dismissed the suit in equity, and plaintiff appealed.

Are the city ordinances enforceable against agents of plaintiff? Plaintiff is a corporation organized under the laws of New Jersey and manufactures in Newark, in that state, extracts, spices, toilet articles and other things. The products are sold in both interstate and intrastate commerce in the principal cities of the country. It has a branch office and a warehouse in Omaha and an office in Lincoln. It sells merchandise manufactured by plaintiff only; men hired and sent out to solicit orders for future delivery; ten men engaged for Lincoln; solicitors carry samples, price list and order book; orders taken for future delivery on basis of price list and samples; no payments collected at the time; agents solicit orders by going from house to house; orders inspected by branch manager; orders in Lincoln, if approved, filled from stock in Omaha warehouse; has stock in warehouse before orders are taken; no goods sold along the streets. Evidence tending to prove the foregoing facts is uncontradicted.

Of the ten solicitors engaged for service in Lincoln, two were prosecuted, convicted and fined in municipal court for violating the ordinances and appealed to the district court, where the fines were affirmed. Proceedings in error from the district court to the supreme court were dismissed on the ground that appeals were the exclusive remedies for review, but it was distinctly stated in the opinion that the validity of the city ordinances was not determined. *Hoover v. State,* 126 Neb. 277, 253 N. W. 359. To prevent the prosecutions from multiplying, plaintiff suspended business in Lincoln pending a test of the ordinances.

Ordinance 1232 requires a peddler plying his business for a month to pay a license fee of $15. Ordinance 3134 imposes on a peddler an occupation tax of $40 a month. Estimated by the month, the sum of the license fee and the occupation tax is $55 for each solicitor of plaintiff. The undisputed evidence is that the average earnings of each solicitor in net profits to plaintiff is about $2 for a working day, or less than $55 a month. Each solicitor, taking orders for future delivery only, defined by ordinance as a "peddler," is required to pay both the license fee and the occupation tax. It follows, therefore, that the ordinances impose upon a solicitor a burden equal to or in excess of his net earnings for plaintiff. On this basis the ordinances, as applicable to plaintiff, are confiscatory and amount to a prohibition of the right to transact business in Lincoln. Profit, the incentive to private enterprise, will be gone, if the municipal legislation is enforced against plaintiff. The law is that "such taxes must be reasonable, considering the nature of the business, and not so high as to prohibit the carrying on of the business." *Caldwell v. City of Lincoln,* 19 Neb. 569, 27 N. W. 647; *Petersen Baking Co. v. City of Fremont,* 119 Neb. 212, 228 N. W. 256. On the record, therefore, these ordinances, in their present form, are not enforceable against plaintiff or its agents, when the nature of the business is considered. It is equally clear that plaintiff does not have an adequate remedy at law to prevent irreparable injury. In a proper case, a court of equity may

exercise jurisdiction to prevent a multiplicity of prosecutions to collect confiscatory fines for violations of city ordinances where their continued enforcement to recover penalties will interfere with the transaction of commercial business lawful in itself and result in irreparable injury. An injunction, however, is not grantable on the trial *de novo,* since the chief of police who directed the arrest of plaintiff's agents and the city attorney who prosecuted them are not now in office. Their successors are not parties hereto and there is nothing in the record to indicate that the present city officers will interfere with plaintiff's business under existing ordinances. For the purpose of further proceedings, the judgment of the district court is reversed and the cause remanded.

REVERSED.

ALBERT P. ROBERTSON, APPELLEE, V. SAFE WAY STORES, INC., ET AL., APPELLANTS.

FILED JANUARY 2, 1936. No. 29419.

1. **False imprisonment** is the unlawful restraint of a person without his consent.
2. **Damages.** Under the facts detailed in the opinion, recovery of $300 *held* not excessive.

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

Brown, Fitch & West, for appellants.

Leigh & Krajicek, Marcell & Caldwell and *William C. Meyer, contra.*

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

GOOD, J.

In an action for damages for false imprisonment, plaintiff recovered a judgment for $300 against defendants Safe

Way Stores, Inc., and Joseph W. Kastoryz, manager of the corporate defendant. Defendants have appealed.

Defendants contend that the evidence is insufficient to sustain a verdict for plaintiff, and that the judgment is excessive.

Since the jury found for plaintiff, we must assume the truth of the evidence most favorable to plaintiff's contention. His evidence tends to prove the following facts:

Corporate defendant operates a self-serving grocery store in which the customer enters the store through a turnstile, takes a basket and selects such articles as he desires to purchase, and then brings them to a checker stand where the amount of his purchases is ascertained and paid for. Plaintiff and his son entered this store to purchase groceries. They selected a number of articles, presented them at the checker counter and paid what they supposed was the amount due for the items purchased, left the store building and went to their truck standing in front of the store and deposited their groceries therein. Plaintiff's son had entered the truck, and plaintiff was about to enter, when defendant Kastoryz accosted him, and he was pulled and pushed back across the sidewalk into and through the store to a back room and accused of theft of a 15-cent sack of candy. After considerable controversy between the plaintiff, his son and the manager and other employees of the store, plaintiff paid the sum of $5 to defendant Kastoryz, which the latter claimed was for articles purloined by plaintiff's son. According to the testimony of plaintiff, he selected, among other articles, the bag of candy, presented it on the checker's stand, and the son deposited some money to pay for the articles, each supposing that all of the items had been paid for before they left the store. Subsequent checking of the articles disclosed that the bag of candy had not been paid for, and plaintiff's son thereafter paid for the candy, in addition to the $5 which plaintiff paid. There is evidence that defendant Kastoryz made threats that plaintiff's son would be fined $25; that the police would be called and the son taken to jail unless settlement was made

for what was claimed to be due. It was upon this threat that the plaintiff was induced to pay $5 after larger sums had been demanded, but which he did not possess. There was testimony that defendant Kastoryz stated that another party, under similar circumstances, had paid $25. It is unnecessary to go further into the details.

"False imprisonment" is defined in 25 C. J. 443, in this language: "False imprisonment consists in the unlawful restraint against his will of an individual's personal liberty or freedom of locomotion. The gist of false imprisonment is unlawful detention."

In *Johnson v. Bouton,* 35 Neb. 898, 53 N. W. 995, it was held: "False imprisonment is the unlawful restraint of a person without his consent either with or without process of law."

The evidence plainly indicates that plaintiff was forcibly and against his will taken from beside his truck, pulled and pushed across the sidewalk through the store and into a back room and detained for a period of 30 or 40 minutes. There is no pretense that there was any warrant for his arrest, and, according to plaintiff's testimony, he was guilty of no act which would justify such conduct on the part of defendants. We think the evidence was sufficient to sustain a finding that defendants were guilty of false imprisonment, within the legal definition of that term.

Defendants assert that the judgment is excessive. The law prescribes no rule for the ascertainment of the exact amount of recovery that should be allowed in a case of this character. The general rule is that it is such sum as will fairly and reasonably compensate plaintiff for the pecuniary damage which the jury may find, from the evidence, was caused by the wrongful acts of defendant. This rule was given to the jury by an instruction of the court. It is true that plaintiff did not testify as to the shame, humiliation, disgrace and mental anguish that he suffered by reason of the defendants' conduct. The evidence discloses that the pulling and pushing of plaintiff from the truck into and through the store was in the presence of a large number

of persons. We think the jury might justifiably infer that plaintiff suffered humiliation, shame and mental anguish, although the extent thereof is not disclosed by the evidence. The facts proved would warrant an inference that plaintiff did so suffer. Under the circumstances disclosed, we are unable to say that a judgment for $300 was excessive.

Error prejudicial to defendants is not disclosed.

AFFIRMED.

CARTER, J., dissents.

In my judgment, the facts set forth in the court's opinion do not justify the finding of the jury that the plaintiff sustained substantial damage because of the shame, humiliation, disgrace and mental anguish that he suffered. I agree that some persons might suffer shame, humiliation, disgrace and mental anguish as a result of such an experience, while others would not. The court ought not to assume, without any evidence on the subject, that plaintiff falls within one class or the other. Damages ought not to be allowed on possibility or conjecture. I submit that, under the facts of this case, there is no competent evidence from which the mental state of the plaintiff can be inferred. Nominal damages are all that have been proved and a judgment in excess thereof is not supported by the evidence.

PAINE, J., concurs in the above dissent.

DONALD ROBERTSON, APPELLEE, V. SAFE WAY STORES, INC., ET AL., APPELLANTS.

FILED JANUARY 2, 1936. No. 29420.

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

Brown, Fitch & West, for appellants.

Leigh & Krajicek, Marcell & Caldwell and *William C. Meyer, contra.*

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

GOOD, J.

This is a companion case to *Robertson v. Safe Way Stores, Inc., ante,* p. 82, decided at the present term of court. In the instant case plaintiff recovered a judgment for $100, and defendants have appealed.

The facts relative to the false imprisonment are the same as those detailed in *Robertson v. Safe Way Stores, Inc., supra,* and grow out of the same transaction. This action is by the son, while the former is by the father. The facts are quite similar and need not be here repeated. The only contention of defendants on this appeal is that the verdict is excessive.

For the reasons set forth in *Robertson v. Safe Way Stores, Inc., ante,* p. 82, we are of the opinion that the contention cannot be sustained.

No error is apparent.

AFFIRMED.

CARTER, J., dissents.

I dissent in this case for the reasons stated in my dissent in *Robertson v. Safe Way Stores, Inc., ante,* p. 82.

PAINE, J., concurs in the above dissent.

LUCINDA STORM, APPELLANT, V. JOHN CHRISTENSON, APPELLEE.

FILED JANUARY 2, 1936. No. 29414.

Record examined, and evidence therein *held* ample to support the verdict and judgment of the trial court.

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

Arthur J. Denney, for appellant.

Rain & Rain, contra.

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

EBERLY, J.

This is an action for damages for personal injuries sustained by the appellant (hereinafter referred to as plaintiff), caused by an automobile collision in the intersection of E and Ninth streets in the city of Fairbury, Nebraska. The automobile in which plaintiff was riding was struck by a car driven by defendant's daughter and overturned, resulting in the damages for which plaintiff seeks recovery. There was a trial to a jury, verdict and judgment for defendant, and from the order of the trial court denying her motion for a new trial, plaintiff appealed.

The collision occurred on January 23, 1933, at approximately 4:20 p. m. All witnesses agree that it was a bright, clear day. E street slopes to the south and Ninth street to the westward at the point in question. At the northeast corner of this intersection, facing approaching travel from the east on Ninth street, is a "stop sign." Immediately preceding the collision, plaintiff, as a passenger and guest in an automobile then driven by one Renshaw, was proceeding southward over E street, and the car then driven by the daughter of defendant was coming westward over Ninth street. The front fender of defendant's car came in contact with the left rear fender of the car in which plaintiff was riding, at a point some 3 or 4 feet west of the center of this intersection. From this contact the damages in suit resulted. The testimony on behalf of the plaintiff is, in substance, that the car in which she was riding was traveling at not to exceed 15 miles an hour, was the first to enter the intersection, and had the right of way, particularly so because of the nature of E street at the point of the collision, it being a public highway on which north and south traffic, by city ordinance, had priority over the traffic passing over Ninth street; and that defendant's car failed to stop at the "stop sign," and entered, and was passing over, the intersection at an excessive and

dangerous rate of speed, resulting in a collision occasioning the injuries in suit.

However, the evidence of plaintiff was met with testimony on behalf of defendant which contradicted it at almost all material points. It is, in substance, that, looking northward along E street for the distance of a city block from the "stop sign," the entire street is in plain view to the intersection of E and Tenth streets. To the north, beyond this intersection of E and Tenth streets, an automobile proceeding south on E street, due to the configuration of the terrain, cannot be seen from the intersection of Ninth and E streets. The evidence of three witnesses is that the defendant's automobile came to a stop at the "stop sign" as required; that they looked northward along E street, and no car was in sight; that the driver of defendant's car shifted to "intermediate," and then entered the intersection at a rate of speed not exceeding 6 or 7 miles an hour, and that in that period of time, viz., 7 seconds, plaintiff's automobile must have passed over the intersection at E and Tenth streets, one block away, come into view of the scene of the accident, traversed the intervening distance, and reached the point of impact. On the basis of the express testimony of defendant's witnesses, and the logical and necessary deductions therefrom, as well as the physical facts involved, the jury were justified, if believing such evidence, in finding that the plaintiff was traveling at the rate of approximately 30 miles an hour just preceding the collision. There is also evidence in the record that plaintiff's driver, immediately after the accident, admitted that, on seeing defendant's car in the intersection, he "stepped on the gas" in an attempt to pass in front of it, which action resulted in the collision in suit. True, this is denied by the driver.

But, obviously, these disputed questions of fact were for the jury to determine, and whatever might have been the conclusion of this court, were it vested with the power of determining facts, we are confronted with the condition that this function is, under our Constitution, to be dis-

charged by the jury. In the record before us, we find ample evidence which sustains the jury's conclusion. There is no question of contributory negligence in this case. It is solely a question of proximate cause. Defendant's evidence, if worthy of belief, fairly establishes that the negligence of plaintiff's driver constituted the proximate cause.

We have carefully considered the other assignments of error, but do not find that in any material degree the trial court erred.

It follows that ample evidence in the record supports the verdict of the jury returned herein, and, no affirmative errors appearing, the judgment of the trial court must be

AFFIRMED.

ANDREW F. STURM, APPELLANT, V. LISSA LLOYD, APPELLEE.

FILED JANUARY 2, 1936. No. 29485.

1. **Husband and Wife:** ACTION ON NOTE: PAROL EVIDENCE. In a suit at law on a note signed by a married woman, containing a recital by which the wife expressly stipulates that her separate estate should be charged with its payment, it is error for the trial court, over objection, to permit the introduction of parol evidence to contradict the express provisions of the recital where fraud, accident or mistake are not pleaded as a defense. To permit the introduction of such evidence would constitute a violation of the parol evidence rule.
2. **Case Overruled.** The holding of this court in the case of *McRoberts v. Dworak*, 117 Neb. 342, 220 N. W. 587, under the statement of facts contained in the opinion therein, is hereby overruled.

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

Pitzer & Pitzer, for appellant.

W. G. Kieck, contra.

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

CARTER, J.

This is an action at law to recover on a promissory note. At the close of the evidence both parties moved for a directed verdict. Defendant's motion was sustained by the trial court and a judgment for defendant entered. From the overruling of his motion for a new trial plaintiff appeals.

The evidence shows that on March 6, 1923, John W. Lloyd and Lissa Lloyd, his wife, executed and delivered to Andrew F. Sturm their promissory note for $863.30, bearing interest at 8 per cent. The evidence is undisputed that payments had been made thereon, the last under date of May 4, 1929. The note sued upon contained the following clause: "And each of us hereby personally charge our own separate estate with the payment of this note." Plaintiff also produced evidence that was not disputed to the effect that the defendant Lissa Lloyd had a separate estate at the time the note was executed.

The evidence of Lissa Lloyd, the only witness called by the defense, was to the effect that she was a married woman at the time the note was executed, that she signed the note without reading it, and that she never intended to bind her separate estate for its payment. Both parties thereupon moved for a directed verdict. The jury were then discharged and the court entered a judgment for the defendant.

The testimony of defendant, to the effect that she signed the note at the request of her husband without reading it, cannot help her any in this case. She admitted on cross-examination that she could read and that she did not read it merely because she relied wholly upon her husband's advice in the matter. This court has held this to be no defense. In *McKell v. Merchants Nat. Bank of Omaha*, 62 Neb. 608, 87 N. W. 317, the court said: "The remaining allegations are in the nature of a charge of fraud

and imposition practiced upon her to induce her to sign the notes, but they do not amount to such a charge of those matters as to constitute a defense. There is no pretense that she was unable to read, nor that she lacked opportunity to examine the notes and learn their contents. With the notes before him and ample opportunity to read and acquaint himself with their contents, it will not be claimed that a man could escape liability on the ground that he did not know their contents, and relied upon the statement of his comaker that his signature was required merely as a matter of form. *McKinney v. Herrick,* 66 Ia. 414, 23 N. W. 767. The same rule should apply to married women, when acting within the scope of their statutory capacity to contract."

The only question remaining is whether the court erred in permitting the introduction of parol evidence by the defendant, over objection, that at the time she signed the note she did not intend to bind her separate estate for the payment thereof.

Many cases are cited by appellee holding that the burden is upon the person seeking a judgment on a note signed by a married woman, when coverture is pleaded, to prove the intent to bind her separate estate. That such is the law of this state can hardly be disputed, and in cases where the note does not contain a clause to the effect that the wife intends to bind her separate estate, parol evidence is admissible to show the intent of the parties. *Grand Island Banking Co. v. Wright,* 53 Neb. 574, 74 N. W. 82; *First Nat. Bank v. Ernst,* 117 Neb. 34, 219 N. W. 798; *John Fletcher College v. Estate of Pailing,* 121 Neb. 847, 238 N. W. 750.

But, in a case where the note contains a recital by which the wife expressly stipulates that her separate estate should be charged, a different question arises. In *Biltwell Tire & Battery Co. v. Book,* 112 Neb. 647, 200 N. W. 868, Morrissey, C. J., speaking for the court, said:

"After plaintiff had made its case and rested, appellant, as a witness in her own behalf, offered testimony in support of the allegations of her answer. The court sustained ob-

jections to the offered testimony. The proper record was made on behalf of appellant and the correctness of the court's ruling is presented here for review. Perhaps the issue, so far as it relates to the defense of coverture, cannot be better stated than in the language of the distinguished jurist who presided at the trial. He said: 'I think it is due to counsel and to the defendants for me to state briefly and concisely the view I entertain of the issue in this case on the question of coverture. I hold that a married woman who deliberately makes a joint note with her husband, in which she agrees to bind her separate estate, is bound by that contract in the absence of fraud, accident, or mistake, or some circumstance that would relieve a person from such contract; that she thereby estops herself and is as much bound as the husband.' The well-known rule is:

" 'Evidence is admissible which does not tend to vary or contradict the terms of a written obligation but merely shows the nature or extent of the liability of the obligors. Thus parol evidence may be admitted to show the relation *inter se* of the parties to commercial paper or other obligations for the payment of money, as who is principal and who surety in a note or bond; that as between themselves the relation of successive indorsers is that of cosureties or that successive accommodation indorsers had agreed to be jointly bound. It is also competent to show that a person signing a note, apparently as maker, signed only as a witness. But this rule does not extend so far as to authorize the admission of evidence which is inconsistent with, or contradictory of, the instrument itself, and accordingly parol evidence is not admissible to show that an indorsement of a note was intended to be without recourse. It has also been considered that one who apparently signed a promissory note as maker cannot show by parol that he was indorser only.' 22 C. J. 1228."

While the case above cited was reversed by this court on another point, we expressly approved the holding of the trial court that the express terms of the note could not be disputed by parol testimony for the reason that it would

be a violation of the parol evidence rule. Such seems to have been the law of this state until the decision was handed down in the case of *McRoberts v. Dworak,* 117 Neb. 342, 220 N. W. 587. In that case, the note contained the clause: "I or we, each of us, personally hereby charge our own separate and individual estate with the payment of this note." The trial court permitted the introduction of parol evidence to show an oral agreement between the parties that the wife's separate estate was not to be bound for the payment of the note. The trial court, however, held that the wife's separate estate was bound for the payment of the note. In reversing the case, this court said: "Clearly, it is within the well-recognized rule for Mrs. Dworak to establish by parol testimony that she did not intend to bind her separate estate. And it is undisputed that she did not intend to do so. It follows that no liability attaches in respect of her property."

There is a hopeless conflict in the holdings in *Biltwell Tire & Battery Co. v. Book, supra,* and *McRoberts v. Dworak, supra.* The note sued on in each case contained almost identical language with respect to charging the separate estate with the payment thereof. We have concluded that the rule in the case of *Biltwell Tire & Battery Co. v. Book, supra,* states the better principle of law. We know of no better way for a person to express intent than to write it in definite words over his signature. Where a person has so expressed it, it is clearly a violation of the parol evidence rule to permit oral evidence to contradict it. We have therefore come to the conclusion that the opinion in the case of *McRoberts v. Dworak, supra,* is wrong, under the facts stated therein, in so far as it conflicts with our views as herein expressed, and to that extent it is overruled.

We conclude that the trial court erred in the case at bar in permitting the introduction of parol testimony to dispute the express provision of the note with reference to the intent of the wife to charge her separate estate. The evidence produced by the appellee does not constitute a defense and the trial court should have sustained plaintiff's motion for

a directed verdict. For the reasons herein set out, the judgment is reversed and the cause remanded.

REVERSED.

JOHN HAVLIK, APPELLEE, V. LILLIAN ANDERSON ET AL., APPELLANTS.

FILED JANUARY 2, 1936. No. 29501.

1. **Evidence:** ADMISSIONS. The declarations and admissions of a party to an action, against his own interest, upon a material matter, are admissible against him as original evidence.
2. **Witnesses:** IMPEACHMENT. When a party to a suit testifies as a witness, it is competent to ask him on cross-examination if he did not, on a specified occasion, make a particular statement contradictory to his present testimony.

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

O'Sullivan & Southard, C. E. Walsh and *Robert H. McCaw,* for appellants.

Rudolph Tesar, Rosewater, Mecham, Shackelford & Stoehr and *R. B. Hasselquist, contra.*

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

KROGER, District Judge.

This is an action to recover damages for personal injuries resulting from an automobile accident. The accident occurred on L street between Twenty-fifth and Twenty-sixth streets in Omaha. The evidence of the plaintiff tended to establish that he was driving west on L street on the north or right-hand portion of said street and that defendant Lillian Anderson was driving east on the south portion of said street; that when approximately ten or fifteen feet past the alley intersecting L street, said defendant, without signal or warning, made a left U turn and came from the south side of L street to the north side and struck the car

plaintiff was driving, overturning the same and seriously injuring plaintiff.

The evidence of the defendants tended to establish that the defendant Lillian Anderson was, just prior to the collision, traveling west on L street on the north portion thereof and near the curb; that she turned slightly to the left to avoid a parked car, and, just as she did so, her car was struck from the rear by the car plaintiff was driving and as a result of the collision plaintiff's car overturned. There was a verdict and judgment for plaintiff, and defendants appeal.

1. It is the contention of the defendants that the trial court erred in excluding the testimony of defendants' witness Krulis. Defendants offered to prove by this witness that a few days after the accident the plaintiff stated to the witness that he was not hurt much, but thought he ought to have a little settlement.

It is a well-settled rule in this state that the declarations and admissions of a party to an action, against his own interest, are admissible against him as original evidence. *Luikart v. Korbmaker,* 128 Neb. 199, 258 N. W. 263; *Young v. Kinney,* 79 Neb. 421, 112 N. W. 558. Since the extent of plaintiff's injuries was a material issue in the case, it was prejudicial error to sustain the objections to the introduction of this evidence.

2. During the cross-examination of plaintiff, he was asked if he remembered testifying in police court regarding this case, and plaintiff's objection that it was not proper cross-examination was sustained. An offer was thereupon made to prove by the witness that when he testified in police court he stated that the defendant Lillian Anderson was preceding him on the north side of L street, traveling west, and that at the time he undertook to pass her she turned out slightly to miss a parked car on the north side of L street, and it was then that the accident happened. Plaintiff's objection to this offer was sustained and this ruling is assigned as error. We are of the opinion that in this ruling the trial court committed error. The statement, if

made, would have supported defendants' theory of how the accident happened, and contradicted plaintiff's theory, and was therefore material.

Palmer v. Burleigh, 68 Neb. 24, 93 N. W. 1049, holds clearly that, when a party to a suit testifies as a witness, it is competent to ask him on cross-examination if he did not, on a specified previous occasion, make a particular statement contradictory to his present testimony.

While the offer to prove appears to be broader than the question asked, it was not objected to on that ground, and from the entire record it is clear that the trial court was not misled thereby.

Other errors are assigned and discussed in the briefs, but as they are not likely to occur on a retrial they are not discussed herein.

For the reasons stated, the judgment of the district court is hereby reversed and the cause remanded.

REVERSED.

MARGARETTE ELLWANGER, APPELLEE, V. PHILLIP H. ELLWANGER, APPELLANT.

FILED JANUARY 2, 1936. No. 29359.

1. **Divorce.** Evidence examined, and *held* sufficient to sustain a decree of divorce on grounds of extreme cruelty and failure to support.
2. ———: ALIMONY. "In awarding alimony, the court should consider the condition, situation, and standing of the parties, financially and otherwise, the duration of their marriage, the amount and value of the husband's estate, the source from which it came, and how far, if at all, the wife contributed thereto." *McKee v. McKee*, 2 Neb. (Unof.) 322, 96 N. W. 489.
3. ———: PROPERTY RIGHTS. "The determination of property rights not growing out of the marriage relation should not be joined with an action for divorce, but when such rights are asserted in the petition for a divorce and no objection is made to the misjoinder, the court should hear and determine the controversy." *Reed v. Reed*, 65 Neb. 849, 91 N. W. 857.

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

Holeman & Holeman, for appellant.

L. T. Fleetwood and *H. B. Muffly, contra.*

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

MUNDAY, District Judge.

Plaintiff brought this action for divorce from the defendant on grounds of extreme cruelty and nonsupport and asked approval of a property settlement made by the parties. After the petition for divorce was filed, defendant brought suit against the plaintiff to vacate and reform certain deeds. On motion of the defendant in the divorce action, the actions were consolidated and tried at the same time. Trial was had in June, 1933, and the case was taken under consideration by the court. On motion, the case was reopened for additional testimony and the cause again submitted to the court, and on December 15, 1933, the submission was again set aside and further testimony taken and the cause again submitted. On December 20, 1933, the court awarded the plaintiff a divorce on the grounds of cruelty and nonsupport and approved the property settlement and quieted title to the real estate in the parties as prayed for in the amended petition. From this decree the defendant, Phillip H. Ellwanger, has appealed.

The appellant contends that the evidence does not support the decree of divorce on the grounds of extreme cruelty and for nonsupport. While much of the evidence is not undisputed, a fair conclusion therefrom seems to be: That the defendant cursed the plaintiff and cursed her to others; that the plaintiff worked out so as to keep the defendant quiet on money matters, and did much to support the family; that the defendant threatened to frame the plaintiff and to do her injury; that the plaintiff was afraid of the defendant; that he frequently would not talk to her and was angry at her for long periods of time, and that there

were times when the defendant refused to work. On reading the record, we think it shows the trial court gave the evidence careful consideration and that the evidence sustains the trial court in granting the plaintiff a divorce on the grounds mentioned.

The defendant complains because the actions were consolidated for trial. This action of the trial court was taken on motion of the defendant and he cannot now complain of the court's action. *Reed v. Reed,* 65 Neb. 849, 91 N. W. 857.

The defendant's principal complaint seems to be that the property settlement should not have been approved by the trial court, because it divided the property unjustly between the parties and because some of the real estate mentioned in the property settlement was owned by the defendant before the marriage of the parties. It is also contended that the defendant did not understand this property settlement, and that it was obtained by means that amounted to constructive fraud, but these contentions are not sustained by the record. There was some variance between the two copies of the property settlement, one of which was given to each of the parties at the time the settlement was made. It is clearly shown that this was only an error in writing out the agreement and we do not think it material.

The parties were married in 1907 and have no children. The wife worked out and earned considerable money and the defendant worked at different periods during their married life, but they seemed never to have been very congenial with each other.

The property in dispute consists of a business property in Sutton, Nebraska, and a residence property at 829 G street, Lincoln, Nebraska. The evidence is very meagre as to the value of these properties. The testimony is that in 1925 the Lincoln property was bought for $2,500. The testimony as to the value of the property in Sutton indicates that the husband had previously valued it at $5,000. The trial court approved the property settlement which gave the Sutton property to the defendant and the Lincoln

property to the plaintiff. Under the evidence in the record as to the value of these properties, we cannot say the division was not just and equitable.

There was not much personal property to divide, being mostly household goods which were disposed of by the property settlement. Considering the ability of the parties to earn money, if the court had given either party a judgment against the other for a sum of money, or a lien on the property of the other, it probably would have meant that the one against whom the judgment was given or the one against whose property the lien was so established would likely lose the real estate received under the decree. We think the trial court considered all these facts, circumstances and contentions of the parties and reached a correct conclusion both as to the divorce and the division of the property, and that its decree should be affirmed.

AFFIRMED.

NEBRASKA WHEAT GROWERS ASSOCIATION, APPELLEE, V. A. J. JOHNSON ET AL., APPELLANTS.

FILED JANUARY 7, 1936. No. 29395.

1. **Fraudulent Conveyances:** BURDEN OF PROOF. The burden of establishing the *bona fides* of a conveyance by a husband to a wife is upon the grantee.
2. ———: PREFERENCES. "A debtor in failing or insolvent circumstances may prefer one creditor notwithstanding the fact it may be to the exclusion of others, and this rule may include relatives of the debtor who are his creditors." *National Bank of Commerce v. Chapman*, 50 Neb. 484, 70 N. W. 39.
3. ———. "To make a conveyance a fraudulent transfer, a fraudulent intent participated in by both parties to the transfer must exist." *Logie v. Snyder*, 129 Neb. 583, 262 N. W. 489.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Affirmed in part and reversed in part, with directions.*

Peterson & Devoe and *Harvey W. Hess,* for appellants.

Mayer & Mayer, contra.

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

GOSS, C. J.

This is a suit in equity to set aside conveyances to the wife and to subject land to a judgment against the husband. From a decree for plaintiff the defendants appeal.

The judgment on which plaintiff's action was based was obtained against A. J. Johnson and several others on January 21, 1932, for $10,520. The suit was begun July 26, 1928. In the journal entry the court found that defendants, prior to December 16, 1926, unlawfully used assets of plaintiff for the benefit of another corporation. We state this fact to show that the judgment was founded upon tort and not upon contract. No credit therefore was extended to A. J. Johnson because of any land he owned with the title either in his name or in the name of Anna M. Johnson, his wife. A transcript of this judgment was filed in Thayer county August 30, 1932. The instant suit was begun on or about June 20, 1933, after executions had been issued and returned unsatisfied in both Cheyenne and Thayer counties. The purpose of this action was to have the title to 200 acres of Thayer county land standing in the name of Anna M. Johnson decreed to be held by her as trustee for A. J. Johnson and to subject it to the payment of the judgment against her husband. The trial court sustained the prayer of plaintiff, but allowed defendants Johnson a $2,000 homestead right in the premises superior to the lien of plaintiff.

No objection was made by defendants to quitclaim deeds offered by plaintiff showing that this 200-acre farm was conveyed by Johnson and wife on January 31, 1931, to Joseph J. Newman and on the same day Newman conveyed it to Anna M. Johnson. Both deeds were recorded February 14, 1931. It was stipulated that A. J. Johnson originally got title by a deed from Hans W. Larson and wife, re-

corded February 1, 1913, with an expressed consideration of $19,000, defendants reserving the right to show the actual consideration. The evidence shows that Larson traded this land to Johnson for a half section of land in Furnas county, valued in the contract for exchange at $11,800, and Johnson assumed encumbrances of $7,200 on the Thayer county land. No money passed between the parties. It was a trade of equities or interests in the respective lands.

A. J. Johnson had acquired an undivided half interest in the Furnas county land for a stated consideration of $3,500, by a deed dated August 5, 1908, and had acquired the other half for a stated consideration of $5,000 by a deed dated July 6, 1911. The Johnsons testified that in 1907 Mrs. Johnson received $1,183.37 from the estate of her father and also in 1911 received $1,000 from other heirs in settlement of a contest of her father's will threatened by Mrs. Johnson. They testified that this money was invested in the Furnas county land; that it was agreed between them that she should have a deed to the land, "but the Swedish people always looks down on a man that can't have his title to his farm in his name, and that was the reason it wasn't made."

Mrs. Johnson owned a house and lot in Stamford, Harlan county. This was sold and conveyed in November, 1915, and she received $1,800 for it. Mr. Johnson testified that, early in December, 1915, this money was used toward making a payment of $2,000 on the note and mortgage held by the Mutual Benefit Life Insurance Company on the Thayer county farm. A receipt for $2,000, dated December 2, 1915, was introduced in evidence showing payment of that sum on that day and stating that the amount had been indorsed on the principal note.

The Johnsons also testified that, when her father ceased farming, he gave her four good horses. In 1908 they were sold to the Johnson's hired man who was going into farming on his own account, and that he gave his interest-bearing note for $600 for them, which was paid in 1915 in the total

sum of $979.20. That money was also used to help pay off the encumbrance on the Thayer county land.

The total of the items of money produced by Mrs. Johnson and entering into the payment for these farms under the agreement testified to by Mr. and Mrs. Johnson is $4,962.57. They testified that it was in pursuance of the agreement to give her title that the Thayer county farm was deeded to her, as heretofore recited, by the deeds which plaintiff seeks to set aside. The payment of the items by Mrs. Johnson was so long before plaintiff's suit and the trial thereof that it was manifestly difficult for plaintiff to contradict this evidence.

The testimony of Mrs. Johnson was to the effect that she had no knowledge of the pending suit or of the judgment against her husband in Cheyenne county. Mr. Johnson testified that he thought that suit had been settled by stipulation. A stipulation for settlement had evidently been made, but it became ineffectual because its terms had not been performed by defendants in that case.

The burden of establishing the *bona fides* of a conveyance by a husband to a wife is upon the grantee. *Luikart v. Tidrick,* 126 Neb. 398, 253 N. W. 414. Under the evidence heretofore stated, Mrs. Johnson showed that she was a creditor of her husband to the extent of $4,962.57 and that the conveyances were made to her in pursuance of an oral agreement that such an act would be performed. "A debtor in failing or insolvent circumstances may prefer one creditor notwithstanding the fact it may be to the exclusion of others, and this rule may include relatives of the debtor who are his creditors." *National Bank of Commerce v. Chapman,* 50 Neb. 484, 70 N. W. 39; *Luikart v. Tidrick,* 126 Neb. 398, 253 N. W. 414.

It was not shown that Mrs. Johnson had any knowledge of plaintiff's pending suit against her husband in which the judgment here relied upon was based. She testified that she had no such knowledge. "To make a conveyance a fraudulent transfer, a fraudulent intent participated in by both parties to the transfer must exist." *Logie v.*

Snyder, 129 Neb. 583, 262 N. W. 489. See *Farmers & Merchants Nat. Bank v. Mosher,* 63 Neb. 130, 88 N. W. 552; *State Bank of Beaver Crossing v. Mackley,* 121 Neb. 28, 236 N. W. 165.

Several witnesses testified that the land was worth about the same in 1931 that it was in 1913. Then Johnson exchanged the Furnas county land, in which $8,500 had been invested, for this land and assumed encumbrances of $7,200. Witnesses appraised the land in 1931 as low as $5,200 and $7,200. It was said to be valued for taxing purposes at $11,600, which probably was not far different from its fair market value then or in 1913. We think the value at the time it was conveyed to Mrs. Johnson as a creditor of her husband so far exceeded the debt due her from him that equity ought not to permit her to take the benefit of the legal title to the exclusion of the rights of plaintiff as a creditor. We are of the opinion that the trial court properly allowed defendants a homestead interest in the land, but that it was erroneous to deny Mrs. Johnson's lien upon the land for the amount she had contributed of her own funds towards its purchase. That total of $4,962.57 ought not to be augmented by any increment of interest prior to the date of the original decree, for the reason that Mrs. Johnson has had her enjoyment of the farm or farms since their acquirement.

The judgment of the district court is affirmed as to the allowance of a homestead to defendants, but is reversed as to other respects, with further direction to allow Anna M. Johnson a lien upon the land for $4,962.57, with legal interest from June 25, 1934, the date of the decree, as a first judgment lien, and to allow plaintiff a lien for its judgment as a second lien upon the land.

AFFIRMED IN PART AND REVERSED IN PART.

ROBERT A. MORISON, APPELLANT, V. FREMONT JOINT STOCK LAND BANK ET AL., APPELLEES.

FILED JANUARY 7, 1936. No. 29421.

1. **Specific Performance:** CONTRACTS: TIME. Time is not generally considered as the essence of a contract, unless it is expressly so provided or it appears that such was the intention of the parties.
2. **Vendor and Purchaser:** PRIOR CLAIMS: NOTICE. A purchaser of real property, who has actual knowledge of the assertion by a third party of a claim to such property under a prior contract, takes subject to the legal rights of such third party against the vendor.

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

Johnsen, Gross & Crawford and *Merrow & Murphy,* for appellant.

Good, Good & Kirpatrick, Mark Simons, John W. Holoubek and *H. L. Mossman, contra.*

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

GOSS, C. J.

This is a suit to compel defendant to specifically perform an agreement with plaintiff and to cancel a deed to approximately 460 acres of Sarpy county land deeded by defendant bank to defendants Holoubek or to quiet title in plaintiff as against all defendants.

The bank had foreclosed a mortgage held by it against the mortgagors and against Morison who had become the record owner subject to the mortgage. Plaintiff was desirous of redeeming the land. On June 16, 1933, he had an interview with W. E. Barkley, vice-president and general manager of the bank, in his office at Lincoln and came to terms on the subject. Mr. Barkley took him to Fred M. Deweese, attorney for the company, and Mr. Deweese dictated a letter containing the terms of the agreement as follows:

"June 16, 1933.

"Mr. Robert A. Morison,
"Omaha, Nebr.
"Dear Sir:

"Re: Seefus, N-097-e.

"You have just had a conversation with Mr. Barkley in my presence in which he agreed to accept $18,000 for an assignment of all the Land Bank's rights included in this loan provided payment is made by August 1, 1933. If payment cannot be made on August 1, 1933, it will be accepted within the next thirty days with interest at 6% from August 1st.

"The property will be offered for sale by the sheriff in the foreclosure proceedings and the Land Bank will make a bid for the amount due to it under its decree plus interest and costs and if you purchase the Land Bank's interests the bid can be assigned to any one named by you.

"Yours very truly,
"Fred M. Deweese, Atty."

"In event of purchase of this land by me it is agreed that I am to pay court costs in connection with same from this date.

"Robt. A. Morison."

The letter was submitted to Mr. Barkley, was approved by him, was signed by Mr. Deweese and delivered to Morison. Plaintiff did not exercise his rights merely to take an assignment of the bank's interests under the contract or option or whatever the instrument is, but the other alternative contemplated was followed. Judicial sale was had and the bank bid in the property, cutting out other liens. In the meantime, in August, complications arose, not of Morison's making, which made it impossible for Morison to carry out the contract by September 1. On October 10, 1933, the property was sold on a written contract and conveyed, on October 20, 1933, by the bank to the defendants Holoubek as joint tenants.

The postscript of the letter quoted was not put upon the

original taken away by Morison, but was written by him upon the carbon kept in the bank's file. Although Morison had the title to the land, the evidence shows that it was necessary to eliminate liens subsequent to that of the bank before Morison could raise enough money to handle the land. So the words "purchase the land" had a meaning; the inference is that the bank intended not exactly to "make an assignment of all the land bank's rights included in this loan" by assigning the decree, but actually to get a good title at judicial sale and to deed to plaintiff its interests thus acquired. Inferentially this was the definite understanding between Barkley and Morison. When it was suggested on June 16, 1933, to fix an upset date of August 1 for closing the deal, Morison said that it might not be long enough for the bank to secure the deed or for Morison to arrange the mortgage papers through the Federal Land Bank and a land bank commissioner loan, which had been discussed as a means for plaintiff to raise the money. Mr. Barkley authorized Mr. Deweese to prepare the memorandum, giving until September 1, 1933, to close the deal. Plaintiff withdrew his request for stay theretofore filed and the bank proceeded to have the property sold at judicial sale and to try to get the title in readiness to carry out its part of the arrangement to convey title free from encumbrance subsequent to its own mortgage lien. From the dealings, acts and conversations of the parties, that, we think, was what they both thought was the nature of the engagement between them. Time was not expressly made the essence of the contract. It was the implication of all the circumstances then known that sufficient time had been fixed for the bank to get ready to convey a merchantable title and for Morison to raise his money through the sources named. If unexpected crcumstances of delay arose later, the contract did not in terms cut off their consideration.

The bank now says that all other things were merged in the letter of June 16, 1933, and that it was in effect a mere option granted to plaintiff by the bank, to be exer-

cised strictly within the time limited. "The letter killeth, but the spirit maketh to live."

Morison would have been ready with his money in time, but one Warren intervened, August 1, 1933, with a motion in the suit, claiming that Barkley had, on June 1, 1933, agreed to sell him the bank's rights for $20,000. This showed on the abstract and made it so hazardous that the federal agencies halted action on the loan until the claim was out of the way. Warren appealed (in the same title as the instant case) from the confirmation and that put it beyond the power of the bank either to assign its rights or bid or to convey a merchantable title of its interests or of the land until the mandate favorable to the bank in that proceeding came down from the supreme court in April, 1934. It was not the fault of Morison that Warren intervened. We do not mean to imply that it was the fault of the bank. But, in view of the fact of the intervention of Warren, claimed to be based upon an agreement with the bank's authorized agent, which, if sustained, would have destroyed the agreement with Morison, the bank acted contrary to the equities in declaring the contract with Morison at an end and in selling the land to another. The position of the bank is legally very technical and in our judgment cannot stand against the equities in favor of Morison.

Time is not generally considered as the essence of a contract, unless it is expressly so provided or it appears that such was the intention of the parties. *J. H. Melville Lumber Co. v. Welpton Lumber Co.*, 121 Neb. 370, 236 N. W. 438; *Brown v. Ulrich*, 48 Neb. 409, 67 N. W. 168; *Langan v. Thummel*, 24 Neb. 265, 38 N. W. 782.

The Holoubeks had notice of the claims of Morison. Their contract with the bank provided that the bank was to furnish an abstract showing merchantable title. They had made to the bank a written offer for the land on October 10, 1933. On October 20, 1933, duplicate letters were signed by them making some modification of their former offer. In these duplicate letters the bank was

careful to have the Holoubeks include a statement that the attorney for the Holoubeks had examined the abstract and approved the title and that they accepted the title "knowing of the *lis pendens* filed by Morison." That *lis pendens* was filed in Sarpy county September 5, 1933. It may have lacked in power to give constructive notice, and hence the admission of actual notice by the Holoubeks before they purchased the property. In the *lis pendens* Morison gave notice that he was the owner under the contract with the bank dated June 16, 1933.

A purchaser of real property, who has actual knowledge of the assertion by a third party of a claim to such property under a prior contract, takes subject to the legal rights of such third party against the vendor. *Mulligan v. Snavely*, 117 Neb. 765, 223 N. W. 8.

The judgment is reversed, with directions to the district court to order the bank to convey the land involved herein to plaintiff, upon his payment, within 60 days from the issuance of the mandate, of $18,000 and interest at 6 per cent. thereon for one month to the Fremont Joint Stock Land Bank; and to order the cancelation of the deed of said bank to defendants Holoubek, and to make such other incidental orders as may be necessary to carry this into effect.

REVERSED.

AMERICAN STATES LIFE INSURANCE COMPANY, APPELLEE, V. WILLIAM L. RICHARDSON ET AL., APPELLANTS.

FILED JANUARY 7, 1936. No. 29423.

1. **Principal and Agent:** SETTLEMENT OF ACCOUNTS. A settlement of accounts between principal and agent is generally binding on the agent in absence of fraud or mistake.
2. ———: ———. A settlement of accounts between an insurance company and an agent engaged in selling life insurance on commissions, including charges for advances in excess of commissions, *held* binding on the agent under evidence outlined in opinion.

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

John J. Ledwith and *Herman Ginsburg,* for appellants.

Frank M. Johnson and *Perry, Van Pelt & Marti, contra.*

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

ROSE, J.

This is a suit in equity to foreclose a 1,400-dollar mortgage on improved lots of land in Lancaster county. The note and the mortgage were dated December 1, 1931. The American States Life Insurance Company, plaintiff, was mortgagee, and William L. Richardson and Evelyn Richardson, husband and wife, defendants, were mortgagors. The district court upon a trial of the cause decreed a foreclosure of the mortgage for the full amount of the principal and interest. Defendants appealed.

William L. Richardson, defendant, hereinafter called "agent," had been engaged in selling life insurance for plaintiff on commissions. The principal sum of $1,400 which defendants promised in their note and mortgage to pay to plaintiff included two items, in round numbers, as follows: Payment by plaintiff of two former mortgages on the lots encumbered by the mortgage in suit, $500; sum of advancements charged by plaintiff to its agent in excess of the latter's commissions, $900.

For the purposes of the appeal defendants have reduced the issues to the following propositions: The 500-dollar payment discharging the two former mortgages against the real estate of the agent was the only consideration for the note and mortgage in suit. The 900-dollar item consisted of advancements previously charged against his account for commissions. There was no express agreement to refund advancements in excess of commissions. Consequently, there was no legal liability for repayment of any advancements. Since a mortgage challenged for

want of consideration can only be enforced to the extent of the existing debt, the judgment herein must be limited to $500 with interest. In support of these propositions defendants invoke the following principle of law:

"In the absence of a special agreement, an agent who receives advances on account of commissions cannot be held to a personal liability for such advances, although the commissions earned by him do not equal the advances, and although his employment has ceased." 2 C. J. 787.

Counsel for defendants, with commendable diligence, have cited cases in which this rule has been adopted. There seems, however, to be a diversity of judicial opinion on the subject, some courts holding that advances to an agent in excess of his commissions imply an agreement for repayment to that extent. In the recent case of *Shaler Umbrella Co. v. Blow,* 199 Wis. 489, 227 N. W. 1, the supreme court of that state cited cases in which diverse views were expressed. Which rule should be adopted in Nebraska, however, seems immaterial under the evidence. The present controversy is not an action at law to recover advances in excess of commissions, but is a suit in equity to foreclose a mortgage for the amount of money paid to discharge prior mortgages and for charges against the agent for advances in excess of commissions.

The agent testified in substance: The note and the mortgage dated December 1, 1931, were executed. He was then in the employ of plaintiff, writing insurance on commissions; began to work for plaintiff in March, 1931; had a verbal agrement with H. O. Hutson, agency manager of plaintiff. The agent's version of what Hutson said follows:

"Why, he told me to go up and go to work for him and he would take care of me and take care of my renewals and pay me 75% commission on life, 7½% renewals for nine years and it would be absolute, and that he would pay me $7 on thrift and he would give me 5% renewals for five years, and I could have the overwriting on any agent I appointed beneath that amount."

He testified further, in effect: Hutson said he would take care of advancements to be charged against commissions which became matters of credit and debit with advancements; had a debit of about $1,000 December 1, 1931; mortgage was not executed on that date, but nearer the end of the year; Hutson said that he wanted the account "cleaned up," because it was the end of the year; that the mortgage would be paid by credits for commissions; that commissions were sufficient to pay the mortgage.

Though the agent said he started to work for plaintiff in March, 1931, he did not testify to oral terms of employment until May 31, 1934. He did not produce any books of account or other writings showing that his commissions equaled his advances when he executed the note and the mortgage or that advances in excess of commissions were not to be refunded. He admitted that he then owed plaintiff $1,400 on the basis of debits for advances charged against commissions and that he had been asked for a settlement before the end of the year 1931. December 1, 1931, he signed and verified by oath an application to plaintiff for a loan of $1,400 to be secured by mortgage and life insurance. In the note he promised to pay $1,400. He secured his promise by mortgage. He signed a written contract of agency, between himself and plaintiff, dated March 9, 1931, which contained the following provision:

"If this contract be terminated by either party before September 1, 1933, no renewal commissions are to be paid on business written by said agent on business written prior to September 1, 1932."

From January or February, 1932, until September, 1932, he was not in the employ of plaintiff. He said that he entered into the written contract of employment about September 1, 1932, and received a copy of it, but that it had been dated back to March 9, 1931, a fact unknown to him at the time, not having read what he signed; that he attempted to organize an insurance company of his

own, but instead became agency manager of it; that he only wrote one policy under the written contract of employment. There is nothing to show that he ever made any effort to reform the application for a loan or the note or the mortgage or the written contract of employment in accordance with his understanding of their true import. He did not prove fraud on the part of plaintiff nor mutual mistake of the parties in the procuring of the note and the mortgage.

The president of plaintiff testified positively that the balance of $1,400 was approximately the amount of money owing by the agent to plaintiff when the note and the mortgage were executed, as shown by plaintiff's books of account; that the agent owed a total of approximately $1,400 which he agreed to pay by giving a mortgage on his property; that his account was credited with $1,400. The written instruments which the agent signed years before he testified as a witness herein are in harmony with plaintiff's evidence and cause of action. If there were any controversy over the debt owing by the agent to plaintiff when the note and the mortgage were executed, it was settled, as indicated by those instruments, according to a preponderance of the evidence. If there were then no such controversy, the proper finding from all the evidence is that the parties mutually understood that advances in excess of commissions were debts owing by the agent to plaintiff. In either view there was a settlement of accounts without fraud or mistake. A settlement of accounts between principal and agent is generally binding on the agent in absence of fraud or mistake. 2 C. J. 786. The findings of fact on appeal are in favor of plaintiff.

AFFIRMED.

STOCK YARDS NATIONAL BANK, APPELLEE, V. T. E. WYMAN, COUNTY TREASURER, ET AL., APPELLANTS.

FILED JANUARY 7, 1936. No. 29516.

1. **Public Lands:** LEASING. The auction of state school land leases, pursuant to the provisions of section 72-217, Comp. St. 1929, may not be conducted by the county clerk. Such auction of leases must be conducted by the commissioner of public lands and buildings, or, under his direction, by his deputy, or the treasurer of the county in which such lands are located.
2. ———: ———: NOTICE. Notice for the auction of leases of state school lands, pursuant to the provisions of section 72-217, Comp. St. 1929, becomes *functus officio* if, upon the time stated in the notice, neither the commissioner of public lands and buildings, his deputy, nor the treasurer of the county in which the lands are located is present to conduct the auction.
3. ———: ———: FORFEITURE: REDEMPTION. The holder of a lease of state school lands which has been declared forfeited for nonpayment of rentals, pursuant to the provisions of section 72-219, Comp. St. 1929, may redeem from such forfeiture by paying all delinquencies, fees and cost of forfeiture at any time before such land is advertised to be leased at public auction.
4. ———: ———: ———: ———. Where forfeiture of a lease of state school lands has been declared by the board of educational lands and funds for nonpayment of rentals, and thereafter notice has been published of the auction of the lease of such land, as provided by section 72-217, Comp. St. 1929, and at the time fixed in such published notice neither the commissioner of public lands and buildings, his deputy, nor the treasurer of the county in which such lands are located is present to conduct such auction, such lands cannot be leased at auction until another notice has been given. The holder of such lease, declared forfeited, may redeem at any time before the subsequent notice has been given.

APPEAL from the district court for Wheeler county: ERNEST G. KROGER, JUDGE. *Affirmed.*

William H. Wright, Attorney General, George W. Ayres and *Williams & Williams,* for appellants.

Jackson & Rice, contra.

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

GOOD, J.

This is a controversy over a lease of section 16, township 23 north, range 9 west, in Wheeler county, Nebraska, being a part of the state school lands.

Plaintiff claims to be entitled to possession of the school lands as assignee of a lease issued in 1924 to one Seymour; that the commissioner of public lands and buildings had wrongfully declared the lease forfeited for nonpayment of rentals, and had issued a new lease to defendant Wolf, who has forcibly and wrongfully dispossessed plaintiff. Plaintiff prayed to be allowed to redeem from the forfeiture and for reinstatement of its lease, and that title and right of possession be quieted in it as against defendant Wolf and the commissioner of public lands and buildings, and for other equitable relief.

The commissioner of public lands and buildings answered, admitting the former lease, alleged that the assignment to plaintiff had never been recorded in his office; alleged that the lease had been forfeited for nonpayment of rent, and that the premises had been lawfully leased to defendant Wolf. Defendant Wolf answered, alleging the rental of the land to himself and that he is the holder of the lease, and denied plaintiff's rights. The trial court found for plaintiff and reinstated its lease upon condition of payment of the amount of rentals then due the state. The commissioner of public lands and buildings and defendant Wolf have appealed.

The record reflects the following pertinent facts: In 1924 the lands in question were leased by the then commissioner of public lands and buildings to Seymour, who thereafter assigned his lease to McCampbell & Nibecker, Inc., which assignment was recorded in the office of the commissioner of public lands and buildings. Thereafter, McCampbell & Nibecker, Inc., assigned the lease to plaintiff, which assignment was never recorded in the office of the commissioner of public lands and buildings. Subsequent to the assignment to plaintiff, McCampbell & Nibecker, Inc., was reorganized and the name changed to

McCampbell Company. It appears that McCampbell Company, or Mrs. McCampbell, remained in actual possession of the land for plaintiff, and it had arranged for payment of the rentals through the McCampbell Company. It now appears that the rentals were paid up to July, 1931.

In 1932 the commissioner of public lands and buildings, by registered mail, served notice on McCampbell & Nibecker, Inc., that it was in default in payment of rentals, and that, unless such defaulted payments were made within 90 days, the lease would be forfeited. So far as the record discloses, plaintiff had no knowledge of this notice. In 1933 the board of educational lands and funds declared the lease forfeited for nonpayment of rental that was in arrears. In February, 1934, the then commissioner of public lands and buildings gave notice, by publication in a newspaper published in Wheeler county, that at 2 o'clock p. m. on the 27th day of February, 1934, at the office of the county treasurer in Bartlett, Wheeler county, he would offer for lease at public auction the land in question.

October 18, 1933, plaintiff addressed a letter to the county treasurer of Wheeler county, asking to be advised of the status of the lease of the particular land and the date to which rentals had been paid. The treasurer, by his assistant, answered, saying: "Last rental paid to 7-1-33. Semiannual rental is $96.00. Total rental now due $533.80." Thereafter plaintiff was informed of the notice published in February, 1934, and, through its attorneys, made inquiry of the treasurer of Wheeler county as to the amount required to redeem, and received the following reply under date of February 15, 1934: "In regard to the McCampbell school lease—there are 5 payments due. The amount due, including interest, is $519.20." On the 26th of February the plaintiff, through its attorneys, delivered to the treasurer of Wheeler county a draft for $519.20, and requested that a receipt therefor be duly issued. A clerk in the treasurer's office received the draft and stated that a receipt would be issued and sent to plaintiff or its attorneys. Either on that day or the morning following,

the treasurer, or one of his assistants, caused telephone inquiry to be made of the office of the commissioner of public lands and buildings concerning what should be done with reference to the auction of the lease of the premises, with the information that the amount of $519.20 had been paid. The deputy commissioner directed the receiving of the amount and not to include the lease of the lands in the auction sale. On the 27th, and prior to the hour of sale, defendant Wolf appeared and made inquiry, desiring to bid on the lease of this particular section of land, and was informed that the lease had been redeemed. Thereupon, a further inquiry by telephone was made of the office of the commissioner of public lands and buildings, and the deputy commissioner then directed auction of the lease of this particular land. Accordingly, on that afternoon a lease of the land was auctioned by the county clerk of Wheeler county, and defendant Wolf became the purchaser or bidder for the lease of the land. On the 28th day of February, 1934, the treasurer's office returned to plaintiff's attorney the draft, with the information that the land had been leased to Wolf. A controversy arose, and the lease was not actually delivered to Wolf until about the 10th of April, 1934. Plaintiff, through its agents, was in possession of the school land in question, and Wolf forcibly removed the property of plaintiff's agents from the land and took possession thereof. On April 17, 1934, this action was begun, with the result above indicated.

The rights of defendant Wolf depend on whether there was a valid auction of the lease to him. Section 72-217, Comp. St. 1929, provides, among other things, that "The commissioner of public lands and buildings may, at least once in each year, designate a day and hour for offering in a public manner, at the office of the county treasurer in the respective counties, lease contracts on all of the educational lands which may be vacant and subject to lease in that county at the time of such offering. He shall announce said offering in a public manner by publishing for at least three weeks preceding said auction in

one or more of the newspapers published or of general circulation in the county in which said unleased land is located and shall, at the time arranged, be at the office of the county treasurer of the county in which said land is located and offer the same for lease as heretofore provided. * * * *Provided,* if said commissioner is unable to attend the offering aforesaid his deputy or the county treasurer may, upon his direction, act in his stead."

It appears from the record in this case that neither the commissioner of public lands and buildings, nor his deputy, nor the treasurer of the county was present at the public auction, and that the auction was conducted by the county clerk of Wheeler county. We find no authority for an auction conducted in this manner. The statute authorizes certain persons only to conduct such auction and, by implication, excludes all others. Since the statute prescribes the manner in which the auction shall be conducted, it follows that, if that manner is not substantially followed, there could be no valid auction. Defendant Wolf acquired no right by virtue of the invalid auction, and the lease to him was a nullity.

We next come to the question of whether there was a valid forfeiture so that the leased premises were reinvested in the board of educational lands and funds. Section 72-219, Comp. St. 1929, provides: "If any lessee of educational lands shall be in default of the semiannual rental due the state for a period of six months * * * the commissioner of public lands and buildings may cause notice to be given to such delinquent lessee, or purchaser that, if such delinquency is not paid within ninety days from the date of the service of such notice, his lease or sale contract will be declared forfeited by the board of educational lands and funds. If the amounts due are not paid within ninety days from the date of the service of such notice, the contract of lease or sale may be, by said board, declared forfeited and the lands therein described shall revert to the state the same as though such lease or sale had never been made. * * * The service of the notice herein contemplated to

be made by registered letter. * * * In serving the notices of delinquency and forfeiture herein provided for, the commissioner shall recognize as the lessee or owner of the lease or sale contract the person or persons whose title appears last of record in his office: *Provided,* the owner of any contract of sale or lease so forfeited may redeem the same by paying all delinquencies, fees and costs of forfeiture at any time before such land is advertised to be leased at public auction."

Since there was no valid auction of the lease on the 27th day of February, 1934, the notice given for the auction to be held on that day became *functus officio,* the same as if no notice had ever been given. Consequently, before the premises could be auctioned again, another notice must be published. The statute provides that the plaintiff may redeem at any time before publication of the notice. Until another notice was given, it was entitled to redeem.

The record discloses that it has been the policy of the board of educational lands and funds to permit redemption from forfeiture of school land leases at any time prior to the actual leasing of the same to another. It may be observed that before the published notice was complete plaintiff attempted to redeem. It now appears that $519.20 was not the full amount of rental due. This, however, was due to an error made in the county treasurer's office. The plaintiff stood ready and willing to pay the full amount and paid the amount that it was advised was required. The record also discloses that at the hearing plaintiff tendered and paid into court the amount that was then determined to be due on the lease, including interest and costs.

Under the facts disclosed, the trial court rightly held that plaintiff was entitled to redeem, and reinstated its lease.

AFFIRMED.

HENRY KOCH V. STATE OF NEBRASKA.

FILED JANUARY 7, 1936. No. 29675.

1. **Criminal Law**: WITNESSES: CAUTIONARY INSTRUCTION. Mere fact that witnesses in criminal prosecution were regular police officers of city does not entitle accused to instruction that jury, in weighing their testimony, should exercise greater care than in weighing testimony of other witnesses.
2. ———: INSTRUCTIONS. Trial court may properly refuse an instruction which contains both correct and incorrect statements of law.
3. ———: ———. Where the court has instructed the jury upon all the issues of the case, it is not required to give a more explicit instruction with reference to the effect of certain evidence, unless the party desiring such instruction prepares and requests the giving of a proper instruction upon the question.
4. ———: BILL OF EXCEPTIONS. It is not error for the court to permit to be incorporated in the record a transcript of a stenographer's shorthand notes which have been properly read in evidence.

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Robert A. Nelson and *C. L. Rein,* for plaintiff in error.

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

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

GOOD, J.

Henry Koch, hereinafter designated defendant, was convicted of robbery and sentenced to imprisonment in the state reformatory for men for a period of ten years. He brings the record of his conviction to this court for review.

Defendant contends that the court committed error in refusing to give his requested instruction No. 11. At the trial a number of the regular police officers of the city of Lincoln were called and testified as witnesses. The requested instruction directed that the evidence of such witnesses should be weighed with greater care than that of

ordinary disinterested witnesses on account of the tendency of such officials to construe facts against the defendant and to overlook facts which might be for his benefit. This question has been frequently before this court.

In *McCartney v. State,* 129 Neb. 716, 262 N. W. 679, the former holdings of this court upon the question were reviewed, and it was therein held: "The mere fact that witnesses in a criminal prosecution are regular police officers of a city will not justify an instruction that the jury, in weighing their testimony, should exercise greater care than in weighing the testimony of other witnesses." The court properly refused the proffered instruction.

The defendant contends that the trial court erred in refusing to give his requested instruction No. 12. The instruction related to the effect of impeaching testimony, and stated that such evidence cannot be considered as evidence against the defendant. The instruction as requested was not a correct statement of the law. Certainly, the evidence of impeaching witnesses may be considered against the defendant, but not as evidence of defendant's guilt. Had a proper instruction been requested, the court, no doubt, would have given it, limiting the effect of such testimony to determination of the weight to be given the evidence of witnesses who were impeached. The court may properly refuse to give a requested instruction which is in part erroneous. See *Williams v. City of Lansing,* 152 Mich. 169, 115 N. W. 961; *Hall v. American Investment Co.,* 241 Mich. 349, 217 N. W. 18. No error was committed by the court in refusing this instruction.

The defendant, however, argues that it was the duty of the court to give a proper instruction. The court instructed upon the issues presented by the pleadings, and it was incumbent upon the defendant, if he desired a more explicit instruction with reference to the effect of such evidence, to prepare and request a proper instruction. Having failed so to do, he may not complain of the failure of the court to give such an instruction.

During the course of the trial, two of defendant's

brothers testified as witnesses for him. On cross-examination, they were asked with reference to statements they had made in an interview with police officers prior to the trial that were at variance with the testimony given. They denied making such statements. A stenographer, who took their statements at the time they were made to the police officers, was called and testified that he had taken down in shorthand the questions put to such witnesses, with their answers, produced his notes, testified as to their accuracy and read from his notes the questions and answers so given. After this was done, he was asked if he had reduced his shorthand notes to typewriting and answered that he had. The typewritten transcript of his notes was then offered in evidence and received over objection. It does not appear, however, that it was again read to the jury. We perceive no error that was prejudicial to defendant in this respect.

Error prejudicial to defendant is not shown.

AFFIRMED.

IN RE ESTATE OF ALONZO L. CLARKE.
MARGARET DALE CLARKE, APPELLANT, V. LIDA CLARKE SEATON, APPELLEE.

FILED JANUARY 7, 1936. No. 29400.

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

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

Carlos W. Goltz, Alfred Pizey and *Ivan E. Maginn,* for appellant.

C. J. Baird and *Barton H. Kuhns, contra.*

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

EBERLY, J.

This was originally a proceeding in equity instituted by Arthur H. Jones and Archie D. Marvel, trustees duly appointed to execute trusts created by the will of Alonzo L. Clarke, deceased. They prayed for the interpretation of two paragraphs of his will and for a judicial order directing distribution of his estate.

It appears from the record before us that in this proceeding an issue was joined between Helen Clarke (in behalf of herself and Lida Clarke Seaton) and Margaret Dale Clarke, the adopted daughter of William H. Clarke, deceased, as to the right to receive certain bequests provided in the last will of Alonzo L. Clarke, deceased, for the "heirs at law" of William H. Clarke, deceased. After a trial in the district court, judgment and findings on the issues so joined were entered in favor of Margaret Dale Clarke, and against Helen Clarke and also Lida Clarke Seaton. Upon appeal by Helen Clarke, in which Margaret Dale Clarke appeared by counsel in this tribunal, and after trial *de novo* in this court, an opinion was adopted determining that Margaret Dale Clarke was not an "heir at law" of William H. Clarke, deceased, as that term was employed in the last will heretofore referred to, and that Margaret Dale Clarke was entitled to take nothing under the provisions of such will. See *In re Estate of Clarke,* 125 Neb. 625, 251 N. W. 279, for a complete statement of facts and conclusions of this court. Thereupon a judgment was duly entered on the journal of this court, which, in addition to determining the rights of certain parties to such appeal and the duties of the executors under the provisions of the will, continued as follows:

"Upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of said district court with respect to that part which determines that Margaret Dale Clarke is an 'heir at law' of William H. Clarke, deceased, within the meaning of paragraphs 22 and 27 of the will, and orders distribution to her on that basis, * * * and that part of said judgment which

determines that Margaret Dale Clarke is an heir at law of William H. Clarke, deceased, within the meaning of paragraphs 22 and 27 of the will and orders distribution to her on that basis, be, and the same hereby is, reversed and the cause is remanded, with directions to enter a judgment in harmony with the opinion of this court this day filed herein," etc.

It is further disclosed by the present record now before us that the action of this court thus had was duly transmitted to the district court for Adams county by the proper mandate of this court, and thereupon judgment was entered by that district court strictly in accord with the opinion, judgment and decree of this court.

It also appears that the present proceeding is an appeal from the judgment so entered pursuant to the mandate of this court, by Margaret Dale Clarke, in which she seeks to renew and retry contentions which were determined by the trial court in favor of Lida Clarke Seaton in this last decree by it so entered. This, Margaret Dale Clarke may not do.

"The proceeding to obtain a decree of distribution is not in the nature of a suit between party and party in which one seeks to recover a right withheld by the other; but is analogous in its character to a proceeding *in rem,* in which a decision between the parties before the court settles the rights of all parties to the property in question." 24 C. J. 508.

The judgment of reversal entered in this court is a complete settlement of the controversy and is binding on the parties to the action. It determined that Margaret Dale Clarke had no right or interest in the subject-matter of the action, and the executors were, in legal effect, directed to make distribution in harmony with this finding. This decision constitutes the law of the case and is controlling on this appeal.

"When this court upon appeal determines the law of the case, the trial court is bound thereby, and its judgment accordingly will not under any ordinary conditions be disturbed upon another appeal." *Home Savings Bank v.*

Shallenberger, 100 Neb. 113, 158 N. W. 455. See, also, *Scott v. Scotts Bluff County*, 106 Neb. 355, 183 N. W. 573.

The trial court has followed our decision, and its judgment is, therefore,

AFFIRMED.

W. J. ASSENMACHER COMPANY V. IRA K. HOLMES, ADMINISTRATOR, APPELLEE: BRYAN MEMORIAL HOSPITAL, APPELLANT.

FILED JANUARY 7, 1936. No. 29425.

1. **Fraudulent Conveyances.** One who in good faith and for a valuable and sufficient consideration purchases a note secured by a real estate mortgage before it is due will be protected in such purchase from the creditors of the grantor, even if grantor thereby intended to hinder, delay and defraud his creditors.
2. ———. This rule obtains even where a part of the consideration is an agreement for an annuity to the grantor in the future.

APPEAL from the district court for Jefferson county: JOHN W. YEAGER, JUDGE. *Reversed and dismissed.*

G. E. Hager, for appellant.

W. J. Moss, Melvin Moss, Claude S. Wilson, Roy F. Gilkeson and *Hymen Rosenberg, contra.*

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

CARTER, J.

This is a suit to foreclose a real estate mortgage brought by the plaintiff, W. J. Assenmacher Company. The petition alleged the execution of the note and mortgage by Ira K. Holmes and Tracy Holmes, husband and wife, to William H. Holmes, the sale of the same by William H. Holmes to the Bryan Memorial Hospital, and the purchase of the note and mortgage by the plaintiff from the Bryan Memorial Hospital for a valuable consideration, before it became due.

The First National Bank of Fairbury, Nebraska, filed a cross-petition alleging that it had recovered a judgment against William H. Holmes and Ira K. Holmes, as Holmes Brothers, in the sum of $19,582.15; that the Bryan Memorial Hospital and the other defendants had entered into a conspiracy to cheat, wrong and defraud the bank and to hinder and delay the collection of its judgment. The bank further alleged that the execution and delivery of the note and mortgage to William H. Holmes and the subsequent transfer thereof to Bryan Memorial Hospital and W. J. Assenmacher Company were made to further this conspiracy, and prayed for the cancelation of the mortgage and the sale of the land covered thereby to satisfy the bank's judgment.

The Bryan Memorial Hospital filed its answer to the cross-petition of the First National Bank in which it denied all allegations of fraud pleaded by the bank. W. J. Assenmacher Company also answered the cross-petition of the bank, denying that it had procured the note and mortgage by fraud and alleging that it was an innocent purchaser for value. The bank filed a reply to the answer of the Bryan Memorial Hospital, alleging that the transfer of the note and mortgage by William H. Holmes to the Bryan Memorial Hospital was a voluntary conveyance, made to cheat, wrong and defraud the bank. The prayer of the reply was that, if the W. J. Assenmacher Company be found to have been an innocent purchaser of the note and mortgage, the bank recover judgment of and from the Bryan Memorial Hospital for the amount of the value of the note and mortgage transferred to it by William H. Holmes.

The trial court entered a decree of foreclosure on the mortgage and ordered the property sold. The court found against the bank as to its allegations of fraud. The court, however, found that the transfer of the note and mortgage by William H. Holmes to Bryan Memorial Hospital was not an absolute assignment and that William H. Holmes retained a beneficial interest therein, that it was in fraud of the rights of creditors of William H. Holmes, although

binding as to plaintiff, it being an innocent purchaser for value. Upon this finding the trial court entered judgment against Bryan Memorial Hospital and in favor of Ira K. Holmes, administrator of the estate of William H. Holmes, for the sum of $5,917.77. From the entry of this money judgment only Bryan Memorial Hospital brings the case to this court on appeal.

The evidence shows that Ira K. Holmes and William H. Holmes had received title to certain real estate in Jefferson county as tenants in common by will from their mother. They subsequently decided to divide the land so that each would own his share in fee simple. In making the division, Ira K. Holmes received the more valuable lands and therefore agreed to pay William H. Holmes the sum of $5,000 as the difference in value of the two tracts. Ira K. Holmes, not having the cash, executed a note to William H. Holmes for the amount. When the note became due it was not paid. A new note, including some past-due interest, was then given in the sum of $5,350, and a mortgage executed to secure the same, which note and mortgage are the basis of the suit at bar.

The evidence further shows that William H. Holmes had made two subscriptions of $2,500 each to the Bryan Memorial Hospital, payable at his death, for the purpose of providing rooms in the hospital as memorials to his father and mother. Although these subscriptions were not due, William H. Holmes desired to pay them off in his lifetime, and, after negotiating with the Bryan Memorial Hospital, he assigned the note and mortgage given to him by Ira K. Holmes and wife to the hospital without recourse as full payment of the subscription notes he had executed to the hospital. As a consideration for his paying the subscription notes before they were due, Bryan Memorial Hospital executed a contract with William H. Holmes whereby it agreed, among other things, to pay to William H. Holmes, during his lifetime, an amount equal to the interest payments actually paid by Ira K. Holmes, the maker of the note and mortgage; also, if Bryan Memorial Hospital sold

or transferred the note and mortgage during the lifetime of William H. Holmes, the hospital agreed to pay said Holmes, in lieu of the interest payments, an annuity equal to 6 per cent. of the face of the note and mortgage, payable semiannually.

The evidence shows that the hospital assigned the note and mortgage to plaintiff as a part of the contract price for constructing a hospital building, and the hospital thereupon became obligated to pay to William H. Holmes the annuity equal to 6 per cent. of the face of the note during the balance of his life. Upon this statement of the evidence, the trial court held that the assignment of the note and mortgage by William H. Holmes to Bryan Memorial Hospital was not absolute; that William H. Holmes retained a beneficial interest therein; that the assignment was in fraud of the rights of creditors of William H. Holmes, and entered judgment against Bryan Memorial Hospital for $5,917.77.

The payment of the subscription notes given by William H. Holmes to Bryan Memorial Hospital is a valid consideration for the assignment. This point is well discussed in *Seymour v. Wilson,* 19 N. Y. 417, as follows: "When, however, the transfer, instead of being to a stranger, is to a creditor of the vendor, a different principle applies. It is not necessary, in such a case, that the vendee, in order to protect himself from a claim by the other creditors, should show any new consideration paid; for the obvious reason that his equity, at the time of the transfer, was the same as theirs, and he is entitled to the benefit of the universal rule, that where the equities are equal the legal title must prevail. Such a transaction could amount to nothing more than the voluntary preference of one creditor over another; and supposing the creditor receiving the transfer to have full knowledge of the object of his debtor, the title which he acquires would not be thereby affected. There is no doubt that the debt paid or secured by the transfer must, in such a case, be regarded as a 'valuable consideration,' within the section which saves the rights of *bona fide* purchasers; so that if the creditor acts in good faith, and for

the mere purpose of obtaining satisfaction of his own debt in accepting the transfer, he will acquire a valid title. There being no equity prior to his own to be overcome, the necessity which calls for proof of a new consideration in other cases does not exist."

The theory of the trial court was, however, that the annuity contract, executed as a part of the same transaction, amounted to a reservation of a beneficial interest. A like situation arose in the case of *Farlin v. Sook*, 30 Kan. 401, 1 Pac. 123, wherein the court, after stating the facts, said:

"This, therefore, is the question presented: Where a conveyance of real estate is made, the larger part of the consideration being the payment of a just debt, and the purchaser acting in good faith, is such sale void as against the creditors of the grantor simply because a small portion of the consideration is an agreement on the part of the grantee or her husband to support the grantor in the future? The answers to the special questions, as well as the instructions of the court, distinctly present this question, and the judgment must be affirmed, unless the mere fact that a part of the consideration was an agreement for the future support of the grantor necessarily vitiates the conveyance as against his creditors, and this notwithstanding that the grantee was acting in good faith, in ignorance of the grantor's indebtedness, and received the conveyance mainly in payment of a debt due to her.

"We think the conclusions of the district court are correct; that this is a case of an alleged fraudulent sale, and that participation in the fraud on the part of the grantee, or at least knowledge of the intended fraud of the grantor, must be shown, or the sale will be upheld. * * * But where the grantee is acting in good faith, either seeking to obtain payment of a debt due him, or to purchase the property for his own benefit simply, and the substantial part of the consideration is a debt or other thing of value, then to treat the conveyance as void at the instance of the creditors, simply because a small portion of the consideration is open

to challenge as a reservation for the grantor's benefit, would reverse the ordinary rule, and prefer the equity of a creditor to the equity of a *bona fide* purchaser. * * * It may be remarked that doubtless a creditor would have a right to treat the agreement for future support as a mere obligation of the grantee, and charge him and perhaps hold the property for the value of such agreement, that value being the difference between the value of the property and the amount of the consideration paid in money or other property. The consideration under such circumstances may be considered as partially paid and partially unpaid, and the unpaid portion as still responsible for the grantor's debts."

While the unpaid annuity payments are undoubtedly subject to the payment of the debts of William H. Holmes, that question is not before this court, it being wholly outside the issues disclosed by the pleadings. We are convinced that the trial court erred in holding that William H. Holmes retained a beneficial interest in the note and mortgage in question. They were assigned absolutely and without recourse. The consideration was the payment of the two subscription notes of $2,500 each that were not due and the execution of the annuity contract hereinbefore mentioned. The subscription notes not being due until the death of William H. Holmes, it is natural to suppose that, upon payment being made during the lifetime of Holmes, he would be entitled to receive an annuity equivalent to the value of the use of the principal amount thereof for the balance of his life. In addition to this, the terms of the agreement provided for the contingency of a sale of the note and mortgage by the hospital, an indication of an intent to convey a complete title. There is no evidence to support a finding of bad faith or knowledge of an intent to defraud on the part of Bryan Memorial Hospital. We conclude, therefore, that the assignment of William H. Holmes to Bryan Memorial Hospital was full and complete and that the trial court erred in holding to the contrary.

The action of the trial court in entering judgment in favor of Ira K. Holmes, administrator of the estate of

William H. Holmes, deceased, and against Bryan Memorial Hospital is reversed and the action dismissed as to the Bryan Memorial Hospital.

REVERSED AND DISMISSED.

NATIONAL FIDELITY LIFE INSURANCE COMPANY, APPELLANT, v. ORLIE A. GORDON ET AL., APPELLEES.

FILED JANUARY 7, 1936. No. 29440.

1. **Mortgages:** ACTION ON NOTE. Under section 20-2142, Comp. St. 1929, it is not necessary to obtain leave of court to commence an action at law on a note, secured by real estate mortgage, where the pleadings and proof show that no action has been filed in the district court of the county where the mortgaged premises are situated to foreclose or satisfy the mortgage.
2. **Evidence:** PRESUMPTIONS: LAWS OF SISTER STATES. In the absence of proof to the contrary, the laws of a sister state will be presumed to be the same as the laws of Nebraska.

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

Kennedy, Holland & DeLacy and *Edson Smith,* for appellant.

Gaines, McGilton, McLaughlin & Gaines, contra.

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

KROGER, District Judge.

This is an action brought by the plaintiff, appellant herein, to recover the balance due on a promissory note secured by a trust deed to lands in Logan county, Colorado.

In its amended petition, the plaintiff alleges that it is a Missouri corporation, and that the defendants are residents of Douglas county, Nebraska; that on December 31, 1926, the Grand Island Trust Company loaned defendants $4,500, and on that date defendants executed and delivered to the Grand Island Trust Company an instrument entitled "Real

Estate First Mortgage Coupon Bond" in the principal sum of $4,500, bearing interest at 6 per cent. per annum from January 1, 1927, signed by both defendants, the principal payable January 1, 1932; and that at the same time the defendants executed and delivered a trust deed to the public trustee of Logan county, Colorado, conveying to said trustee a certain section of land in Logan county, Colorado, as security for the real estate first mortgage coupon bond and the interest coupons. Said amended petition further pleaded the assignment of the note and trust deed to plaintiff, and the laws of Colorado applicable to trust deeds, and alleged default in the payment of interest due July 1, 1931, and that the property was sold by the public trustee for the sum of $3,500, which was applied on the indebtedness, leaving a balance due and owing plaintiff from the defendants of $1,504.57, for which sum plaintiff prayed judgment, with interest from January 5, 1932, and costs.

To this petition defendants, appellees herein, filed an answer admitting the execution of the real estate mortgage coupon bond, and denying each and every other allegation contained in the petition.

Trial was had to a jury and, at the conclusion of plaintiff's evidence, the court sustained defendants' motion for a directed verdict.

By competent evidence, plaintiff established the execution of the real estate first mortgage coupon bond, and plaintiff's testimony further showed that the sum of $3,500 had been paid on that obligation by the public trustee of Logan county, Colorado, as a result of the sale of the property located in Logan county, Colorado, under a trust deed. There was no evidence offered by plaintiff to prove the laws of Colorado as set out in its petition.

It is the contention of the appellees that, in the absence of proof to the contrary, the laws of Colorado will be presumed to be the same as those of Nebraska, and that, under the law of this state, when an instrument is given as security for the payment of money, it is a mortgage, whatever may be its form, and that the law of this state further pro-

vides that, after a petition has been filed to foreclose a mortgage, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court, and that the plaintiff in this action had failed to show that it had obtained leave of court to file this suit.

It is appellant's contention that section 20-2142, Comp. St. 1929, does not require the plaintiff to obtain leave of court to bring suit at law, where the note is secured by a trust deed to Colorado land to a public trustee in Colorado, where such trustee has sold the land without court proceedings and applied the proceeds to the note, as there is in fact no court from which such consent could be obtained.

As we view the facts, it is not necessary to a correct decision of this case for this court to interpret section 20-2142, *supra*. The contention of the appellees that the laws of Colorado, in the absence of proof to the contrary, will be presumed to be the same as those of Nebraska, is correct. *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37. In this case there was no such proof. That being true, then section 20-2139, Comp. St. 1929, will also be presumed to be the law of Colorado. This section provides: "All petitions for the foreclosure or satisfaction of mortgages shall be filed in the district court where the mortgaged premises are situated."

Plaintiff's pleadings and evidence clearly show that no action to foreclose the mortgage was filed in the district court for Logan county, Colorado, where the mortgaged premises were situated, and consequently it was not necessary for plaintiff to show that it had obtained leave of court to file the present suit.

The trial court erred in sustaining defendants' motion for a directed verdict.

REVERSED AND REMANDED.

SOUTHERN NEBRASKA POWER COMPANY, APPELLANT, V. VILLAGE OF DESHLER ET AL., APPELLEES.

FILED JANUARY 7, 1936. No. 29390.

1. **Municipal Corporations:** ACTION. An action will not lie against a village for an act done by its officers outside the actual and apparent scope of their authority.
2. ———: INJUNCTION. If the members of the village board threaten to exceed their authority in carrying out a village ordinance which will be prejudicial to the rights of the plaintiff, injunctive relief may, in a proper case, be granted against them, but not against the village.
3. ———: ———. But in such case injunctive relief could not be granted against the members of the board when they were not made parties to the action.
4. **Action:** DECLARATORY JUDGMENTS ACT. The declaratory judgments act is applicable only where all interested persons are made parties to the proceeding.

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

F. H. Stubbs, for appellant.

Perry, Van Pelt & Marti, contra.

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

MUNDAY, District Judge.

The Southern Nebraska Power Company, appellant herein, brought this action under the uniform declaratory judgments act, alleging that ordinance No. 93 of the Village of Deshler, appellee, was void under sections 18-101 and 18-103, Comp. St. 1929, and also prayed for injunctive relief. The trial court found for the defendants and dismissed the action. Plaintiff has appealed.

The appellant contends that such ordinance provides for the construction and maintenance of a municipal light plant in the defendant village by voting bonds, and that the sections above set out provide for only the construction of such plant; that said ordinance and all proceedings thereunder and the proposed bond issue are void. The appellees

deny these contentions, and further contend that all interested persons are not made parties to the action, and therefore the trial court had no jurisdiction, regardless of whether or not the action is tried under the uniform declaratory judgments act or is tried as an ordinary action in equity on the petition praying for injunctive relief.

The village of Deshler had no power to authorize a municipal bond issue for the maintenance of a municipal light plant. Comp. St. 1929, sec. 18-103. Therefore, the adoption of the ordinance was beyond the power of the village authorities and, at that time, under a sufficient showing, they probably would have been enjoined in a proper proceeding. But only one member of the village board is a party to this action. An action will not lie against a village for an act of its officers outside of their authority. The village is not bound. In attempting to legislate upon matters beyond its power, the village board does not represent the village, nor act as its agent. An action cannot be maintained against a village for an act done by its board outside of the actual and apparent scope of its authority.

The members of the village board not being parties to this action, the action will not lie against the village for acts of the board beyond its actual and apparent authority.

We approve the language of Judge Sullivan in *Wabaska Electric Co. v. City of Wymore,* 60 Neb. 199, 82 N. W. 626. In that case the plaintiff brought the action to prevent the carrying out of a proposed ordinance, which was void, and to prevent the interference with certain contract rights of the plaintiff, and for injunctive relief. The mayor and council were not parties to the action, and the court said:

"The adoption of the ordinance referred to in the fifth paragraph of the petition, being entirely beyond the power of the city authorities, and being an act which would, according to the showing of the plaintiff, result in irreparable injury, should, doubtless, be enjoined, if the proper parties were before the court. *Davis v. Sturtevant,* 9 N. Y. 263; *People v. Dwyer,* 90 N. Y. 402; *Spring Valley Water Works*

v. Bartlett, 16 Fed. 615; *Roberts v. City of Louisville,* 92 Ky. 95; High, Injunctions, sec. 1241. But the mayor and city council are not parties to this suit, and we do not understand that an action will ever lie against a city for an act done by one of its officers outside the scope of his authority. The mayor and council have power to enact ordinances, but that power is plainly limited by the law under which the city is organized. In attempting to legislate upon matters beyond its jurisdiction, the governing body of a city does not represent the city; does not act as its agent, nor by color of its authority. It is like any other agent who transcends his authority, and it, and not its principal, must answer for the wrongful act done or threatened. If the authorities of Wymore are threatening to do an illegal act obviously beyond the scope and limit of their agency, the injunction must go against them and not against the city."

The uniform declaratory judgments act provides 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." Comp. St. 1929, sec. 21-21,145. It is clear that the trial court in this case had no jurisdiction to determine any controversy between the plaintiff and the members of the village board of Deshler, because the members of the board are not parties to this action.

In *Lynn v. Kearney County,* 121 Neb. 122, 236 N. W. 192, 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."

In the case of *Dobson v. Ocean Accident & Guarantee Corporation,* 124 Neb. 652, 247 N. W. 789, the syllabi are:

"A court may refuse to enter a declaratory judgment where it would not terminate the uncertainty or controversy giving rise to the proceeding.

"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."

Therefore, this action cannot be maintained under the uniform declaratory judgments act, as all interested persons are not made parties, nor could the injunctive relief prayed for be granted in an ordinary action in equity for the same reason. *Wabaska Electric Co. v. City of Wymore, supra.*

For these reasons, the judgment of the trial court is

AFFIRMED.

ROY CLOUGH, ADMINISTRATOR, APPELLEE, V. STANDARD OIL COMPANY, APPELLANT.

FILED JANUARY 7, 1936. No. 29324.

1. **Landlord and Tenant.** The relation of landlord and tenant is created by contract.
2. **Contracts:** CONSTRUCTION. The general rule of construction applicable to contracts is to ascertain and give effect to the intentions and purposes of the parties executing such contracts.

APPEAL from the district for Cheyenne county: ISAAC J. NISLEY, JUDGE. *Reversed, with directions to dismiss.*

W. H. Herdman and *Heaton & Heaton,* for appellant.

Golden P. Kratz and *A. J. Kinnersley, contra.*

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and RYAN and MESSMORE, District Judges.

RYAN, District Judge.

This is an action brought upon a lease covering lots 4, 5 and 6, in block 19, Carow's Second Addition to Dalton, Nebraska. The improvements on the premises consisted of a building covering about one-third the area of the lots. The front part of the building was adapted for use as a gasoline filling station and the vacant portions of the lots

were used as a free camp ground for tourists. The premises were owned by W. J. Ewing. On and prior to September 30, 1930, Rhea operated a filling station on the premises involved under a different lease with Ewing, the business conducted being the operation of a gasoline filling or service station. The gasoline pumps and underground tanks used in connection with the service station were the property of the defendant and were leased by Rhea, who was buying his products from the defendant and selling them at the station.

On September 30, 1930, Ewing, Rhea, and Randels, a representative of the defendant, met in the Dalton State Bank, of which Ewing was president. At that time Ewing executed a lease on said premises to Rhea for a term of three years from October 1, 1930, to October 1, 1933, for the sum of $30 a month and the upkeep on his automobile. The rental was payable on the first day of each month in advance. The lease was in the usual form and contained the usual covenants for forfeiture on default in payment of rent and that Rhea would not assign or sublet without the written consent of Ewing. On the same day a lease was drawn from Rhea to the defendant, Standard Oil Company, for the same premises, for the same term. The rent stipulated in this lease was: "A sum equal to one-half cent for each and every gallon of gasoline sold by second party at said filling station, payable monthly on the 15th day of each month for the preceding calendar month." It also contained this provision: "Said second party reserving the right to terminate this lease at any time by giving to first party thirty days' notice of its intention to so terminate said lease." The next provision is as follows: "In consideration of the foregoing, the first party hereby sets over and assigns to the second party, first party's licenses, consents and permits to maintain and operate a gasoline filling station on the above described premises; such assignment to be effective only during the term of this lease, and all renewals and extensions thereof."

Attached to this lease was the following:

"Consent of Owner

"The undersigned, owner in fee simple of the premises described in the within lease, hereby consents hereto and agrees with said Standard Oil Company that it may enter the hereinabove demised premises and remove therefrom any and all pumps, tanks and equipment placed thereon by the said Standard Oil Company, at any time within thirty (30) days after the expiration or prior termination of the undersigned's lease with the aforesaid party of the first part. The undersigned further agrees that if the said party of the first part shall default in the payment of the rent reserved in his lease with the undersigned, the said Standard Oil Company may, at its option, pay said rent and will thereupon succeed to the rights of the said party of the first part in the demised premises to the same extent as if the said party of the first part had assigned his lease to the said Standard Oil Company."

Rhea paid Ewing the rent due under his lease from Ewing for the months of October, November, and December, 1930, and January, 1931, but defaulted in the payment of rent due Ewing on February 1, 1931. The record does not disclose how much rent the defendant, Standard Oil Company, paid Rhea under its lease from him. The only reference to this subject found in the record appears in the cross-examination of the witness Rhea: "Q. I will ask you if the Standard Oil Company owes you for any rent on those premises? A. No."

On February 6, 1933, W. J. Ewing wrote the defendant that he was looking to it for the payment of the rent on the premises and for its assignment of the lease from Rhea. In reply to this letter the defendant wrote: "There evidently is some misunderstanding in regard to the payment of rent and I am arranging for our Paul Latschar to see you and go into this matter thoroughly. Mr. Latschar should be able to see you within the next ten days or two weeks."

The plaintiff, Ewing, was helplessly ill and unable to talk at the time of the trial. He expired shortly afterward and the action was revived in the name of the

administrator of his estate. The defendant, Standard Oil Company, on May 18, 1933, exercised its option to cancel its lease with Rhea and notified him in writing of such intention, effective June 16, 1933. After the cancelation of this lease by the defendant, Rhea took possession of the premises and has since occupied the same.

There is no material dispute of fact in the record. The case was tried to the court without the intervention of a jury. The trial court found, as a matter of law, that the lease executed by Rhea to defendant was in effect an assignment by Rhea to defendant of the lease executed by Ewing to Rhea, and by reason of said assignment, defendant became obligated to pay Ewing the rent stipulated in plaintiff's lease to Rhea. The defendant brings the case to this court on appeal.

The only question presented by the appeal is whether the lease from Rhea to the defendant amounted to an assignment of his lease with Ewing or whether it was a sublease. The defendant contends that this lease from Rhea to it was a sublease and that the trial court erred in finding that said lease amounted to an assignment.

It is an elementary principle of law that the relation of landlord and tenant is created by contract. The general rule to be applied in construing contracts is to ascertain and give effect to the intention and purpose of the parties executing such contract. As was said by this court in *Nebraska Hardware Co. v. Humphrey Hardware Co.*, 81 Neb. 693, 116 N. W. 659: "In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relation of the parties, the nature and situation of the subject-matter, and the apparent purpose of making the contract. The court will, so far as possible, put itself in the place of the parties and interpret the contract in the light of the circumstances surrounding them at the time it was made and the object which they had in view."

The lease from Ewing to Rhea and the lease from Rhea to the Standard Oil Company were executed at the same time. They were executed in the bank of which Ewing was president. Ewing was familiar with the terms of both instruments and signed the written consent to the lease from Rhea to the defendant, Standard Oil Company, which is set out above. While it does not appear from the record, since Ewing was unable to testify, it is quite apparent that the reason for the execution of the two instruments instead of the defendant leasing direct from Ewing was that the defendant evidently desired a lease upon a gallonage basis and apparently Ewing desired to have the repair of his automobile in addition to the stipulated rental. The parties knew of this difference in the consideration named in the two instruments. Ewing knew that the Standard Oil Company did not expressly assume the payment of the cash rent to him, and it is not claimed that the defendant is liable for the reasonable cost of keeping Ewing's automobile in repair. Rhea paid the rent to Ewing for four months and was in default for more than two years before Ewing made any demand upon the defendant for the payment of the cash rent. Ewing was also aware that there was a reservation in the lease from Rhea to the defendant, giving the defendant the right to terminate the lease at any time by giving thirty days' notice to Rhea. There was no such provision in his lease to Rhea.

We think it quite apparent that the parties by their conduct treated the lease from Rhea to the defendant as a sublease and not as an assignment. In fact, we think that construction follows conclusively from this provision found in the consent: "The undersigned further agrees that if the said party of the first part shall default in the payment of the rent reserved in his lease with the undersigned, the said Standard Oil Company may, at its option, pay said rent and will thereupon succeed to the rights of the said party of the first part in the demised premises to the same extent as if the said party of the

first part had assigned his lease to the said Standard Oil Company."

In view of the facts above set forth and the rules of construction heretofore laid down by this court, we conclude that the learned trial court was in error in holding that the second lease amounted to an assignment. The judgment is accordingly reversed and the cause remanded, with instructions that it be dismissed.

REVERSED.

LANCASTER COUNTY BANK, APPELLANT, V. DEEM MARSHEL ET AL., APPELLEES.

FILED JANUARY 10, 1936. No. 29382.

1. **Wills:** TRUSTS: RESTRICTION ON ALIENATION. No particular form of words is necessary to create restrictions rendering the interest of a beneficiary of a testamentary trust inalienable and placing the same beyond the reach of his creditors, nor is it necessary that the restrictions be expressed directly in the testamentary language employed. They may be implied if that intention can be clearly ascertained from the whole will, in connection with the surrounding circumstances.
2. ———: ———: ———. Courts look at all the provisions of a will and the circumstances under which it was made, including the condition of the beneficiary, and, if an intent to restrict the beneficiary's interest in property devised so that he may not alienate it nor his creditors seize it is reasonably plain from a consideration of all of such features, courts will give effect to that intent.
3. ———: ———: ———. The fact of placing property by will in the hands of a trustee, under the facts and circumstances of this case, evidences an intent on the part of the testator to put it beyond the power of the beneficiary to alienate or his creditors to seize.
4. **Trusts:** DUTY OF TRUSTEE. "It is firmly established, both by English and American courts, that a trustee is bound to perform faithfully the duties relating to his trust, and that in doing so he cannot allow his own interests to interfere. If he unites his personal and representative capacities, he confuses transactions which the law requires him to keep separate and distinct. If he attempts to acquire an individual interest in the subject-

matter of his trust or agency, he creates a temptation to serve himself at the expense of the beneficiary or principal, and enters a realm where his secret purposes with reference to trust property or interests may escape judicial scrutiny. To prevent evil consequences from growing out of the advantages which his position gives him, it will be presumed that what he does in relation to the interests or property involved in the trust or agency is done in a representative capacity." *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 139 N. W. 839.

5. ———: BREACH OF TRUST. When an act or agreement of the parties disappoints the purpose of the settlor by divesting a trust property or trust income from the purpose indicated by the will establishing the trust, especially where the trustee participates therein or receives personal financial benefits therefrom or by reason thereof, such act or agreement is void *ab initio*.

6. ———: ———: ACTIVE TRUSTS. So long as the trustee, either expressly or by implication, has imposed upon him some affirmative and substantial duty to perform or useful purpose to subserve, or discretion to exercise with respect to the control, protection, management, or disposition of the trust property, or to protect the estate for a given time or until the death of some person, in this state (in the absence of a statute of uses) the trust remains an active trust.

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

Fred C. Foster and *R. M. Charters*, for appellant.

Lee Basye, contra.

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

EBERLY, J.

This is an action to foreclose a real estate mortgage upon what is alleged in the petition to be a life interest, and which is described as "The use and possession of and the rents and profits accruing from (described real estate) during the natural life of said Anna Marie Marshel; it being the intention to convey all of the interest that Anna Marie Marshel acquired in and to (described real estate) under the will of John Olson, deceased, which will was duly

admitted to probate in the county court of Lancaster county, Nebraska, on January 14, 1921."

Plaintiff's petition was in ordinary form. It set forth copies of the notes for which this mortgage purports to be given, alleged a default on part of the mortgagors, and prayed for foreclosure and sale.

To the petition, defendant Anna Marie Marshel filed a separate answer and cross-petition. Her answer admitted the signing of the notes and mortgage, alleged want of consideration, and denied every allegation contained in the petition which was not so admitted; alleged that she owned no life interest in the real estate mortgaged; that such real estate constituted a spendthrift trust created under the terms of the last will and testament of her father, John Olson, deceased; and set forth a copy of such will. In her cross-petition, forming a part of the issues, there were set forth at length allegations which may be briefly recapitulated as follows: That the will created a spendthrift trust as to the lands described in plaintiff's petition, and because of this fact the real estate described in plaintiff's petition, as well as defendant's rights therein, are inalienable and not subject to the demands of the creditors of Mrs. Marshel; that Charles J. Warner and Carl E. Berg duly qualified as executors and trustees thereof, and since continue in that capacity; that the trust so created by the will is an active trust; that Charles J. Warner is now, and at all times covered by the petition has been, the president of the plaintiff bank, and that because of the fiduciary relation created and existing between said Warner and this defendant by the terms of the will of John Olson, and the duties imposed thereby, the mortgage and notes in suit herein are voidable, and that defendant elects to annul the same. The defendant thereupon prayed that the notes and mortgage in suit be canceled, and that she be given general relief and her costs. To this pleading the plaintiff bank filed a reply which was, in substance, a general denial.

On the issues thus formed, a trial was had, and at the conclusion thereof the district court found, in substance,

for the defendants and against the plaintiff; found that the will of John Olson created an active spendthrift trust, of which Anna Marie Marshel was a beneficiary, and that her interests therein were inalienable and not subject to the claims of plaintiff; also that Charles J. Warner was the duly appointed executor and trustee nominated by such will, and he duly qualified, and since has continued as such; that because of the fiduciary relations and duties created by the Olson will, added to the fact that said Warner was at all times, and now is, the president of plaintiff bank and a stockholder therein, the instruments in suit are wholly void. Thereupon the trial court, as to defendant Anna Marie Marshel, canceled the notes and mortgage in suit, and denied foreclosure of the mortgage set forth in plaintiff's petition. Plaintiff then filed its motion for a new trial, which was overruled, and from such ruling it appealed to this court.

The record reflects the following facts: That John Olson was the father of the defendant Anna Marie Marshel, and in his lifetime was the owner in fee simple of the lands described in plaintiff's petition. At his death he left a last will which was duly admitted to probate in the county court of Lancaster county, Nebraska, on January 14, 1921. The provisions of this will, so far as material here, are as follows:

"I give and devise the following described real property, to wit: The Northwest Quarter (NW¼) of Section Twenty-three (23); the South Half of the Northeast Quarter (S½ NE¼) of Section Fourteen (14) and the North Half of the Southeast Quarter (N½ SE¼) of Section Fourteen (14), all in Township Eleven (11) North, Range Eight (8), east of the Sixth Principal Meridian in Lancaster county, Nebraska, to Carl Berg and Charley Warner as trustees, upon the following trusts and conditions:

"My daughter, Anna Marie Marshel, shall have the use and possession of, or the rents and profits accruing from, the said Northwest Quarter (NW¼) of Section Twenty-three (23), Township Eleven (11), Range Eight (8), for

and during her natural life, she to pay for said use and possession, or out of the rents and profits therefrom, all taxes levied thereon.

"My daughter, Elizabeth Christina Hatten, shall have the use and possession of, or the rents and profits accruing from, the said South Half of the Northeast Quarter (S½ NE¼) and the North Half of the Southeast Quarter (N½ SE¼) of Section Fourteen (14), Township Eleven (11), Range Eight (8), for and during her natural life, she to pay for said use and possession, or out of the rents and profits therefrom, all taxes levied thereon.

"Upon the death of my daughter, Anna Marie Marshel, if she leaves a child or children or any issue of any deceased child or children her surviving, then and in that event, I give and devise to said child or children or to the issue of any deceased child or children, by representation, the Northwest Quarter (NW¼) of Section Twenty-three (23), Township Eleven (11), Range Eight (8), hereinbefore described, share and share alike, in fee simple.

"If my said daughter, Anna Marie Marshel, dies without leaving any child or children or issue of any deceased child or children her surviving, then my daughter, Elizabeth Christina Hatten, if she survives my daughter, Anna Marie Marshel, shall have the use and possession of, or the rents and profits from, said premises for and during her natural life, and, upon her death, I give and devise said premises to such her child or children or issue of any her deceased child or children, by representation, as shall survive her, share and share alike, in fee simple.

"Upon the death of my said daughter, Elizabeth Christina Hatten, if she leave a child or children or any issue of deceased child or children her surviving, then I give to said child or children or to the issue of such deceased child or children, by representation, the South Half of the Northeast Quarter (S½ NE¼) and the North Half of the Southeast Quarter (N½ SE¼) of Section Fourteen (14), Township Eleven (11), Range Eight (8), hereinbefore described, share and share alike, in fee simple.

"If my daughter, Elizabeth Christina Hatten, dies without leaving any child or children or issue of any deceased child or children her surviving, then my daughter, Anna Marie Marshel, if she survives my daughter, Elizabeth Christina Hatten, shall have the use and possession of, or the rents and profits from, said premises for and during her natural life, and, upon her death, I give and devise said premises to such her child or children or issue of any her child or children as shall survive her, by representation, share and share alike, in fee simple.

"Should neither of my said daughters leave any child or any issue of any deceased child her surviving, then, upon the death of the survivor of my said daughter, I direct that the trustees herein named, or their successors in office, shall sell said premises, namely, the Northwest Quarter (NW¼) of Section Twenty-three (23), the South Half of the Northeast Quarter (S½ NE¼) and the North Half of the Southeast Quarter (N½ SE¼) of Section Fourteen (14), Township Eleven (11) North, Range Eight (8), in Lancaster county, Nebraska, and distribute the proceeds thereof among such persons as shall, at the death of the survivor of my said daughters, be my next of kin and entitled, under the statutes of the state of Nebraska, in force at that time, to share in my estate as my heirs in the absence of any will and in the proportions determined by said statutes in case of intestate estates.

"If either of my daughters die before my death, the premises described in paragraph two shall descend in the same manner as provided therein had the one so dying survived me. * * *

"I nominate and appoint Carl Berg and Charley Warner as executors of this my Last Will and Testament *and as trustees to carry out the provisions of this my Last Will and Testament* and I hereby revoke all former wills or codicils of wills by me made. If either Carl Berg or Charley Warner die before me I direct that the survivor act as executor and trustee. If both die before me or fail to qualify, I direct that the court appoint some competent

person outside of the beneficiaries of this will as executor and trustee."

It further appears that, in due time after the admission of this will to probate, Charles J. Warner and Carl E. Berg qualified as such executors and trustees in February, 1921, by taking the oath and giving bond as required by law, and entered upon their duties as such. That since that time Charles J. Warner has continued as, and now is, one of the executors and trustees of such last will and testament, and is vested with powers and duties therein conferred. That the notes and mortgage in suit were executed in renewal and settlement of a previous indebtedness of Deem Marshel to the Lancaster County Bank of Waverly. That no part of the consideration upon which the instruments in suit were based was received by Anna Marie Marshel, or inured to the benefit of her separate estate, of which the rights in the land devised to her by the will of John Olson, her father, constituted a part. That Anna Marie Marshel appears in the transaction presented by this litigation as an apparent surety for her husband's preexisting debts. That during the entire period of time occupied by the present transaction, as well as the connected transactions which preceded it, Charles J. Warner was the president of, and a stockholder in, the plaintiff bank. That, in the capacity of president of that institution and in its behalf, he made and executed a contract in writing, bearing date of October 26, 1931, to which Deem Marshel and Anna Marie Marshel were parties of the second part. That this contract in writing provided for the making and delivery to the Lancaster County Bank, by the parties of the second part, of the notes and mortgage in suit, and solely pursuant thereto these instruments were subscribed by the parties of the second part and actually received by the plaintiff bank.

The correctness of the judgment of the trial court is to be determined by a proper construction and application of the provisions of the John Olson will, in the light of the surrounding circumstances.

This jurisdiction has long been committed to the view

that "The statute of uses is not of the law of this state." *Farmers & Merchants Ins. Co. v. Jensen,* 58 Neb. 522, 78 N. W. 1054.

The principle appears well established that, "Prior to the enactment of the statute of uses a person who held land to the use of another had, in addition to his negative duties, the following two affirmative duties: (1) To protect the property against other persons than the beneficiary; (2) to convey the property to the beneficiary or in accordance with his directions. If there was a manifestation of an intention to impose additional affirmative duties, he held upon an active trust." Restatement, Trusts, sec. 69.

In view of the powers conferred and duties imposed on the executors and trustees, specified and enumerated in the will of John Olson, which are affirmative and additional to those embraced within the restatement of the law of trusts quoted above, and which Charles J. Warner and Carl E. Berg are thereby and therein expressly directed as trustees to carry out, it appears that we are dealing with an "active trust."

In addition, the controlling rule of construction in this state is statutory, and embraces the following direction: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is consistent with the rules of law." Comp. St. 1929, sec. 76-109.

In the application of this legislative formula, this jurisdiction is committed to the view that "No rule of law is better settled or more in accord with good sense than that which requires the intention of the testator to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, no conventional forms of expression, are necessary to make an effective testamentary disposition of his property. The

court, without much regard to the canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it. *Albin v. Parmele,* 70 Neb. 740, 98 N. W. 29; *McCulloch v. Valentine,* 24 Neb. 215, 38 N. W. 854; *Lesiur v. Sipherd,* 84 Neb. 296, 121 N. W. 104; *Heywood v. Heywood,* 92 Neb. 72, 137 N. W. 984; *Draper v. Eager,* 112 Neb. 611, 200 N. W. 170." *In re Estate of Combs,* 117 Neb. 257, 220 N. W. 269. See, also, *Nebraska Nat. Bank v. Bayer,* 123 Neb. 391, 243 N. W. 115.

Reading the provisions of the will, as required by the terms of the statute quoted, it will be noted that the lands to which this controversy relates were given and devised to "Carl Berg and Charley Warner as trustees, upon the following trusts and conditions."

Section 30-202, Comp. St. 1929, provides: "Every devise of land in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will, that the devisor intended to convey a less estate."

The will itself also authorizes and directs the trustees named therein, or their successors in office, upon the death of each of the testator's daughters leaving no child or issue of any deceased child, them surviving, to sell the premises described in said will, which includes the lands affected by this proceeding, and to distribute the proceeds thereof among such persons as shall "then" be "my next of kin," etc.

It follows that the provisions of the will generally constituted an active trust, necessarily to continue until after the death of the immediate devisees, and that the executors were vested with ample powers to execute the same. It also appears that the deceased, at the time of the execution of his will, had two married daughters and this will in substantially identical words directs what benefits each of these daughters shall receive out of the testator's real estate. In the instant case the words employed are, "my daughter, Anna Marie Marshel, shall have the use and possession of, *or* the rents and profits accruing from," the lands described.

In view of the context, and the circumstances of the testator, we may not ascribe to the word "or" employed in the sentence last above quoted any other than its ordinary literal definition. This is expressed by Webster's New International Dictionary (2d ed.) as: "A co-ordinating particle that marks an alternative; as, you may read *or* may write—that is, you may do one of the things at your pleasure, but not both." In view of context, surrounding circumstances, and purposes evidenced thereby, "or", as employed in the language of the will above quoted, may not properly be construed as "and." *Miller v. Philip,* 5 Paige Ch. (N. Y.) 573; *Toothman v. Barrett,* 14 W. Va. 301; *Austin v. Oakes,* 1 N. Y. Supp. 307. So, too, "use" and "ownership" are not synonymous. *State v. Stockwell,* 23 N. Dak. 70, 134 N. W. 767. The right to use is but an incident of ownership, but does not necessarily imply ownership. "In its primary meaning, 'use' as a noun may signify the act of employing anything, or the state of being employed; the act of employing anything, or of applying it to one's service. * * * The state of being used, employed, or applied." 66 C. J. 66. "Possession," as employed in this will, carries the sense of being practically synonymous with "occupation." *Macklem v. Macklem* (1890) 19 Ont. 482. "In its usual sense 'occupation' is where a person exercises physical control over land; and as applied to real property it is, ordinarily, equivalent to, or synonymous with, actual possession; 'possession;' subjection to the will and control." 46 C. J. 895. The alternative benefits provided by the Olson will are "rents and profits." This term "is well understood, and generally it is equipollent with 'profits and gains.' As applied to real estate, the income which does not impair or diminish the fee; or the net income of it; the sum annually yielded by the same." 54 C. J. 384. "Rents and profits" do not necessarily imply physical possession and control of the real estate from which derived. While by the terms of the will the trustees receive the direction that "my daughter, Anna Marie Marshel, shall have the use and possession of, or the rents and profits accruing from," the

land described, the will does not expressly confer upon the devisee the right or power of election, and obviously it was not intended that she should enjoy the alternative benefits at the same time. On the other hand, the fifth provision of the will expressly provides that Carl Berg and Charley Warner are appointed "as trustees to carry out the provisions of this my last will," etc. Manifestly, the power of election between the alternative benefits is vested in the trustees, to be exercised from time to time as the best interests of their trust may require.

In this connection, it may be said: "(1) That where a power of electing is given to trustees, as to the rights of third persons, they are bound to exercise such power most beneficially for the *cestuis que trust.* (2) Reference must always be had, in the execution of a power, *to the end or purpose intended* by the creator of the power, and this end or purpose must be gathered from a construction of the written instrument; and a power must always *be executed bona fide for the end and purpose designed.* (3) A power cannot be executed in favor of the donee of the power, or of his family, unless the instrument specially authorized him so to do. (4) The donee of a power cannot execute it for any pecuniary gain, directly or indirectly, to himself. Nor (5) can he exercise it for any other purposes personal to himself." 2 Perry, Trusts and Trustees (7th ed.) sec. 511a.

From the will as an entirety, and the circumstances surrounding the same, it appears that the object and purpose of the alternative benefits provided for Mrs. Marshel were by and through the exercise of the power of election vested in the trustees to protect this devisee against the result of her own acts, and to protect the interests of the remaindermen against damage to their rights by the acts of Mrs. Marshel, such as waste committed by her, or committed by others with her authority or consent. In other words, it was the plain intent of the testator that, by a proper exercise of the powers vested in his trustees by the terms of his will, his daughter would at all times be protected against

her own improvidence and incapacity, and would be certain of receiving the support which the trust estate, properly managed, would assure her. These features, at least so far as the trustees were concerned, under the facts in this case, amounted to the creation of a spendthrift trust.

The controlling legal principles applicable to the facts disclosed by this record are: "It is now well established that no particular form of words is necessary to create the restriction. Nor is it necessary that the restriction be expressed directly in the language of the will. On the other hand, courts look at all of the provisions of the will, and the circumstances under which it was made, including the condition of the beneficiary, and, if the intent to restrict is reasonably plain from a consideration of all of these features, courts will give effect to that intent." *Jones v. Harrison,* 7 Fed. (2d) 461. See, also, *Higbee v. Brockenbrough,* 191 S. W. (Mo.) 994; *Berry v. Dunham,* 202 Mass. 133, 88 N. E. 904; *Bennett v. Bennett,* 217 Ill. 434, 75 N. E. 339; *Estate of Stambaugh,* 135 Pa. St. 585, 19 Atl. 1058; *Everitt v. Haskins,* 102 Kan. 546, 171 Pac. 632; *Barnes v. Dow,* 59 Vt. 530, 10 Atl. 258; *Roberts v. Stevens,* 84 Me. 325, 24 Atl. 873; *Patten v. Herring & Kelley,* 9 Tex. Civ. App. 640, 29 S. W. 388; *Seymour v. McAvoy,* 121 Cal. 438, 53 Pac. 946; *Mattison v. Mattison,* 53 Or. 254, 100 Pac. 4; *Morrow v. Apple,* 26 Fed. (2d) 543.

"The fact of placing property in the hands of a trustee evidences an intent on the part of the testator to put it beyond the power of the beneficiary to alienate, or his creditors to seize." *Jones v. Harrison,* 7 Fed. (2d) 461. See, also, *Higbee v. Brockenbrough, supra; Morrow v. Apple, supra.*

"If it appears from the will that it was the intent of the testator that the beneficiary should have nothing that she could dispose of, it will be as effectual to protect the trust as if there was an express clause against alienation." *Barnes v. Dow,* 59 Vt. 530, 543, 10 Atl. 258. See, also, *Higbee v. Brockenbrough, supra; Mattison v. Mattison, supra.*

"Any conveyance whether by operation of law or by act of any of the parties, which disappoints the purposes of the settlor by divesting the property or the income from the purposes named, would be a breach of the trust." 1 Perry, Trusts and Trustees (7th ed.) sec. 386a. See, also, *Bixby v. St. Louis Union Trust Co.*, 323 Mo. 1014, 22 S. W. (2d) 813.

When an act or agreement of parties disappoints the purpose of the settlor by divesting a property or income from the purposes named, such act or agreement is void *ab initio. Bixby v. St. Louis Union Trust Co., supra.*

"It is firmly established, both by English and American courts, that a trustee is bound to perform faithfully the duties relating to his trust, and that in doing so he cannot allow his own interests to interfere. If he unites his personal and representative capacities, he confuses transactions which the law requires him to keep separate and distinct. If he attempts to acquire an individual interest in the subject-matter of his trust or agency, he creates a temptation to serve himself at the expense of the beneficiary or principal, and enters a realm where his secret purposes with reference to trust property or interests may escape judicial scrutiny. To prevent evil consequences from growing out of the advantages which his position gives him, it will be presumed that what he does in relation to the interests or property involved in the trust or agency is done in a representative capacity." *Nebraska Power Co. v. Koenig,* 93 Neb. 68, 139 N. W. 839.

It is quite obvious that by virtue of the transaction entered into between Anna Marie Marshel and plaintiff, by and through the agency of Charles J. Warner, representing the plaintiff bank of which he was president and a stockholder, including the execution of the notes and mortgage in suit, the purposes expressed in the will of John Olson were disappointed, and the income provided by him for his daughter was divested from the purpose contemplated by the will, which purpose it was one of the duties of Charles J. Warner, as trustee, to carry out. Indeed, the result of

the transaction was the enrichment of this trustee out of the trust represented by him, to the prejudice of the *cestui que trust.* This, equity will not permit.

The judgment of the district court is, therefore, correct in all respects, and it is

AFFIRMED.

G. C. LOVEJOY V. STATE OF NEBRASKA.

FILED JANUARY 10, 1936. No. 29510.

1. **Larceny:** OWNERSHIP. "Ownership of chattels may, in an indictment for their theft, be laid either in the owner, or in the person who at the time of the theft was in the actual peaceable possession of them, although such person may have no other property therein than the right of possession as against the thief." 36 C. J. 832.
2. ———: ———: PROOF. Ownership of personal property, ordinarily, may be established by circumstantial evidence.
3. ———: "NONCONSENT:" PROOF. "In prosecutions for larceny, nonconsent of the owner of the property alleged to have been stolen may, in a proper case, be inferred from circumstances." *Palmer v. State,* 70 Neb. 136, 97 N. W. 235.
4. **Criminal Law:** PROOF. "A conviction may rest on the uncorroborated evidence of an accomplice, when, considered with all the testimony, it satisfies the jury beyond a reasonable doubt of the guilt of the accused." *Lamb v. State,* 40 Neb. 312, 58 N. W. 963.
5. **Instruction,** given as to evidence of accomplices, approved.
6. **Evidence** examined, and *held* ample to sustain the conviction.

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

Cordeal, Colfer & Russell, for plaintiff in error.

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

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

EBERLY, J.

The plaintiff in error, hereinafter referred to as the defendant, was charged in the district court on seven

separate counts charging him with buying and receiving stolen chickens, "well knowing the said chickens aforesaid, to have been stolen." On trial, he was found guilty on five of the counts referred to, and was sentenced to imprisonment in the county jail of Red Willow county, Nebraska, for the period of 50 days on each of the counts on which he was found guilty, said sentences to run concurrently. From the order of the trial court overruling his motion for a new trial, he prosecutes error.

The charges contained in the information were laid under section 28-524, Comp. St. 1929. The crime here presented is defined in that section as, "whoever * * * receives or buys any chickens * * * that shall have been stolen, knowing the same to have been stolen, with intent, by such receiving or buying, to defraud the owner; * * * shall for the first offense be imprisoned in the county jail," etc. This language defines an independent statutory crime. Substantially identical language, as applied to cattle, has been construed by this court in the following words: "The buying or receiving of cattle knowing them to have been stolen is, by statute in this state, made an independent substantive crime, hence it is not essential in an indictment therefor that the name of the original thief be alleged." *Ream v. State,* 52 Neb. 727, 73 N. W. 227.

Ream v. State, supra, followed *Levi v. State,* 14 Neb. 1, 14 N. W. 543, wherein the rule was announced: "In this state the receiving or buying of stolen goods, with intent to defraud the owner, is not an accessory, but a substantive offense, and a conviction may be had without regard to the person who stole the goods, or from whom they were received." Both the *Ream* and the *Levi* cases were cited and approved in the case of *In re Loomis,* 84 Neb. 493, 121 N. W. 456.

The accused bases his first challenge on the alleged general insufficiency of the evidence to sustain his conviction. His contention is that, when, in a prosecution for receiving or buying stolen property, it appears that the defendant had kept records of purchases as required by

law, and that he paid the full price for the property, and the only evidence supporting a verdict of guilty was the testimony of the persons who admitted they had stolen the property, a conviction should not be sustained.

Conceding that the facts thus emphasized may form a strong foundation for a potent appeal to the triers of fact on behalf of the accused, this jurisdiction was early committed to the view that accomplices are competent witnesses for the state in criminal trials. *Carroll v. State,* 5 Neb. 31.

As to the weight which is to be accorded to the testimony of an accomplice, we are likewise committed to the view that "A conviction may rest on the uncorroborated evidence of an accomplice, when, considered with all the testimony, it satisfies the jury beyond a reasonable doubt of the guilt of the accused." *Lamb v. State,* 40 Neb. 312, 58 N. W. 963. See, also, *Olive v. State,* 11 Neb. 1, 7 N. W. 444; *Lawhead v. State,* 46 Neb. 607, 65 N. W. 779; *Bartlett v. State,* 115 Neb. 148, 211 N. W. 994; *Hutter v. State,* 105 Neb. 601, 181 N. W. 552; *Cockeram v. State,* 121 Neb. 757, 238 N. W. 524; *Barnes v. State,* 124 Neb. 826, 248 N. W. 381.

In *Jahnke v. State,* 68 Neb. 181, 104 N. W. 154, we find practically the only instance in this jurisdiction of an exception or qualification of the rule just quoted. Under the facts disclosed by the record in that case, the majority opinion of the court, on rehearing (Holcomb, C. J., dissenting), announced its determination that "The evidence of an accomplice should be closely scrutinized. If it appears that such witness has wilfully sworn falsely in regard to a material matter upon the trial, his evidence cannot be sufficient, if uncorroborated, to support a verdict of guilty."

A careful reading of the entire record in the instant case discloses that it contains no evidence from which the conclusion may be properly drawn that any of the witnesses for the state has "wilfully sworn falsely in regard to a material matter upon the trial." Rather, the situation here presented is aptly described in the language of Rose, J., in *Cockeram v. State, supra,* viz.: "The credibility of the wit-

nesses was a question for the jury, and they believed the story of the accomplices, which is not incredible or unbelievable or physically impossible."

The defendant contends that, in the present case, to sustain a conviction it is essential that the state prove the ownership of the property involved, and that such owner's evidence as to his lack of consent to the taking of the property is required unless it is shown that the owner's testimony is not obtainable.

It is axiomatic in criminal procedure that "Ownership of chattels may, in an indictment for their theft, be laid either in the owner, or in the person who at the time of the theft was in the actual peaceable possession of them, although such person may have no other property therein than the right of possession as against the thief." 36 C. J. 832. See, also, *Martin v. State,* 78 Neb. 826, 112 N. W. 285; *Sharp v. State,* 61 Neb. 187, 85 N. W. 38; *Clark v. State,* 102 Neb. 728, 169 N. W. 271.

While the owners of the stolen property did not appear as witnesses in this case, the evidence of others in the record, if believed, amply establishes, in addition to other circumstances, that the persons charged as the thieves went to the premises then occupied by the persons alleged to be the owners of the chickens in suit, and removed therefrom and from the buildings situated thereon certain chickens, in the absence of such owners, and without their knowledge or consent; that the chickens so secured were immediately taken to the place of business of the accused, and were delivered to and purchased by him, under such circumstances as brought knowledge home to him that these chickens had been stolen. The accomplices who testified, expressly and by necessary implication, disclosed that they were not the owners of the property taken; that they asserted no claim of right thereto, notwithstanding they made an unauthorized sale of such property and appropriated the proceeds to their own use.

It is true that in *Bubster v. State,* 33 Neb. 663, 50 N. W. 953, the rule was announced, viz.: "In a prosecution for

larceny, the owner of the property ordinarily must be called as a witness to prove the nonconsent to the taking of the property." And in *Perry v. State,* 44 Neb. 414, 63 N. W. 26, the principle was laid down, viz.: "In a prosecution for larceny, if the owner of the property alleged to have been stolen is examined as a witness upon the trial, his testimony that he did not consent to the taking of the property is indispensable to a conviction." However, in the instant case, none of the owners of the chickens stolen appeared as witnesses or were called by the state to testify to their nonconsent.

In *Rema v. State,* 52 Neb. 375, 72 N. W. 474, which involved the subject here for consideration, Norval, J., says, in part: "Applying this rule to the facts in the case in hand, are they sufficient to show that no consent was obtained to the taking of the property? If we are able to comprehend the effect and force of the testimony, the answer must be that there was an entire lack of consent, although no witness in express terms so stated at the trial. It is disclosed by the uncontradicted testimony of several persons that the cow charged to have been stolen, and many others belonging to the Equitable Farm and Stock Improvement Company, were at the time in the immediate and exclusive possession and control of Edward Richards and Henry Chestnut, the foreman and agent, respectively, of said corporation; that on the day preceding the night of the alleged larceny both of them were apprised that some of the cattle of the corporation in their care were going to be stolen; that Chestnut and Richards, together with Sheriff Camp and one Harding, watched the pastures in which the cattle were kept the following night, and saw the defendant enter the pasture between ten and twelve o'clock of that night and with much haste drive therefrom the cow in dispute and several others; that they followed rapidly on horseback a distance of ten or twelve miles, and saw the defendant drive the cow into a ravine or 'blow out,' as called by some of the witnesses, and caught the accused in the very act of skinning the animal and thereupon arrested

him for the theft. Thus it was shown by the persons in whose immediate possession the property was that the same was taken without their authority, permission, or consent."

In the later case of *Van Syoc v. State,* 69 Neb. 520, 96 N. W. 266, this court announced the rule: "The fact that property alleged to have been stolen was taken without the consent of the owner may be inferred from circumstances shown in evidence as well as by direct testimony that none was given."

And, in *Palmer v. State,* 70 Neb. 136, 97 N. W. 235, we again distinctly announced the rule: "In prosecutions for larceny, nonconsent of the owner of the property alleged to have been stolen may, in a proper case, be inferred from circumstances." In discussing this principle, in the opinion in such *Palmer* case, Sullivan, C. J., says: "The first assignment of error discussed by counsel is based upon the failure of the state to show by direct evidence that the stolen steer was taken by defendant without the owner's consent. The owner was not a witness and had, it would seem, no personal knowledge of the means by which he was deprived of his property. That he did not consent to the taking is a warrantable inference from the evidence. Indeed, no other inference is warrantable. Want of consent in prosecutions for larceny may be inferred from circumstances. Direct proof is not indispensable. *Wiegrefe v. State,* 66 Neb. 23, 92 N. W. 161."

The facts of the instant case bring it fairly within the rule announced in *Palmer v. State, supra,* and defendant's contention to the contrary may not be sustained.

The correctness of the trial court's instructions to the jury relating to the testimony of an accomplice is challenged, and its refusal to give instruction No. 3 as requested by the defendant is assigned as error. This court is committed to the view that "One who steals personal property and sells it to another may, under a proper state of facts, be considered an accomplice of the buyer of the stolen property." *Neiden v. State,* 120 Neb. 619, 234 N. W. 563.

Under the facts in the instant case, the rule above quoted requires that the trial jury be instructed on the subject of evidence of accomplices. But, in the *Neiden* case, the trial court gave no instruction whatever on the subject of the testimony of accomplices, and the conviction was reversed because the record was "held to require an instruction on the subject of accomplices." Indeed, the paragraph of the opinion in the *Neiden* case devoted to this subject concludes with the sentence, "In such a situation, even if the exact and entire form (of the instruction requested by defendant) was objectionable, it was the duty of the court to give a proper instruction upon the subject." But, in the instant case, an instruction on this subject was given by the trial court, in the following language:

"The fact that several of the witnesses who have testified on behalf of the state are shown by the testimony to be accomplices does not make them incompetent as witnesses. The turpitude of their conduct does not disqualify them from testifying. The admission of an accomplice as a witness is said to be justified by the necessity in a case, and with the wisdom of the practice you are not concerned. The degree of credit which ought to be given to the testimony of a witness who is an accomplice is a matter exclusively within your province to determine. Greater caution in weighing such testimony is dictated by prudence and sound reason. You may, under the law, if you see fit, act upon the testimony of an accomplice or accomplices, and if satisfied, beyond a reasonable doubt, from it and all the other evidence in the case, that the defendant is guilty as charged in one or more of all of the counts of the information, then you should so find."

Instruction No. 3, as requested by the defendant, was as follows:

"In this case the witnesses who testified that they sold chickens to the defendant are accomplices to the crime charged in this case. While it is a rule of law that a person accused of crime may be convicted upon the testimony of an accomplice or accomplices, still you should act upon such

testimony with great care and caution, and subject it to careful examination, in the light of all the other evidence in the case, and you ought not convict the defendant on such testimony alone, unless, after a careful examination of such testimony, you are satisfied beyond a reasonable doubt of its truth, and that you can safely rely upon it."

A careful comparison of the instruction given with the instruction here refused, it is thought, discloses that as given by the trial court every essential element contained in the instruction requested is included. The principal difference is that in one the ideas are couched in the affirmative, and in the other expressed in the negative. But, under the terms of the trial court's instruction, all matters properly for consideration in connection with the testimony of accomplices was necessarily and substantially presented for the consideration of the jury. The defendant suffered no prejudice from this mere difference of form of expression. It will be remembered, in this connection, that in *Dyson v. State,* 107 Neb. 774, 186 N. W. 984, the instruction substantially as given in the instant case was under consideration by this court, and the paragraph containing the discussion thereof closes as follows: "The rule embodied in the instruction is in accord with the former holdings of this court, and with the general rule. *Lamb v. State,* 40 Neb. 312, 58 N. W. 963; *State v. Sneff,* 22 Neb. 481, 35 N. W. 219; 16 C. J. 605, sec. 1422; Randall's Instruction to Juries, sec. 21." It is deemed that the language quoted states the correct conclusion.

Even if the conclusion here announced and the refusal of the trial court to give the requested instruction involve a technical error, the case then presented would plainly be within the purview of the statutory injunction that "No judgment shall be set aside, or new trial granted, * * * in a criminal case on the grounds of misdirection of the jury, * * * if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." Comp. St. 1929, sec. 29-2308.

It follows that no substantial error has been committed by the trial court, and its judgment and sentence imposed are

AFFIRMED.

MARVIN R. BISHOP, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED JANUARY 10, 1936. No. 29666.

1. **Municipal Corporations:** FIREMEN. Firemen who are regular members of the fire department of the city of Omaha are public officers.
2. ——: ——: COMPENSATION. A public officer who is duly appointed and qualified, and who performs the duties of his office, is entitled to draw the salary therefor as fixed by law; no more and no less.
3. ——: ——: ——. The legal right to the salary fixed for a public officer is an incident to his office, and cannot be changed by an agreement on his part to take less.
4. ——: ——: ——. A city officer is not estopped from asserting his claim to a balance due of the legal salary provided for the services he has performed, simply because the authorities paid him a less sum which he accepted.
5. ——: ——: ——: PUBLIC POLICY. It is against public policy for a city officer to agree to perform the duties of his office for a sum less than the amount fixed by law.
6. ——: ——: ——. Any agreement, oral or written, by a public officer to serve for less than the salary fixed by law is null and void.

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

Seymour L. Smith, A. C. R. Swenson, Harold C. Linahan and *William W. Wenstrand,* for appellant.

Rosewater, Mecham, Shackelford & Stoehr and *Reginald C. Miller, contra.*

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

PAINE, J.

This is a suit at law by members of the fire department to recover from the city of Omaha a large sum claimed to be due on back salaries. A jury was waived, and the district court rendered judgment, each party appealing from that part of the judgment which was adverse to its claim.

Marvin R. Bishop, the plaintiff, appellee and cross-appellant, was the assignee of the claims of some 250 other members of the fire department of the city of Omaha, and will hereafter be referred to as the firemen. The city of Omaha is the defendant, appellant and cross-appellee, and will hereafter be styled the city.

On May 10, 1934, a transcript on appeal from the city council was filed in the office of the clerk of the district court, together with a petition setting out two causes of action against the city, and seeking to recover $55,472.33. The first cause of action related to the salaries of the firemen for the year 1932, and the second to their salaries for the year 1933.

It appears that all of the firemen were members of the city fire department during the years 1932 and 1933; that all of them held claims for unpaid salary as officers and men of the fire department, as set out in exhibit A, attached to the petition and consisting of five pages, giving the alphabetical list of names of said firemen, the respective positions that each filled in the fire department, such as assistant chief, battalion chief, senior and junior captains, chauffeurs, pipe men, truck men and mechanics, which exhibit shows the deductions from their salaries for certain months during the years 1932 and 1933, also showing in another column their regular salaries, running from $321.66 a month for assistant chief, $280 a month for a battalion chief, $205 for senior captain, $192.50 for junior captain, and the other salaries down to $150 a month. In each of the causes of action it is charged that the city failed to pay the firemen at the rate of salary provided by the ordinance.

Section 14-504, Comp. St. 1929, provides that the department of accounts and finance shall open an account with

each fund, and place therein a credit of 90 per cent. of the tax levy apportioned to it, and credit thereto all funds coming in, and section 14-506 provides that no warrant can be drawn against said fund in excess of the amount credited thereto; so that when the 90 per cent. has been exhausted no further warrants can be drawn unless actual receipts of money in excess thereof have come into the fund.

In accordance therewith, the comptroller credited the fund in 1932 with $535,953.53, and in the first five months of the year warrants were drawn to the amount of $280,-658.50. Thereupon, to avoid a threatened deficit, the city council adopted resolutions in June and also on July 12, 1932, which resolutions suspended each of the firemen without pay for three days each month from June to December, 1932, inclusive, and the members of the fire department signed a resolution in which they agreed to serve without pay in their regular capacity during each three-day period of suspension, retaining during such three-day suspension their retirement, pension and compensation rights. It is shown by the evidence that several very serious fires occurred during these periods of three-day suspensions, and that all of the firemen served valiantly, although receiving no pay. These resolutions constituted legal suspensions, duly acquiesced in by the firemen. *State v. Moores,* 63 Neb. 301, 88 N. W. 490. The firemen took no appeal from such action of the council, and its action was and is final. However, the city in addition deducted from the first pay check, issued in September, 1932, an additional 10 per cent. of seven days' salary. The trial court found that such 10 per cent. additional deduction from each fireman was wholly unwarranted, and rendered judgment on the first cause of action against the city for this sum of $1,045.65, with interest.

The second cause of action set out in the petition relates to the firemen's salaries for the year 1933. It is alleged that the power of the city council to change, fix, or revise salaries is fixed by section 14-708, Comp. St. 1929, as amended by a vote of the electors of said city, and forms a

part of the home rule charter; that, in accordance therewith, ordinance No. 14100 was passed, fixing the salaries of said firemen, which ordinance was effective from September 1, 1932, to January 1, 1934. That during the months of July to December, 1933, the city failed to pay the salaries so fixed in said ordinance, but illegally deducted $30 each month from the salary of each fireman, and, in addition, illegally deducted $1 a day for the last eight days in December, 1933, all as set out in detail in exhibits attached, the total deductions amounting to the sum of $40,-661.69.

The defendant, for answer to the second cause of action, alleges that on or about July 1, 1933, it became apparent that the revenues available for the payment of firemen's salaries would be insufficient to pay salaries at the amounts fixed by ordinance, and that, in order to prevent the passage of an ordinance reducing salaries, the firemen each voluntarily signed and executed in writing the following agreement, many copies thereof being made:

"Omaha, Nebraska, July 21, 1933.

"We, the undersigned, officers and men of the fire department of the city of Omaha, knowing and realizing that there is not available for the payment of the present fiscal year adequate funds to maintain the fire department at the present strength with all men working full time, and that certain concessions will have to be made: That is, a reduction in salary in an amount equal to $30 per man until December 31, 1933.

"We, the undersigned, in order that the fire department may function adequately and efficiently until the end of the year, 1933, within the funds available, hereby agree to take from time to time temporary lay-offs individually and severally without pay, and to make such other concessions as may be necessary to keep the cost, for salaries of said department, within the maximum available for said purposes for the remainder of the year 1933. Each of us signing this agreement signs it willingly and voluntarily, without coercion or compulsion."

That pursuant thereto, the city caused to be deducted said $30 a month from each warrant.

For reply thereto, the firemen allege that such request was not voluntarily signed, but was obtained under duress, without consideration, by means of threats and intimidations on the part of the city and its agents; that the same was contrary to public policy and void, and was part of a scheme to obtain the labor of said firemen without pay; that the signatures of the firemen were obtained by statements and representations that the funds lawfully appropriated had been depleted so there remained insufficient funds to pay said salaries; that said representations were untrue in material portions thereof, but were believed by the firemen and fully relied upon by them, and so misled them. The firemen further reply that there were at all times in 1933 sufficient funds to pay the full salaries fixed by ordinance, and this allegation was sustained by the evidence.

In the bill of exceptions is found a purported ordinance, being identified as exhibit 12, document No. 1633, which was identified by the city clerk as having been presented to the city council on July 11, 1933. It purports to be an ordinance fixing salaries of all officers and employees in the fire department at certain sum per annum, all sums being left in blank, and section 2 thereof provides that ordinance No. 14100 be repealed. It was to take effect August 8, 1933, and bears simply the signature of Roy N. Towl, as the commissioner who introduced it, and the words, "Approved, Seymour L. Smith," but no signature of the mayor or clerk. It is disclosed that the record taken thereon was by motion of Mr. Hopkins: "That the action on the ordinance be postponed and that the council approve the plan of the fire department of making up deficit in department, with the understanding that agreement with one hundred per cent. of the members be brought in Tuesday, July 25, 1933. Dan B. Butler, Chairman, Committee of the whole;" which report was adopted.

It is therefore shown by the evidence that in 1932 the

city council actually passed a resolution legally suspending the firemen for definite days in definite months, but in 1933 no such resolution was passed, but when this exhibit 12, an ordinance drawn up in skeleton form, was introduced into the council, the firemen were greatly aroused because of the threats of the passage of such an ordinance legally reducing their salaries, and when mimeographed copies of an agreement were presented to them they were signed by all the firemen in the various companies employed in the department. It appears that after the firemen had signed such agreement to make a reduction of $30 a month per man, it being by error stated in the agreement that it was only $30 per man, the proposed ordinance was pigeonholed in committee of the whole, and never actually passed by the council, and that the city officials not only deducted the suggested $30 a month per man, but also other and additional sums from their legal salaries. The firemen insist that this agreement was drawn and prepared by the city legal department. Many firemen testified that they were forced to sign it, and some claim that they could not get their pay warrants until after they signed the agreement, and evidence is in the record to the effect that perhaps a dozen of the firemen never signed the agreement at all.

Firemen who are regular members of the fire department of the city of Omaha are public officers. *Gillespie v. City of Lincoln,* 35 Neb. 34, 52 N. W. 811.

When a public officer has been duly appointed, and has qualified and entered upon the duties of his office, he is entitled to draw the salary prescribed by statute, and to draw no compensation in excess of that fixed by law. *Frasier v. Dundy County,* 115 Neb. 372, 213 N. W. 371; *United States v. Andrews,* 240 U. S. 90; *Bayha v. Webster County,* 18 Neb. 131, 24 N. W. 457.

There is no question but what the city council of Omaha had the power to suspend any member of the fire department for economic reasons, and that it was clearly within the right of the city, when the council had good reason to believe the funds of the department would be exhausted in

1932, to suspend each fireman for three days each month, but it does not follow that the city officers could, in addition to the suspension provided in a resolution, arbitrarily deduct additional sums from such salary, and the trial court was right in holding that the firemen were entitled to recover judgment for such additional sums so deducted.

The procedure in the year 1933 was entirely different. The city council were not actually facing any threatened shortage of funds, but still seemed to desire to cut the legally fixed salaries. The threat of reduction of salaries by the ordinance introduced led the members of the fire department to sign up waivers of a portion of their salary. Did the signing of these waivers estop the firemen from recovery in this action?

On this second cause of action, covering the year 1933, it may be admitted that, in the able brief filed by the counsel for the city, cases are presented from other jurisdictions which sustain to a certain extent their contentions, such as *Hobbs v. City of Yonkers,* 102 N. Y. 13, 5 N. E. 778, and *De Boest v. Gambell,* 35 Or. 368, 58 Pac. 72, but in a later case the supreme court of Oregon, in *Brauer v. City of Portland,* 35 Or. 471, 58 Pac. 861, distinguished the holding in the *De Boest* case, which holding, if adhered to by the Oregon court, would place that state with the minority view.

In the first case of *Hobbs v. City of Yonkers, supra,* there was an agreement by the city treasurer to turn over all fees he received above $2,000 a year to the city, and the council allowed him to remain in office for three years upon this agreement without legally fixing his salary at any sum whatever, and he then sued for the excess fees turned in, and it was held that under these facts he could not recover them.

In *Grant v. City of Rochester,* 79 App. Div. (N. Y.) 460, 80 N. Y. Supp. 522, the commissioner of public works of the city of Rochester agreed to work for $300 a month during the years 1900 and 1901. He received and cashed a treasurer's check each month for $300, which stated that it was for the full salary for that month. During these

two years the board of estimate and apportionment had designated the salary of the commissioner of public works at $4,000 per annum. After he had served two years and drawn $300 a month, the commissioner of public works sued the city for the balance of his salary. It was held that his salary as fixed by the board of estimate and apportionment is an incident to his office, and, in the event of the common council unlawfully assuming to reduce the amount of such salary, an agreement entered into between the commissioner and the mayor, who had the power to remove him at pleasure, by which agreement the commissioner agreed to accept the salary fixed by the common council at $300, will not affect the commissioner's right to recover from the city the difference between the salary as fixed by the board of estimate and apportionment and that fixed by the common council, as his right to salary is not by contract or agreement, but is an incident to his office. In this opinion the court reviews many New York cases and shows that they are in line with the holding of the court, and then lastly they discuss the case of *Hobbs v. City of Yonkers, supra,* and say that it is clearly distinguishable from the others, for there the city treasurer turned over to the city the fees received in excess of the agreed compensation, and that for a portion of the time it was presumed the common council omitted to fix the plaintiff's salary, in reliance upon the agreement.

In the case of *City of Louisville v. Gorley,* 80 S. W. (Ky.) 203, the act of suspending the members of the detective and police force of the city for four days in each month because of lack of funds was held to be void, and that it did not prevent their recovering the pay for such time.

A case closely in point with the case at bar is the case of *City of Louisville v. Thomas,* 257 Ky. 540, 78 S. W. (2d) 767, in which a suit was brought by the clerk of the police court for $412.83, being the amount of a reduction in his salary. It is stated that the city made this reduction when there was grave doubt whether the finances would meet the expenses, and that the clerk of the police court consented to

the reduction and signed an agreement to that effect, together with all other city employees, and that the city relied on the agreement, and that the clerk of the police court should be estopped from asserting his claim for a greater sum than was paid and accepted by him. However, it was held by the court that such an agreement is void.

In the case of *Peterson v. City of Parsons*, 139 Kan. 701, 33 Pac. (2d) 715, any agreement by an appointive city officer of a city of the first class, where the salary for such officer is fixed by ordinance, pursuant to a statute requiring it to be so fixed before his appointment, and such city officer consented to a reduction in salary, it was held that the agreement was void and unenforceable and against public policy. To the same effect is *Rhodes v. City of Tacoma*, 97 Wash. 341, 166 Pac. 647, and *Geddis v. Westside Nat. Bank*, 7 N. J. Misc. 245, 145 Atl. 731.

At least three cases have already been decided by this court involving similar facts. The first is the case of *Gallaher v. City of Lincoln*, 63 Neb. 339, 88 N. W. 505. As this case is discussed by both parties, both in their oral argument and in their briefs, it is perhaps the leading case in Nebraska on the point in question. It appears that Kate Gallaher was employed as police matron of the city of Lincoln, and served in that capacity for 17 months, with an agreement at the time she was employed that she would serve the city for the sum of $25 a month, which amount was paid her each month for the first 16 months of her service. The law then in force provided that she should be paid a salary of $50 a month, and she filed a claim against the city for the balance due and unpaid at the rate fixed by the statute. The case was tried to the district judge without a jury, and the court found for the city of Lincoln. Upon appeal to this court, Commissioner Oldham wrote the opinion, starting with the question, "Can a public officer, whose salary is fixed by law, estop himself, as between himself and the government, from claiming full compensation by accepting an amount less than that prescribed by statute for such services?" He then discusses a number of cases

from various states, and arrives at the answer that such public officer cannot estop himself from claiming the full amount due under the statute. He holds that it is against public policy for an appointive city officer to agree to perform the duties of his office for a sum less than the amount prescribed by law, and that such an agreement on his part is absolutely void.

In the case of *Abbott v. Hayes County,* 78 Neb. 729, 111 N. W. 780, this court had before it the case of M. J. Abbott, a candidate for the office of county attorney of Hayes county, who in his campaign during the fall of 1889 stated that if he was elected he would not demand or accept compensation of more than $300 a year, although at that time the statute fixed the salary of the county attorney in Hayes county at $500 a year. Mr. Abbott was elected and served two years, being paid his quarterly salary claims in the amount of $75 each. After the expiration of his term, suit was brought by one to whom he had assigned a claim for $400, being the balance of $200 a year of the salary as provided by statute. The county board rejected the claim, and Judge Grimes, of North Platte, holding court for Judge Orr, entered judgment for the amount claimed, and the case was appealed to this court. Commissioner Ames held that the case was ruled by the case of *Gallaher v. City of Lincoln, supra.* The county argued that each quarter, when he filed his claim for $75, he thereby donated to the county the undemanded residue of his salary for that quarter, and this argument was rejected, and it was held: "An agreement, express or implied, by a public officer to serve for less than the compensation fixed by law is contrary to public policy and void."

A third case of this nature is found in the Nebraska reports in the case of *Scott v. Scotts Bluff County,* 106 Neb. 355, 183 N. W. 573, in which it was held that a deputy sheriff, appointed by the sheriff to act as jailer, is a public officer, and a contract by which he agrees to perform the duties of jailer for a different compensation than that fixed by law is against public policy and void, and basing the

decision upon the case of *Dunkel v. Hall County*, 89 Neb. 585, 131 N. W. 973, it was held that the plaintiff was entitled to recover.

These Nebraska cases are set out in the annotation in 70 A. L. R. 972, upon the subject, "Validity of agreement by public officer to accept less than compensation or fees fixed by law," and it is therein set out that the majority view in the courts of the United States is well settled that an agreement by a public officer to perform services required of him for a less compensation than that fixed by law is contrary to public policy and void. Such jurisdictions hold that such officer may recover the legal salary or fees for the service rendered.

A careful examination of the record in this case, consisting of four volumes, and of the very excellent briefs, brings us to the conclusion that the judgment of the trial court is in accordance with our former holdings, which are supported by the great weight of authority from other jurisdictions, and, therefore, we conclude that the judgment of the lower court was right, and it is hereby

AFFIRMED.

E. H. LUIKART, RECEIVER, ET AL., APPELLEES, V. W. A. WELLS ET AL., APPELLANTS.

FILED JANUARY 10, 1936. No. 29411.

1. **Banks and Banking:** MISAPPROPRIATION OF ASSETS. Where it appears from the evidence that the managing officer of a banking corporation has caused real estate belonging to the bank to be conveyed to a third person as security for his personal debt, the deeds conveying the property to such person while he remains the owner thereof will be canceled and set aside in a court of equity and the property subjected to the payment of claims against the bank when it has become insolvent.
2. **Corporations:** DIVIDENDS. "Earnings and profits in the possession of a corporation belong to the corporation the same as the property generally, and for this reason there is nothing due and owing a stockholder from the profits as a matter of debt, until a dividend is declared in some appropriate manner." *State v. Nebraska State Bank*, 123 Neb. 289, 242 N. W. 613.

3. **Banks and Banking:** ASSESSMENTS. Where an assessment is levied against the stockholders of a bank to make good an impairment of its capital, due to bad or doubtful loans, the mere payment of the assessment by the stockholders gives them no interest in the bad or doubtful items by operation of law where they are not set apart and the bank continues to hold and realize upon them.

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

James E. Bednar and *John A. McKenzie,* for appellants.

F. C. Radke, S. L. Winters and *Barlow Nye, contra.*

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

CARTER, J.

This is an equity suit brought in Douglas county by E. H. Luikart, as receiver of the insolvent South Omaha State Bank, against the defendants W. A. Wells and Clara B. Wells to obtain the cancelation of two deeds to certain property claimed by defendants and to have the title to the same quieted in the receiver. The trial court entered an order canceling the deeds and quieting the title as prayed. From the overruling of their motion for a new trial, the defendants have brought the case to this court on appeal.

The evidence shows that on November 12, 1924, the Robert Parks Plumbing & Heating Company executed and delivered a mortgage on the property in question herein to the Security State Bank of Omaha for $9,000, subject to a mortgage of $3,500 held by the Omaha Loan & Building Association. On December 23, 1926, the Security State Bank obtained title to the property by foreclosure. On December 30, 1926, the South Omaha State Bank paid off the mortgage held by the Omaha Loan & Building Association by cashier's check in the amount of $3,673.30. The record further shows that on March 23, 1927, the Security State Bank deeded the property to Thomas F. Higgins for a consideration of $5,750, and took back a mortgage of $4,750 dated March 24, 1927, payable to the South Omaha

State Bank. On March 30, 1929, Higgins deeded the property, which we will hereafter designate the Higgins property for convenience, to the South Omaha State Bank, and on May 16, 1929, the South Omaha State Bank released the mortgage that Higgins had given the bank. On December 31, 1929, the South Omaha State Bank deeded the property to Daphne S. McGurk for a consideration of one dollar. On January 18, 1930, Daphne S. McGurk and her husband, John S. McGurk, deeded the property to the defendants W. A. Wells and Clara B. Wells for a consideration of one dollar. The two deeds last above mentioned are the ones that the receiver of the South Omaha State Bank asks to have canceled.

The record further shows that prior to September 7, 1926, the Security State Bank became insolvent and was reorganized under the name of the South Omaha State Bank. On September 7, 1926, the reorganized Security State Bank, which name was subsequently changed to the South Omaha State Bank, purchased assets of the insolvent Security State Bank of the face value of $181,502.37 for the sum of $89,430, the Robert Parks Plumbing & Heating Company note and mortgage being included therein at a value of $1,250 over and above the mortgage of the Omaha Loan & Building Association. The evidence shows that the department of trade and commerce refused to permit the South Omaha State Bank to place these assets in the new bank at their face value, but did permit them to be carried as assets at an amount equal to their purchase price. The directors of the bank thereupon signed a note for the amount of $89,430 and placed it in the bank's note case. As returns came in on the assets purchased from the receiver of the Security State Bank, the amounts thereof were credited on the directors' note until it was paid in full. The proceeds in excess of the directors' note were carried in a fund denominated the "John S. McGurk, Trustee" account. It is the contention of defendants that the $181,502.37 worth of assets purchased of the Security State Bank were the property of the stockholders and not of the South

Omaha State Bank, and that they were placed in the bank as "collateral assets" to the directors' note of $89,430. It is further the contention of defendants that, upon the payment of the $89,430, the assets remaining were the property of the stockholders.

The record shows that all of the $181,502.37 of assets purchased of the receiver of the Security State Bank were registered for their face value on the books of the South Omaha State Bank, although their source as an asset in the bank was shown. The record further shows that the sale of these assets was made to the reorganized Security State Bank which later became the South Omaha State Bank. The amount collected therefrom was carried in the John S. McGurk trustee account, which was carried as an asset of the bank. The real estate involved herein, while not specifically listed as an asset of the bank, was carried as "date paper," "date paper" being defined by the witness McGurk as paper that was due from the date it was given. The evidence further shows that funds of the bank were placed in the John S. McGurk trustee account that were not obtained from the liquidation of the purchased assets of the old Security State Bank. We are convinced, after a reading of the record, that all of the $181,502.37 of assets purchased of the insolvent Security State Bank were the property of the South Omaha State Bank. It is clear that the directors' note of $89,430 was given to show the extent of the personal liability of the directors on this paper and to show the amount that the discounted assets was to represent as approved assets in the new South Omaha State Bank. We conclude therefore that the whole of the $181,502.37 of purchased assets was at all times the property of the bank.

The contention is made that the John S. McGurk trustee account was composed of earnings and profits of the corporation and was therefore the property of the stockholders, as distinguished from that of the bank. In *State v. Nebraska State Bank,* 123 Neb. 289, 242 N. W. 613, this court said: "Earnings and profits in the possession of a corporation belong to the corporation the same as the property general-

ly, and for this reason there is nothing due and owing a stockholder from the profits as a matter of debt, until a dividend is declared in some appropriate manner." In the case at bar, the fund has been used since its inception for the use and benefit of the bank. The assets that were liquidated to provide the fund were purchased by the bank and there is no evidence in the records of the bank tending to show any one else as the owner. There has not been such a severance of the John S. McGurk trustee account from the assets of the bank that would warrant a finding that the fund had become the property of stockholders.

The witness John S. McGurk was the president, managing officer, a director and largest stockholder of the South Omaha State Bank. Clara B. Wells was the mother and W. A. Wells the stepfather of John S. McGurk. It appears from the record that in December, 1929, John S. McGurk was negotiating with the other stockholders for the purchase of their stock. At the same time, McGurk requested a loan from the defendant W. A. Wells which Wells refused. On December 23, 1929, McGurk wrote W. A. Wells, in part, as follows: "It takes $35,000 for my share down here, and if I can have mortgages for that amount, I'll turn them into our note case here." On December 28, 1929, W. A. Wells mailed three real estate mortgages to McGurk of a total face value of $35,000, each of the notes being indorsed in blank. McGurk immediately executed and delivered his personal notes to W. A. Wells for the amounts of the notes and mortgages sent to him. The record further shows that on December 10, 1929, the bank voted to purchase the assets of the South Omaha Safe Deposit & Loan Company as of December 31, 1929, at which time the stockholders were to sell their stock in the bank to McGurk. McGurk, the only stockholder, on December 31, 1929, paid a stockholders' assessment in the amount of $32,581.82, which was paid by placing the three mortgages obtained from W. A. Wells in the bank. Property of the bank was used to purchase the assets of the South Omaha Safe Deposit & Loan Company, and the stock owned by the other stockholders in the South

Omaha State Bank was purchased by McGurk by assigning his stock in the South Omaha Safe Deposit & Loan Company to them as a consideration therefor. When the assessment was made, the stockholders became personally liable for its payment, and when McGurk became the only stockholder with the assessment unpaid, he became personally liable for the whole amount thereof. It is clear therefore that the three mortgages obtained from W. A. Wells were used to pay the assessment that had been levied against McGurk personally as the only stockholder. They were therefore used to pay McGurk's personal obligation.

The defendants contend, however, that the loan was made to the bank. The transaction was wholly between McGurk and his stepfather, Wells. The letters of McGurk clearly indicate that he wanted the loan to apply on his indebtedness and not that of the bank. McGurk offered in the first instance to give his personal notes to Wells if the loan could be made, and when the notes and mortgages arrived, he immediately forwarded his personal notes to cover the amount thereof. Under these circumstances, we are convinced that the loan was one to McGurk personally and not to the bank.

It is true that the bank on December 31, 1929, had deeded the Higgins property in suit to Daphne S. McGurk, the wife of John S. McGurk, for a stated consideration of one dollar. On January 18, 1930, it was deeded to the defendants Wells. It is the contention of defendants that this was the individual property of the McGurks and not of the bank. While it is true that the bank had purchased the note and mortgage on the Higgins property for $1,250, subject to a first mortgage of $3,500, and had subsequently paid off the first mortgage, the defendants claim that the bank was repaid from the excess collected from the old Security State Bank assets over and above the $89,430 value at which they were carried in the South Omaha State Bank. But we have already determined that the whole of the assets purchased for $89,430 was at all times the property of the bank. The purchase price of the Higgins property, and the mortgage

thereon as well, were therefore paid by the bank and not McGurk. It was therefore bank property and not that of McGurk when it was transferred by the South Omaha State Bank to Daphne S. McGurk. It was still the bank's property when Daphne S. McGurk and John S. McGurk conveyed it to the defendants. It goes without saying that the president or other officer of a bank cannot secure or pay his personal obligations with the property of the bank.

Defendants contend that, when McGurk paid the $32,581.82 assessment with the mortgages obtained from defendants, he had a right to take out doubtful assets that the assessment was put in the bank to replace. In the first place, the assessment was made to provide $5,000 additional surplus, $20,000 to reduce the bond account and $7,581.82 to add to the reserve for guaranty fund assessment. It was therefore not even contemplated that doubtful assets were to be taken from the bank when the assessment was made. There being no special arrangement made to substitute the assessment for bad or doubtful paper, the stockholders have no rights therein by operation of law. *Proctor v. First Nat. Bank,* 194 Wis. 20, 215 N. W. 438. In *McCann v. First Nat. Bank,* 112 Ind. 354, 14 N. E. 251, the court said: "If the stockholders had submitted to the proposed assessment of their stock, and paid in the $75,000 instead of reducing the capital stock, it would hardly be claimed that they would have become entitled to take or receive from the bank an equal amount of its suspended assets; nor can we perceive any reason why they should have become entitled to them because they elected to reduce the capital stock. * * * The bank held its suspended bills under the same authority, and charged with like obligations in respect thereto, as measured its rights and duties in respect to other assets."

We conclude, therefore, that the trial court was right in holding that the property in suit was the property of the South Omaha State Bank, and that the loan of $35,000 made by the defendants was to McGurk personally and not to the bank. The trial court rightfully canceled the deeds

from the South Omaha State Bank to Daphne S. McGurk, and from Daphne S. McGurk and John S. McGurk to the defendants Wells, and rightfully quieted the title to the property conveyed thereby in the receiver of the South Omaha State Bank.

AFFIRMED.

E. H. LUIKART, RECEIVER, ET AL., APPELLEES, V. W. A. WELLS ET AL., APPELLANTS.

FILED JANUARY 10, 1936. No. 29428.

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

James E. Bednar and *John A. McKenzie,* for appellants.

F. C. Radke, S. L. Winters, L. T. Fleetwood and *Barlow Nye, contra.*

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

CARTER, J.

This is an appeal from a decree of the district court for Douglas county canceling certain deeds to a parcel of real estate, the deeds being executed and delivered by the South Omaha State Bank to Daphne S. McGurk and by Daphne S. McGurk and John S. McGurk, her husband, to W. A. Wells and Clara B. Wells. From the overruling of their motion for a new trial, defendants appeal.

The real estate involved in the case at bar came into the bank in the same manner and under the same circumstances as the property involved in *Luikart v. Wells, ante,* p. 172. We therefore conclude that it was at all times thereafter the property of the South Omaha State Bank, as held in that case.

The defendants Wells obtained title to the property in the same manner and under the same circumstances as they obtained title to the real estate involved in *Luikart*

v. Wells, ante, p. 172. We therefore adopt the reasoning of that case and hold that the property belonged to the bank and was conveyed by John S. McGurk, the president and managing officer of the bank, to W. A. Wells and Clara B. Wells as security for or payment of a personal debt of his own. The trial court therefore rightfully canceled the deeds to the property and restored the same to the assets of the receivership of the South Omaha State Bank.

In the case at bar it appears that the property had been sold on contract to Ernest N. Collins, who at the time of the entry of the decree had paid thereon the sum of $2,875. It also appears that some of the buildings on the premises were destroyed by fire and that the insurance amounting to $10,500 has been paid to the Live Stock National Bank of Omaha in escrow to await the outcome of this suit. The trial court found that Nathan Perelman, the owner of the first mortgage, is entitled to $9,223.61 of said fund, together with interest from the date of the decree until paid, and that the South Omaha State Bank is entitled to the balance of the fund to be credited on the contract of purchase it holds with Ernest N. Collins. The trial court further found that W. A. Wells and Clara B. Wells had no interest in the property, and quieted the title in the receiver of the South Omaha State Bank as against them. We find this decree to be in all respects proper, under the circumstances of this case.

For the reasons herein set out and for the reasons set out in *Luikart v. Wells, ante,* p. 172, the judgment of the trial court is

AFFIRMED.

FLORENCE L. VAN DAHL, APPELLEE, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLANT.

FILED JANUARY 10, 1936. No. 29502.

1. **Insurance:** CONTRACT. When a member of a fraternal benefit association applies for and receives a beneficiary certificate, the articles of incorporation, constitution, laws and by-laws of the association, the application for membership and the certificate constitute the contract between the association and the certificate-holder.
2. ———: MEMBERS: SUSPENSION. The by-laws of a fraternal benefit association, providing for the payment of assessments made during the month on a certain day and for suspension, without notice, of members in default, are self-executing, and provide a reasonable and necessary penalty for the enforcement of payment of assessments to a fraternal insurance fund.
3. ———: ———: ———: REINSTATEMENT. A member of a fraternal benefit association, who has been suspended for nonpayment of assessments, can be reinstated only in strict conformity with the by-laws in force at the time of reinstatement, and has no rights under his certificate until an actual reinstatement has taken place.
4. ———: ———: ———: ———. Where the constitution and by-laws of a fraternal benefit association provide that a member suspended for nonpayment of assessments may within three months from the date of his suspension again become a member by paying all delinquent assessments to date, and that such payment shall be held to warrant that he is then in good health and that he will remain so for 30 days thereafter, there is no liability on the part of the association where it appears from the evidence that the holder of the certificate died within 30 days from the payment of the delinquent assessments.
5. ———: ———: ———: ———. Proof of a practice of a fraternal benefit association in accepting payments for purposes of reinstatement, after the member was automatically suspended for nonpayment of assessments, does not establish such a course of dealing or custom to accept such payments that would estop the association from asserting a forfeiture on the ground that the holder was not in good health at the time of the payment or that he had failed to remain in good health for 30 days thereafter.

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

Rainey T. Wells, J. M. Sturdevant, George Yeager and *John F. Futcher,* for appellant.

Frank H. Woodland and *Charles H. Marley, contra.*

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

CARTER, J.

This is an action to recover a death benefit under a beneficiary certificate issued to Henry E. Van Dahl by the Sovereign Camp of the Woodmen of the World. The jury returned a verdict for the appellee, the wife of the deceased and the beneficiary under the certificate, for $1,664.09, upon which judgment was entered. From the overruling of its motion for a new trial, appellant brings the case to this court on appeal.

The evidence shows that, at the time of the death of Henry E. Van Dahl, he was possessed of a beneficiary certificate in the amount of $1,585 issued to him by the appellant association. The certificate provided that the articles of incorporation, constitution, laws and by-laws of the association, and all amendments thereto, the application for membership and the certificate constituted the contract between the association and the insured. Under the terms of the certificate, Henry E. Van Dahl was required to pay a monthly instalment of assessment thereon in the sum of $3.34 on or before the last day of the calendar month in which it became due, all instalments becoming due on the first day of the month. The contract also provided that, if any monthly instalment was not paid on or before the last day of the month in which it became due, the said Van Dahl should become suspended and his certificate should be null and void. The contract further provided that a member who had become suspended might again become a member if, within three months from the date of his suspension and while he was in good health, he paid his delinquent instalments, but further provided that such a payment of delinquent instalments should be a warranty that said suspended person was in good health at the time

of the payment thereof and would remain in good health for 30 days thereafter. The contract further provided that the receiving and retaining of the delinquent instalments by the association should not operate as a waiver or estoppel to show that the insured was not in good health when he attempted to reinstate as a member. It was also provided by the contract that any attempt by a suspended member to become reinstated by the payment of delinquent instalments should not be effective for that purpose unless such person continued in good health for 30 days after such attempt, and that the payment of delinquent instalments of assessments should be a warranty that such person was at the time in good health and that, if the warranty was not true, the certificate should be null and void.

The record is undisputed that Henry E. Van Dahl failed to pay the instalment of assessment on the certificate sued upon for the month of December, 1932, on or before the last day of that month and, under the provisions of the contract, he became suspended. On January 16, 1933, Van Dahl attempted to reinstate the certificate by payment of his delinquent instalment for the month of December, 1932, and on January 31, 1933, he paid the instalment for January, 1933. Henry E. Van Dahl died on February 4, 1933, as a result of an operation for a brain tumor. On February 8, 1933, proofs of death were furnished the association by appellee, and appellant denied the claim and tendered back the amount of the December, 1932, and the January, 1933, instalments paid by Henry E. Van Dahl.

It is the contention of appellant that, under this state of facts, Henry E. Van Dahl was suspended on January 1, 1933, and that he was never reinstated thereafter under the terms of the insurance contract.

Where a member of a fraternal benefit association applies for the issuance of a beneficiary certificate for himself, the articles of incorporation, constitution, laws and by-laws of the association, and all amendments thereto, the application for membership and the certificate, when the certificate issued to him so provides, constitute the contract.

Farmers Mutual Ins. Co. v. Kinney, 64 Neb. 808, 90 N. W. 926; *Pope v. Royal Highlanders,* 101 Neb. 774, 164 N. W. 1047. This court has also held that the by-laws of a fraternal benefit association, providing for the payment of assessments made during the month on a certain day and for suspension, without notice, of members in default, are self-executing and a reasonable and necessary penalty for the enforcement of payment of assessments to a fraternal insurance fund. *Field v. National Council of K. & L. of S.,* 64 Neb. 226, 89 N. W. 773; *Sawyer v. Sovereign Camp, W. O. W.,* 105 Neb. 395, 181 N. W. 191; *Jensen v. Grand Lodge, A. O. U. W.,* 106 Neb. 66, 182 N. W. 599.

It is not disputed in the record that Van Dahl was suspended on January 1, 1933, for nonpayment of the December, 1932, instalment of assessment. Having been suspended, he could be reinstated only by a strict compliance with the by-laws of the association with reference thereto. In *Edgerly v. Ladies of the Modern Maccabees,* 151 N. W. 692 (185 Mich. 148) the court said: "A member of a fraternal benefit society who has been suspended can be reinstated only in strict conformity with the by-laws in force at the time of reinstatement, and has no rights until an actual reinstatement has taken place." In *Supreme Lodge v. Grijalva,* 28 Ariz. 77, 235 Pac. 397, the court said: "Now, if a member of a beneficiary society has forfeited his right to benefits, the society may impose such reasonable terms on his reinstatement as it sees fit, and unless all the terms are complied with, it is not liable for benefits accruing after the forfeiture. *Brun v. Supreme Council,* 15 Colo. App. 538, 63 Pac. 796; *McLaughlin v. Supreme Council,* 184 Mass. 298, 68 N. E. 344."

In the case at bar, the constitution and by-laws of the association provided that a member suspended for nonpayment of assessments could be reinstated, within three calendar months from the date of his suspension, by the payment of the current instalment of assessment and all instalments of assessments which should have been paid to maintain him as a member. The provision further provided

that when such payments were made, "such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member." Van Dahl was suspended on January 1, 1933, and paid up his delinquent instalment of assessment on January 16, 1933. He died on February 4, 1933, and therefore did not, and could not, comply with the constitution and by-laws of the association with respect to the condition imposed that he be in good health when the delinquent assessments were paid and that he be in good health for 30 days thereafter. The appellant contends that the inability of Van Dahl to comply defeated the certificate and that the trial court, as a matter of law, should have directed a verdict in its favor.

In *Pickens v. Security Benefit Ass'n,* 117 Kan. 475, 231 Pac. 1016, the court said: "By-laws of a fraternal beneficiary society permitted reinstatement of a member after suspension for nonpayment of dues, by payment of arrearages and dues within a grace period, providing the member was in good health, and payment for purpose of reinstatement constituted a warranty of good health. *Held,* good health in fact was required, and the requirement was not satisfied by appearance of good health or reasonable belief that the member was in good health."

In *Supreme Lodge v. Grijalva, supra,* the court said:

"The warranty of good health, and actual good health on the part of the insured, are expressly made conditions precedent to the reinstatement of the already automatically forfeited certificate in this case. A somewhat similar situation arose in *Richards v. Maine Benefit Ass'n,* 85 Me. 99, 26 Atl. 1050. Therein the insured allowed his assessments to go unpaid until his certificate had lapsed, and afterward caused it to be reinstated by paying his back dues, and fraudulently concealing his state of health. It was held that, notwithstanding the acceptance of the back dues, he could not recover. The principle involved herein is discussed in *Cromeens v. W. O. W.,* 208 Mo. App. 11, 233 S. W.

287, and it is held that a false warranty as to health voided the certificate, notwithstanding the acceptance of dues by the local lodge. It is true that case refers to an original application for insurance, but there is no reason why the same rule should not apply to a false warranty on a reinstatement, when it is expressly agreed the warranty is made as a condition for such reinstatment. See, also, *Marshall v. Women's Mutual Ins. & Accident Co.*, * * * 11 N. Y. Supp. 700.

"It seems to us that the position of the defendant herein is but reasonable. It is provided expressly in its original certificate that if a member, through his own negligence, forfeits his insurance, it cannot be reinstated unless he warrants himself to be in good health, and is actually so, at the time of his application for reinstatement. This condition is not unreasonable. Insurance companies are not organized nor are their premiums calculated on the basis of insuring those already sick, but upon the insuring of the well against a future illness or death. The doctrine of waiver is based on knowledge, and unless the statute clearly requires it, we should not hold that acceptance of past-due assessments on an insurance certificate which has automatically lapsed waives, not only what the insurer already knows, to wit, that the payment is overdue, but also through *ex post facto* action (for that is the only way such result can be produced) reinstates the lapsed policy by a compulsory waiver of the very thing expressly stipulated as essential to reinstatement, and which the insured has agreed he warrants by the very offer of his money, and without which warranty it could not, and would not, have been accepted."

In *Sovereign Camp, W. O. W., v. Cox,* 221 Ala. 58, 127 So. 847, the court said: "But there was in evidence another provision of the constitution and by-laws to the effect, in short, that any such suspended member, 'if in good health, may within ninety days from the date of his suspension again become a member' by paying all proper instalments and assessments to date, with the further stipulation that such payment shall warrant that he is then in good health

and that he will remain so for thirty days thereafter, and it shall be a contract that the payment shall not waive any of the provisions of that section until the Sovereign Camp shall receive notice that he 'was not in good health when he attempted to again become a member,' and that the receipt of such payment when he is not in good health shall not make him a member. Another section (66-b) provides that an 'attempt by a suspended person to again become a member shall not be effective for that purpose unless such person be in fact in good health at the time and continues in good health for thirty days thereafter.' * * * In order for such payment to operate a reinstatement, if that is the proper term under the quoted provisions of the rules, the insured must be in good health when the payment is made. That means received at the proper office. But the only evidence of his condition when the money was *sent* is that he had pneumonia, and that he was dead before it was received. It must be received while he is in good health, and he must remain so for thirty days thereafter in order to be completely and unconditionally restored to membership, according to the constitution and by-laws. The receipt of the money is expressly stated to be on those conditions. * * * That was only one of the conditions, and its compliance was but one step. It is quite well understood that if the company with knowledge of a breach negotiates with assured as though the policy were still in force, and induces the assured to incur trouble or expense, it thereby waives the right to claim the forfeiture. *Sovereign Camp, W. O. W., v. Allen,* 206 Ala. 41, 89 So. 58; *Sovereign Camp, W. O. W., v. Jones, supra.* But, after the occurrence of facts causing the suspension, the company will not be estopped to deny it, nor to waive the unfulfilled conditions of a reinstatement by negotiations which recognize the right to reinstate, and even by accepting one of the conditions without notice that the others cannot or will not be complied with. This principle is also in effect expressly so stated in the provisions of the constitution and by-laws fixing the right to be reinstated."

In *Sovereign Camp, W. O. W., v. Lambert,* 228 Ala. 440, 153 So. 627, the court, in a case very similar in principle to the one at bar and involving identical provisions as to reinstatement for nonpayment of assessments, said:

"The insured member, Talbert N. Lambert, had failed to pay the dues or assessments for the month of April, 1932, during said month, and likewise for the month of May.

"On the evening of June 4th, these delinquent dues, as well as those for the month of June, were paid by the beneficiary to the financial secretary of the local camp.

"On the same evening the insured member was fatally shot in a holdup at his store, and died early next morning. The financial secretary promptly reported the situation to the Sovereign Camp at Omaha, Neb., and was directed to forthwith return the money. The offer to return was refused. * * *

"When for nonpayment of dues as per contract a benefit certificate in a fraternal insurance society is no longer in force, it is for the parties to stipulate whether, in any event, the insurance shall ever again be put in force. If suspended, subject to reinstatement, it is for them to stipulate the terms and conditions on which it shall again become effective. This is sound law everywhere recognized. Contracts stipulating that, upon full compliance with the terms of reinstatement, it shall become effective at the end of a stipulated period thereafter, and conditioned on good health at the end of such period, are upheld as to such condition. * * *

"There is no reason why a warranty may not be given touching future events over which the parties have no control. In other fields of law it is well known that parties may warrant against matters, known or unknown, which may materially concern the parties. * * *

"Surely, if a man is no longer alive, if there be no subject of life insurance, good health as a condition on which the insurance is reinstated cannot exist."

We therefore conclude that, under the terms of the contract, the appellant was not liable for the payment of the

principal sum of the beneficiary certificate involved in this case. The deceased, Van Dahl, when he paid his delinquent instalment of assessment for the purpose of becoming reinstated, warranted, as a condition to his reinstatement, that he was then in good health and that he would remain so for 30 days thereafter. The death of Henry E. Van Dahl within 30 days after the payment of the delinquent instalment of assessment conclusively established the fact that a compliance could not be had with the conditions required as to his good health. The conditions imposed in order to obtain reinstatement not having been met, the certificate is not reinstated and a recovery cannot be had thereunder.

The appellee contends, however, that the delay in the payment of the instalments of assessment was in accordance with the custom and practice of Henry E. Van Dahl, acquiesced in by the appellant, and extending over a period of years; that the appellant waived the requirement of the contract that the monthly assessments be paid during the month for which they were assessed; and that appellant is estopped from claiming any forfeiture growing out of such delay.

This contention is well considered in *Koehler v. Modern Brotherhood of America,* 160 Mich. 180, 125 N. W. 49, as follows: "It is said that the insured had paid 17 assessments, only 5 of which were paid on or before the date specified, and that this was evidence of a practice which misled plaintiff and excused promptness in payment, and that the court erred in refusing to charge the jury that if the insured had been misled by long continued course of conduct, and so believed that a strict performance on his part was not necessary, the defendant could not insist on the forfeiture, and also in instructing the jury that the insured, not having paid his assessments within the time specified, stood suspended, and being suspended at the time of his death, no insurance could be recovered. We are of the opinion that the evidence did not justify the request made, and that the charge given was as favorable instruction as the plaintiff was entitled to. The defendant was not

responsible for these delays. The supreme body was not in a position to know the exact dates of payment, and may never have known that there was a delinquency; but, even if it did and was willing to overlook such delinquencies and receive and treat the payments as seasonably made, this liberality should not be given the effect of waiving in advance subsequent delinquencies, thereby, in effect, abrogating the provisions of the contract and practically making a new one." See, also, *Sovereign Camp, W. O. W., v. Cameron,* 41 S. W. (2d) (Tex. Civ. App.) 283; *Barganier v. Knights of the Maccabees of the World,* 147 La. 409, 85 So. 57; *Supreme Lodge v. Grijalva, supra*; *Pickens v. Security Benefit Ass'n, supra.*

It having been determined that there is no liability on the part of appellant on the beneficiary certificate sued upon, the trial court erred in not sustaining appellant's motion for a directed verdict. The judgment of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

VALVOLINE OIL COMPANY, APPELLANT, V. DUDA-MYERS COMPANY ET AL., APPELLEES.

FILED JANUARY 10, 1936. No. 29371.

1. **Appeal:** PRIMA FACIE CASE. "Where defendant does not adduce any proof, all facts which the evidence on behalf of plaintiff tends to prove will be treated as established for the purposes of a *prima facie* case in plaintiff's favor." *Thamann v. Merritt,* 107 Neb. 602, 186 N. W. 1003.
2. **Sales:** MISTAKE: RIGHT TO RECOVER. Where plaintiff sold and delivered merchandise to defendants, but by mistake the invoice, rendered by the plaintiff therefor and which was paid by the defendants, did not include all the merchandise actually delivered, and defendants have not changed their position in ignorance of the mistake, the plaintiff may recover the balance actually due.
3. ———: ———: ———. In such a case, the fact that the plaintiff had means at hand for ascertaining the mistake some time before the action was commenced for the balance does not

bar a recovery by the plaintiff for the merchandise erroneously omitted from the invoice, in a law action commenced 20 months after the merchandise was delivered.

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

Kennedy, Holland & De Lacy and *Edwin Cassem,* for appellant.

Monsky, Grodinsky, Marer & Cohen, contra.

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

MUNDAY, District Judge.

The plaintiff brought this action against the defendants to recover the price of approximately a half carload of barreled oil. The plaintiff alleged in substance in his petition that on June 11, 1930, it sold and delivered to the defendants, at the oral request of the defendant, Rollie Myers, 65 barrels, 8 half-barrels and a few cases of oil, and that said oil was received by the defendants, but that when the oil was invoiced to the defendants 30 barrels, 4 half-barrels and 4 cases of the oil, of the value of $1,068.10, were, by mistake, left out of the invoice; that the defendants paid the invoice price only, although knowing of the mistake; that on or about March 1, 1932, the plaintiff discovered its mistake and made demand for payment for the remainder of the oil omitted from the invoice, which demand for payment was refused by the defendants.

For answer the defendants allege in substance that there were negotiations between the parties for the purchase of oils and greases by the defendants from the plaintiff, and that it was agreed between the parties that the plaintiff was to ship defendants certain oils and greases in an amount sufficient for defendants to have a reasonable opening stock at a store in North Platte, Nebraska, but the amount was indefinite and not certain, and that plaintiff was to invoice and charge defendants for said oil at its regular price. The defendants allege plaintiff did ship

certain oil and greases and submitted invoice for the same totaling $1,480.03, and that the defendants paid the invoice price to the plaintiff. Defendants also denied the other allegations of the petition, and alleged that they had sold their interest in said business and that the books of the defendant company were no longer available to them, and that the plaintiff's delay had prevented defendants from determining the truth or falsity of plaintiff's claim, and if any mistake was made it was due to the gross negligence of the plaintiff, and that the plaintiff is estopped from asserting its claim. The plaintiff in reply in substance denies the allegations of the answer.

There is some contention by the defendants that the pleadings were in such condition that the plaintiff could not take advantage of any part of the defendants' answer. While the plaintiff's pleading was not a model, still we are unable to agree with this contention of the defendants.

At the close of the introduction of evidence by plaintiff, the trial court sustained a motion by the defendants for a directed verdict in their favor and dismissed the plaintiff's action. From this order the plaintiff has appealed, and has assigned as error the dismissing of the action and the overruling of its motion for a new trial.

To sustain the action of the trial court, the defendants contend that the plaintiff has not proved that the plaintiff sold and delivered to the defendants, at the express oral request of Rollie Myers, all of the specified goods and merchandise set forth in the invoice; that all of the goods and merchandise so ordered were shipped and received by the defendants; that the invoice sent the defendants on June 11, 1930, covered only part of the shipment; that the plaintiff made a mistake, if any, in the invoice; that the plaintiff did not discover its mistake until the 1st day of March, 1932; why the plaintiff did not discover its mistake, if any, sooner; that the defendants knew they received more merchandise than they were billed for and paid for and fraudulently concealed this information.

In directing the verdict and dismissing the case, the trial

court stated in part: "You shipped these goods out there and sent them a bill and they paid the bill. * * * It looks to me like a gift of the remainder of the oil," etc.

The defendants contend that it is immaterial whether the trial court gave a good or bad reason for its conclusion; if the trial court reached a correct decision, that its judgment will not be disturbed. This contention of the defendants is a correct statement of the law. Therefore, it must be determined whether a correct decision was reached by the trial court. The appellees apparently do not contend that the court gave a correct reason for its conclusion. We think it did not.

To uphold the trial court's conclusion and the defendants' contention, the defendants say that when the plaintiff relied upon its ignorance of fact, as an excuse for delay in asserting its rights, it must show why it was so long ignorant and acquit itself of all knowledge of the facts that would have put it on inquiry and show when it first acquired the knowledge. Also, since plaintiff invoiced defendants for the goods shipped, and immediately thereafter had actual notice of a mistake, if any, in the invoice, and defendants thereafter paid the invoice without knowledge of any mistake, and plaintiff remained silent for about 20 months thereafter, and since defendants' evidence of the transaction by which it could determine the truth or falsity of the claim was lost in the usual course of business, that plaintiff could not recover. There is no question of the application of the statute of limitations in this case.

To sustain these propositions and the contentions of the defendants, a great many authorities are cited, both state and federal. We have examined these at great length. The cases cited are mostly equity cases, or in courts of equity, or where the plaintiff, after plaintiff had knowledge of a mistake, acted in a manner inconsistent with the validity of the claim that a mistake had been made, so that the defendant was injured thereby. No such facts appear in the instant case. The plaintiff did not play fast and loose with the defendants. Therefore, these cases will not sustain the

action of the trial court or the contentions of the defendants.

The defendants also cite many authorities to the proposition that a court will refuse relief after inexcusable delay because of the difficulty of arriving at a safe and certain conclusion as to the truth of the matters in controversy and in doing justice between the parties, and it is not necessary that the court should be convinced that the original claim was unjust. A long list of authorities is also cited to this proposition, including the following cases of this court, viz.: *Harrison v. Rice,* 78 Neb. 659, 114 N. W. 151; *Hawley v. Von Lanken,* 75 Neb. 597, 106 N. W. 456; *Geiss v. Trinity Lutheran Church Congregation,* 119 Neb. 745, 230 N. W. 658; *Tombrink v. Sarpy County,* 120 Neb. 160, 231 N. W. 783; *Northwest Ready Roofing Co. v. Antes,* 117 Neb. 121, 219 N. W. 848. These cases were where a trial was had on the equity side of the court and the principle of laches was applied, and have no application in the case at bar.

In the instant case, the record does not show that any action of the plaintiff deceived or misled the defendants to their injury. If the defendants changed their position, and if it was a good defense to this action, it is an affirmative defense.

From the record, the pleadings and the evidence adduced by the plaintiff, it seems as though the plaintiff has made a *prima facie* case; that the plaintiff sold and delivered to the defendants on their request a certain quantity of oils and greases; that said goods were received by the defendants; that the invoice sent the defendants by the plaintiff covered only part of the shipment; that part of said goods received by the defendants was omitted from the invoice; that said goods so omitted have not been paid for by the defendants, and that the goods so omitted were not given to the defendants. When a *prima facie* case is thus made, Judge Rose states the rule of this court in *Thamann v. Merritt, supra,* as follows: "Inferences from evidential facts are questions for the jury, where the evidence will sustain a verdict in favor of plaintiff."

In the case of *Harman & Crockett v. Maddy Bros.*, 57 W. Va. 66, 49 S. E. 1009, the law is stated in the first paragraph of the syllabus as follows: "An item omitted, by mistake, * * * from a settled account between individuals, growing out of an ordinary business transaction, * * * may be recovered in an action of *assumpsit.*"

If the balance of a settled account may be recovered by reason of a mistake, it surely can be recovered in an account or invoice rendered.

In the case of *Union Electric Light & Power Co. v. Surgical Supply Co.*, 122 Mo. App. 631, 99 S. W. 804, the plaintiff furnished power to the defendant and, by negligence and mistake of the plaintiff's employee, the plaintiff failed to correctly measure the service so that the bills which were rendered to the defendant therefor, and which defendant paid, only covered half of the invoice actually furnished. The court used the following language: "As shown by instructions asked by the defendant, it assumed the position that the fact (if shown by the evidence) is that the mistake was the result of negligence on the part of the employees of plaintiff, then the rendition and payment of the monthly bills was a bar to the action; and, second, the rendition and payment of the bills was also a bar, unless one or more of defendant's officers knew or had good reason to believe mistakes were being made in making out the bills from month to month. The trial court ruled against both of these positions." In giving its reasons therefor, the court said: "If the defendant's position, that plaintiff could not recover if the mistake resulted from carelessness of its employees, is correct, then the power of courts to administer relief on account of the mistakes of bookkeepers, agents and employees of commercial firms would be practically nil, for it could be truthfully said, in every such case, that the mistake resulted from carelessness or inattention. There is no rule of law or equity requiring absolute accuracy in such matters or in any other human transaction; on the contrary, the fallibility of man is recognized, and a plaintiff is granted relief when it is made to appear that he has inno-

cently and inadvertently made a mistake which has caused him injury and resulted in profit to the opposite party; nor does his right of relief in every case depend upon the knowledge or information or belief of the opposite party that the mistake has been made. It is enough if the mistake made resulted in injury to the plaintiff and to an unearned profit to the defendant, provided the latter, in ignorance of the mistake, has not changed his situation with reference to the subject-matter, that to correct the mistake would result in injury to him." Also see *Standard Oil Co. v. Van-Etten,* 107 U. S. 325; *Kennedy v. Goodman,* 14 Neb. 585, 16 N. W. 834; *Merchants-Mechanics First Nat. Bank v. Cavers Elevator Co.,* 105 Neb. 321, 180 N. W. 588.

The evidence is sufficient to make a *prima facie* case in favor of the plaintiff, and it is entitled to have a jury pass upon the evidence.

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

REVERSED.

MANLEY STATE BANK, APPELLANT, V. FRANK J. SPANGLER ET AL., APPELLEES.

FILED JANUARY 10, 1936. No. 29378.

1. **Pleading:** ADMISSIONS. "Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or matter to avoid, will be treated as admitted, though the answer also contains a general denial." *Nason v. Nason,* 79 Neb. 582, 113 N. W. 139.
2. **Appeal:** PRIMA FACIE CASE. "Where defendant does not adduce any proof, all facts which the evidence on behalf of plaintiff tends to prove will be treated as established for the purposes of a *prima facie* case in plaintiff's favor." *Thamann v. Merritt,* 107 Neb. 602, 186 N. W. 1003.
3. ———. "Under section 20-853, Comp. St. 1929, violation of the strict rule of cross-examination will not be considered ground for reversal unless it clearly results in prejudice to the substantial rights of the party complaining." *Brooks v. Thayer County,* 126 Neb. 610, 254 N. W. 413.

4. **Bills and Notes.** The note sued on was executed on a sufficient consideration.

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

Dwyer & Dwyer, for appellant.

W. A. Robertson, contra.

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

MUNDAY, District Judge.

The Manley State Bank of Manley, Nebraska, sought to recover judgment against the defendants, Frank J. Spangler, Chas. Ward and H. J. Livingston, on a contract of guaranty for the payment of a promissory note of one Cyrus Livingston, which contract of guaranty was indorsed on the back of said note. The note was dated March 28, 1933, and was for the sum of $2,000.

In answer to the plaintiff's petition, the defendants allege that the signatures of the defendants to said alleged contract of guaranty were obtained by the plaintiff long after plaintiff had procured the note; that there was no consideration paid the defendants or any of them, either directly or indirectly, for signing said guaranty; that said note was the property of said bank, and the extension of credit thereon having been given long prior to the signing of the guaranty by the defendants and each of them, therefore the guaranty is null and void. In reply the plaintiff alleged that the note sued on is a renewal of the original notes that had been renewed from time to time and that the defendants have paid interest thereon, and at the time of execution of said note by Cyrus Livingston the defendants herein signed said guaranty and delivered the same to the plaintiff and denied said note was without consideration.

After plaintiff introduced its evidence and rested, the defendants moved for a directed verdict. The motion was

sustained by the court. From a dismissal of the action, plaintiff appeals.

Exhibit 1 is the note in suit on which the guaranty is indorsed, and exhibit 2 is the last renewal note given before exhibit 1 was executed. Exhibit 2 was executed October 17, 1931.

There is some contention by the parties as to whether or not the defendants by their answer admit the execution and delivery of the note and the contract of guaranty. The answer is in the nature of a confession and avoidance, and admits the truth of such matters in seeking to avoid their legal effect. *Nason v. Nason, supra; Miller v. Drainage District,* 112 Neb. 206, 199 N. W. 28; Comp. St. 1929, sec. 62-111.

Therefore, the execution and delivery of the contract of guaranty and note were admitted for the purposes of this trial. As stated, the defendants allege there was no consideration for the contract of guaranty, as the signatures of the defendants were secured by plaintiff long after the plaintiff procured the note alleged to be secured by the guaranty, and that said note was the property of plaintiff, and that plaintiff had extended the note prior to the signing of the guaranty. There is no issue made by the pleadings of a conditional delivery of the note alleged to have been indemnified. The plaintiff by timely objections endeavored to keep the question of conditional delivery of the note out of the trial, but was overruled by the court.

The court in sustaining the motion indicated that he did so because it appeared to be the agreement between the parties that exhibit 2 would not be surrendered until the interest on exhibit 2 was paid, and that this agreement was never consummated by the payment of interest and the cancelation and surrender of exhibit 2, and that exhibit 1 never became a completed contract, and for the further reason that exhibit 2 was still a valid instrument and not displaced in any manner by exhibit 1.

Although there was no conditional delivery of the note or contract of guaranty raised by the pleadings, yet since

the trial court admitted evidence on cross-examination on this issue and apparently considered such evidence as a reason for directing the verdict, we will consider this and the other reasons assigned for sustaining the decree of the district court.

The defendants borrowed $3,500 of plaintiff in 1926 and this was evidenced by two notes of $1,750 each, and the money was paid to the defendant "Chas. Ward, Treas.," by a draft; these notes were renewed in 1927 and were signed by all of the parties; in 1928 each of said $1,750 notes was reduced by a $750 payment on the principal of each; and, also, in 1928 a new note of $2,000 was given for the total balance due on both notes and interest was paid by the parties; this $2,000 note was renewed on January 22, 1930, and this last note in turn again renewed on October 17, 1931, and lastly the note in suit was executed, being dated March 28, 1933.

The notes made in 1926 and 1927 were signed by all of the parties. After that, one signed on the face and others signed as sureties or guarantors on the back of each note. However, one note was not signed by the defendant Ward as guarantor, but there is no question about his obligation on the original indebtedness for which the other notes were given in renewal.

The guaranty found on part of the notes was apparently placed there at suggestion of a bank examiner. This was done because some of the parties were individual borrowers at the plaintiff bank and thus the individual liability would not exceed the amount the bank could loan to each.

Was the note in suit delivered on condition? The plaintiff proved the signature on the note and the signatures on the contract of guaranty and introduced both in evidence. Defendants then brought out on cross-examination of plaintiff's cashier, over the objections of plaintiff, some testimony relating to the conditional delivery of the note. This was not proper cross-examination. While a violation of the strict rule of cross-examination will not be considered ground for reversal unless it clearly results in

prejudice to the substantial rights of the party complaining, yet a violation of the rule is very material in a case where testimony is elicited, over objecton of the other party, on an issue not made by the pleadings. Such cross-examination is especially material when the evidence brought out by such cross-examination is given as a reason for an instructed verdict and dismissal of the plaintiff's petition. Chief Justice Goss puts it well in *Brooks v. Thayer County, supra*:

"In this state the strict rule of cross-examination has been approved. *Atwood v. Marshall,* 52 Neb. 173; *Davis v. Neligh,* 7 Neb. 84; *Boggs v. Thompson,* 13 Neb. 403; *Hurlbut v. Hall,* 39 Neb. 889; *Easton v. Snyder-Trimble Co.,* 94 Neb. 18; *Owens v. Omaha & C. B. Street R. Co.,* 99 Neb. 364. But 'The scope of the cross-examination of a witness rests largely in the trial court, and its ruling will be upheld, unless an abuse of discretion is shown.' *Peterson v. State,* 63 Neb. 251; *Goemann v. State,* 100 Neb. 772. 'Although a witness is cross-examined as to matters not brought out on the direct examination, the judgment will not be reversed when it plainly appears that no prejudice could have resulted.' 28 R. C. L. 605, sec. 195. This same result is commanded by our section on civil procedure, providing that the court must disregard any error in the proceedings, and may not reverse any judgment on account thereof, unless it affects the substantial rights of a party. Comp. St. 1929, sec. 20-853. So the question to be answered on this point is whether the admission of this testimony on cross-examination affected plaintiff's substantial rights or, in other words, was prejudicial to him."

However, we are not reversing this case for this violation of the rule of cross-examination. Our study of the record convinces us that there was no such conditional delivery of exhibit 1. William J. Rau, cashier of the plaintiff, testified on cross-examination and redirect: "Q. What did you deliver to Cyrus Livingston when he signed the original note, this exhibit 1? A. I didn't deliver anything. * * * A. No, sir; the transaction was, they were to pay the interest up to date when the new note was made and they

didn't do it, so when they come in later on I asked these boys if they weren't going to pay this interest in cash, as I would have to have the note to show there was interest due at that time there when they gave the note for $240 and that wasn't completed, through the fault and neglect of the borrowers who agreed to do it. Q. The balance of interest on that note (ex. 2) is still unpaid? A. Yes, sir; the interest from June 20, 1931, is still unpaid and was to be paid in cash. They agreed to do it. Q. They agreed to raise the money and after they got the renewal note they never came in with the cash but finally they signed this exhibit 7? A. Well, when they didn't come in with the cash, I told them I would have to have something to show there was interest due and as they came in—I remember Mr. Harrison Livingston and Mr. Spangler both came in and signed the note on the back." This testimony of the cashier is not disputed. The evidence does not show that the note, exhibit 1, was not to become a binding contract until the interest was paid on exhibit 2, or a note given for the amount of the interest, or until exhibit 2 was canceled and surrendered. In determining whether the plaintiff had a right to have the case submitted to the jury, it is entitled to have every controverted question of fact resolved in its favor and to have the benefit of every reasonable inference that can be reasonably deduced from the facts and evidence adduced at the trial. *Schmelzel v. Leecy,* 104 Neb. 672, 178 N. W. 267; *Thamann v. Merritt, supra.*

Thus, under this rule, in this case the jury might have properly found from the evidence adduced: That the defendants and Cyrus Livingston borrowed money from the plaintiff in 1926 and evidenced the same by notes and renewal notes from time to time since that time; that Cyrus Livingston executed and delivered exhibit 1 as a renewal of a former note, exhibit 2, and the defendants signed exhibit 1 as guarantors and that there was a valid consideration for exhibit 1; that exhibit 1 was by agreement given as a renewal note for an extension of the time of payment of the principal of exhibit 2; that at the same time exhibit 1 was executed the parties agreed that, if plaintiff would extend the time of payment of principal

of exhibit 2 by accepting exhibit 1 therefor, the defendants and Cyrus Livingston would pay plaintiff the interest due on exhibit 2 in the sum of $240 in cash; that, after exhibit 1 was so executed and delivered and extension of time was given on the principal of exhibit 2 by the plaintiff, they failed to pay the interest on exhibit 2, but later promised to execute and deliver a promissory note for said interest which note was never completed; that exhibit 1 has not been paid.

This court in *Home Savings Bank v. Shallenberger*, 95 Neb. 593, 146 N. W. 993, said in the second paragraph of the syllabus: "The extension of time of payment to a principal debtor is a sufficient consideration to support a new contract of guaranty made after the date of the renewal of such obligation, especially when the guarantor at the time of making such guaranty is still liable as guarantor for the payment of the debt renewed."

In *Saunders v. Bates*, 54 Neb. 209, 74 N. W. 578, the following language is used: "As to the question of consideration for the note sued on, the facts are briefly these: Mr. Saunders, in December, 1890, borrowed a certain sum of money from one John H. Bassett, for which he gave the latter his promissory note secured by a real estate mortgage. The date for payment of the debt was extended from time to time by the maker giving renewal notes, the one in suit being the last of such renewals. The original note and mortgage were never surrendered to Mr. Saunders, but were held and retained by plaintiff as collateral security to each renewal note, to be surrendered to defendant upon the payment of the note sued on. The original loan was sufficient consideration for the last note, and the original note being past due and in the possession of the plaintiff below, defendant is fully protected against a recovery thereon."

The original loan to the defendants in 1926 was sufficient consideration for exhibit 1, and exhibit 2 is now in the possession of the plaintiff, and the defendants are protected against a recovery thereon.

The evidence adduced by plaintiff was sufficient to make a *prima facie* case in favor of the plaintiff and against the defendants. We think the trial court erred in dismissing the plaintiff's petition, and the judgment is reversed and a new trial ordered.

REVERSED AND REMANDED.

SAM BONACORSO, APPELLEE, V. CAMDEN FIRE INSURANCE ASSOCIATION, APPELLANT.

FILED JANUARY 10, 1936. No. 29443.

1. **Insurance**: PERSONALTY: CHANGE OF LOCATION: NOTICE. An insurance agent, having authority to issue policies, maintained an office, consisting of desk room, in the offices of another insurance company under an arrangement with the latter that its employee should receive telephone calls for the former during his absence, and perform certain stenographic work for him. *Held*, that such employee was a clerk in the office of such agent, and that notice to such clerk of removal of personal property insured at a certain place to another location, with a request to "put through a change of address," was notice to such agent and binding on the company.
2. ———: ———: ———: ———. Where an agent of a fire insurance company, having power to issue policies, had knowledge of the removal of the goods to another location and a request to change the policy accordingly several weeks before the goods were destroyed by fire, such knowledge was binding on the company, and it was its duty to cancel the policy if it did not desire to consent to such change, and its failure to do so will ordinarily be taken as evidence of its consent, in absence of notice to the contrary.
3. **Appeal.** Where both parties move for a directed verdict and the jury are discharged, the finding of the court on the facts will have the same effect as a finding by the jury, and, if sustained by sufficient evidence, will not be disturbed on appeal.
4. **Evidence** examined and found sufficient to sustain the finding and judgment.
5. **New Trial.** Upon appeal from the municipal to district court, additional evidence was received for plaintiff, by which defendant was surprised, but made no request for adjournment of the trial. *Held*, that the discovery, after the trial, of evidence by which such additional evidence would be contradicted furnished

no reason for granting a new trial on the ground of newly discovered evidence, defendant having submitted the case upon the evidence adduced.

APPEAL from the district court for Douglas county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

F. S. Howell and *Wright & Kennedy,* for appellant.

Wear, Garrotto & Boland, contra.

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

REDICK, District Judge.

This is an action at law upon a policy of insurance issued by the defendant to the plaintiff on the 22d of July, 1932, upon household goods, in the sum of $1,000. The goods were destroyed by fire the 24th day of November, 1932, while located and contained in premises known as 1502 South Fifth street, in the city of Omaha. At the time the policy was issued the goods were located and contained in a building known as 2033 Dodge street, in said city, and the policy of insurance provided that the personal property therein described was insured "while located and contained as described herein, and not elsewhere, to-wit, all situated and known as 2033 Dodge street, city of Omaha, state of Nebraska." The petition alleged that said household goods and furniture insured under said contract were removed from 2033 Dodge street to 1502 South Fifth street with the full knowledge, oral authority and consent of the defendant, by and through its agents, Hepler and Marcell, and Joseph F. Belfiore.

By its answer the defendant admits the issuance of the policy, and pleads the above quoted provision as to the location of the goods insured, and generally and specifically denies that it ever had any notice or knowledge of or ever gave its consent to the removal of said property, alleging the contrary. The defendant alleges that, had it known of such removal, it would have canceled said policy. The answer contains several other matters of defense which

need not be detailed because no evidence was offered in support of them. The case was tried to a jury, but at the close of the evidence each party moved for a directed verdict in its favor; thereupon the jury were discharged and the district court overruled defendant's motion and sustained the motion of plaintiff for a finding and judgment in plaintiff's favor for the amount of the policy and interest. The defendant appeals.

The evidence establishes without dispute the following facts: Joseph F. Belfiore was an insurance broker, an agent of the defendant for the purpose only of procuring applications for insurance, collecting premiums and delivering policies; he had no authority to enter into contracts of insurance or waive any provisions of the policy—in short, he was not a general agent of the defendant. He procured the issuance of the policy in suit through Hepler and Marcell who were agents of the defendant authorized to issue policies. At the time the policy was issued containing the above quoted provision as to location, the personal property insured was located in a house known as 2033 Dodge street, and on August 14, 1932, was removed to 1502 South Fifth street, at which location it was destroyed by fire on November 24, 1932. Proofs of loss were duly made and the amount thereof is not in dispute.

The contested question of fact in the case is whether or not the defendant prior to the fire had notice of the removal of the goods to the new location. The only evidence upon this question was produced by the plaintiff, the defendant calling but one witness, who testified that the rate of insurance at 1502 South Fifth street, upon the policy in suit, would be $11 instead of $9, the amount paid by plaintiff. In this situation we are confined in our investigation to the evidence offered by the plaintiff.

The plaintiff testified that shortly before the removal of the goods he notified Belfiore of his intention in that regard and told him "that we had to move by the 14th of the month, that our rent would be raised, and so he said he would let me know and take care of it." "Q. And what

was said to him about moving this furniture as to where it was to be moved? A. He asked me where I was going to move it, and I told him back at the old address, and he said, 'Where, down on Fifth street?' And I said, 'Yes.' And he said, 'I will let you know if it costs any more but I don't think there is any difference in rates.'" Belfiore testified that he told the plaintiff as soon as he moved to let him know about it, and that he saw plaintiff after removal and that the plaintiff asked him "to take care of the policy and be sure that everything was all right, and I said I would." "Q. Now, what did you do with reference to taking care of the policy and about the removal of the household goods? A. I called Mr. Hepler and he was not in his office, and I said, 'Well, can you take some information for me?' And she said, 'Yes.' Q. Who is she? A. Well, Mr. Hepler's secretary. Q. That is, the secretary in the office? A. Well, Mr. Hepler was never in his office. Q. And do you know the secretary there? A. Well, I have met her; I know she answers the 'phone. Q. In the office there? A. Yes, sir. Q. What information did you give her? A. I told her the owner of the policy I had written had moved from 2033 Dodge street to 1502 South Fifth street, and to put through a change of address and send out an indorsement on it, and she said she would take care of it." Witness further testified that he saw Mr. Hepler afterwards on November 23, and that Hepler said to him, "Joe, I understand your policyholder, Sam Bonacorso, has moved down on Fifth street." And the witness said, "Yes; wait, I will give you the address," but that Hepler said he was in a hurry and could not wait. No written consent to the removal of the goods was ever made out and attached to the policy.

The defense of appellee is based upon two contentions:

1. That Belfiore was a mere soliciting agent of the defendant without power to issue policies of insurance or waive any of their provisions. This contention is well founded, the evidence being undisputed. The distinction between a mere soliciting agent and one having authority to issue policies is pointed out and discussed in *Krug Park Amusement Co. v. New York Underwriters Ins. Co.*, 129

Neb. 239, 261 N. W. 364, with special reference to the statutes on that subject.

2. That defendant had no notice or knowledge of the fact of the removal of the goods prior to the fire and that no written consent to such removal was ever made out or attached to the policy.

This second contention raises the question of the sufficiency of the evidence offered by the plaintiff to show such notice. It does not appear in the evidence and is not claimed that Hepler and Marcell, the agents issuing the policy, were ever personally notified by either plaintiff or Belfiore of the removal, but the latter testifies positively that at least two or three weeks after the removal he called up the office of Hepler and Marcell and talked with a girl who he describes as their secretary and who he knew received telephone calls for Hepler and Marcell. Neither Hepler nor Marcell was in the office, and he notified the girl of the fact of the removal of the goods from 2033 Dodge street to 1502 South Fifth street and asked her to put through the change of address, and that she replied that she would look after it. He further testified that on the 23d of November, the day before the fire, he met Hepler who voluntarily opened the conversation saying he understood that Bonacorso had moved down on Fifth street, and when Belfiore offered to get the exact number, he said he had not time, and on the morning of the 25th, the day after the fire, but before Belfiore knew of it, he telephoned the office again and gave "the secretary" the number on South Fifth street. The defendant produced no evidence in contradiction—neither Hepler, Marcell, nor "the secretary." It would seem in these days, when a large proportion of business, some of it quite important, is transacted over the telephone, that Belfiore pursued the ordinary method of informing defendant's agent of the fact of the removal, and that such agent had notice thereof through the communication to "the secretary" is a fair inference from the fact of Hepler's conversation with Belfiore on the day

before the fire, if such fact in itself may not be considered sufficient notice for want of a special description of the place to which the goods had been removed, although Belfiore offered to get the specific description from his file a few steps away; it might be fairly claimed that Hepler's refusal to wait and receive it would amount to a waiver of the defect. "It is not indispensable to recovery for the loss of goods insured, after their removal to a different place, that consent should have been first obtained for the removal; subsequent ratification and consent by the insurer, with knowledge of the facts, is equivalent to precedent consent." *Kor v. American Eagle Fire Ins. Co.*, 104 Neb. 610, 178 N. W. 182.

Defendant insists that there is no evidence that "the secretary" had any authority to waive any provisions of the policy or consent to the removal. This may be conceded, but that she had authority to receive telephone calls for Hepler and Marcell is undisputed, and it was her duty to report such calls, and any information thereby conveyed, to the agents. We think that "the secretary" was a clerk in the office of Hepler and Marcell for the purposes of receiving calls and notices for them, and that notice received by her was notice to them, by receiving such notice she was attending to their business. See *Pollock v. German Fire Ins. Co.*, 127 Mich. 460, 86 N. W. 1017, and cases cited; *Continental Ins. Co. v. Ruchman*, 127 Ill. 364, 20 N. E. 77; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; *Electric Life Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *Bennett v. Council Bluffs Ins. Co.*, 70 Ia. 600, 31 N. W. 948.

The finding of the district judge must be given the same effect as that of a jury on a question of fact, and we think it is clearly supported by sufficient evidence and should not be disturbed.

Defendant cites the case of *Krug Park Amusement Co. v. New York Underwriters Ins. Co.*, 129 Neb. 239, 261 N. W. 364, to the point that notice to a soliciting agent is not notice to the company, which is undoubtedly correct;

but in that case the soliciting agent gave no notice of any kind of the transfer of title to the issuing agent. Defendant also cites 3 Couch, Cyclopedia of Insurance Law, sec. 747, *Waters v. Nebraska Mutual Ins. Co.*, 108 Neb. 1, 187 N. W. 125, and *Henslin v. United States Fire Ins. Co.*, 152 Wash. 637, 278 Pac. 702, to the effect that a removal of personal property from the place at which it was insured, where the policy contained the provision, "while located and contained as described herein, and not elsewhere," voided the policy, but in all those cases the rule was qualified by the expression that it took place "without insurer's consent," or "without insurer's knowledge."

In *Mayfield v. North River Ins. Co.*, 122 Neb. 63, 239 N. W. 197, it was held that, where actual knowledge of the removal of goods to a new location was brought home to the agents of the insurance company, such knowledge would be imputed to the company, the court saying: "This court is committed to the doctrine that notice to the local agent of insurer who has authority to issue the policy is notice to the insurer." In *Kor v. American Eagle Fire Ins. Co.*, 104 Neb. 610, 178 N. W. 182, it was held that, where prior to their destruction the insured gave notice of the removal and requested the authorized agent to transfer the insurance to cover the goods in their new location and the agent so agreed, the insurer was bound, although no formal consent or transfer was executed. Hepler and Marcell, having issued the policy, must be assumed to have had authority to receive notice of the removal.

By an amended motion for a new trial defendant set up the ground of newly discovered evidence supported by a number of affidavits from which it appears that, in the trial of this case in the municipal court, the witness Belfiore gave no evidence as to notification to the office of Hepler and Marcell prior to the day after the fire, and defendant contends that it was surprised by the testimony of Belfiore in that behalf in the district court and was therefore not prepared to meet that evidence. And among the affidavits offered was one of Ruth Kuran, evidently the person de-

scribed as "the secretary," to the effect that Hepler rented desk space in the office of one Robert J. Jeffs, state manager for the Federal Life Insurance Company, by whom she was employed, and that Hepler made some arrangement with her employer whereby she was to receive Hepler's telephone calls during his absence from the office and relay the same to Mr. Hepler, and aid Mr. Hepler in some small stenographic duties which he might desire. The failure of defendant to call Mr. Hepler is explained by the showing that he had left the state and his whereabouts were unknown, and the failure to call either Hepler or Ruth Kuran is accounted for upon the ground of surprise, and that defendant did not think their testimony would be necessary. As a matter of fact it appears that Ruth Kuran was in the city during the trial, and her affidavit was procured two days after the verdict. No application was made to the district court for an adjournment of the trial on the ground of surprise, and we think the affidavits presented are insufficient to establish the requisite diligence as a basis for a new trial on the ground of newly discovered evidence. Had the defendant requested an adjournment or continuance on the ground of surprise, no doubt the trial court would have granted it; instead, defendant concluded to take the chance of a favorable verdict and must now submit to the result. Furthermore, we are of the opinion that the evidence is sufficient to sustain the burden upon the plaintiff to establish that Ruth Kuran was the clerk or employee of Hepler and Marcell for the purpose of receiving and reporting communications connected with their insurance business. In *Pollock v. German Fire Ins. Co.*, 127 Mich. 460, 86 N. W. 1017, notice of the removal of the goods, by telephone, to a clerk in the office of the agents of the insurance company was held to be notice to the agents.

Having determined that the evidence is sufficient to show notice of the removal of the goods destroyed prior to the fire, we think it was incumbent upon the insurance company, if it did not wish to consent to the removal and be bound by its policy at the new location, to take some action

by canceling the policy or giving some notice to the insured of the refusal of its consent, so that the latter might procure other insurance for his protection, and that its failure to do so must be considered as evidence of its consent that the policy remain in force. The judgment of the district court is

AFFIRMED.

FARMERS STATE BANK OF LEXINGTON, APPELLANT, V. KATIE LEMMER, APPELLEE.

FILED JANUARY 15, 1936. No. 29426.

Evidence in the record examined, and *held* to require the reversal of the judgment of the district court.

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

Frank M. Johnson, for appellant.

W. A. Stewart, Jr., contra.

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

PER CURIAM.

On April 4, 1934, the appellant commenced an action in the district court for Dawson county upon two promissory notes, executed by defendant. Both bore date of July 2, 1932; one for $3,000, with interest at 8 per cent. per annum from date, was due January 2, 1933; the other for $2,000, with interest at 8 per cent. per annum from date, matured December 2, 1932. On June 26, 1934, appellant caused an affidavit in attachment to be filed in this proceeding, accompanied by a proper and sufficient bond. The grounds for attachment set forth therein were "that the defendant is about to convert her property, or a part thereof, into money, for the purpose of placing it beyond the reach of her creditors; and has assigned, removed or disposed of, or

is about to dispose of her property, or a part thereof, with intent to defraud her creditors." On June 26, 1934, a writ of attachment was duly issued in this cause, and on June 27, 1934, sections 12 and 13, township 12, range 23, pursuant to the commands of the writ, were attached by the sheriff of Dawson county, and return made as required by law. On July 10, 1934, a motion to discharge this attachment was filed, stating "that the grounds of attachment set out in said affidavit are untrue; that the sheriff of Dawson county, Nebraska, has made an excessive levy in that the prayer in the plaintiff's petition asks for sum of $5,000, with interest at 8 per cent. from July 2, 1932, and the land levied upon and appraised shows a value of $13,000." On this date the defendant, Katie Lemmer, also filed an affidavit which set out that "affiant specifically denies she is about to convert her property, or a part thereof, into money for the purpose of placing it beyond the reach of her creditors; specifically denies that she has assigned, removed or disposed of, or is about to dispose of her property, or a part thereof, with intent to defraud her creditors."

On July 18, 1934, the defendant also filed an answer which was, in substance, an admission of the execution and delivery of the notes in suit, with a plea of "no consideration." On July 20, 1934, the motion to discharge the attachment was heard "upon the pleadings and the evidence," and, "upon consideration whereof, the court finds there is insufficient evidence to support the plaintiff's claim or cause, and that said attachment should be discharged," and judgment was thereupon entered that "said attachment * * * be and the same hereby is vacated and discharged."

From the order of the trial court overruling its motion for a new trial, the bank appeals.

The evidence upon which the cause was heard is preserved in a bill of exceptions. The defendant's affidavit traversing the statements of plaintiff's affidavit forms no part of the bill of exceptions. It appears only as a part of the transcript.

This court was early committed to the doctrine that,

"Attachment, though sometimes called an ancillary or auxiliary proceeding, is nevertheless, in all essential respects, a suit. The affidavit of a plaintiff made to obtain the writ of attachment, and the affidavit of a defendant, when made, denying the truth of the averments of the plaintiff, constitute the pleadings in the proceeding." *Jordan v. Dewey,* 40 Neb. 639, 59 N. W. 88.

Considered as a mere pleading, defendant's affidavit, on review in this court, not tendered and received as proof, may not be given evidential value.

So, also, we have repeatedly laid down the rule that affidavits used as evidence, or forming an essential part of the proof, may not be considered on appeal unless preserved in the bill of exceptions. *Banta v. McChesney,* 127 Neb. 764, 257 N. W. 68; *Schmidt v. Village of Papillion,* 92 Neb. 511, 138 N. W. 725; *Bartlett State Bank v. Johnston,* 110 Neb. 782, 195 N. W. 108; *Hannah v. American Live Stock Ins. Co.,* 111 Neb. 660, 197 N. W. 404; *Lee v. State,* 124 Neb. 165, 245 N. W. 445.

While the findings of the trial court may exclude consideration of this question on appeal, it appears to be the rule that, on a motion to discharge the attachment, the defendant cannot properly present the question of excessive levy as a cause for its total dissolution or discharge. 3 Standard Ency. of Procedure, 785.

In the consideration of this case, we do not have the benefit of brief or argument on behalf of the defendant. The evidence discloses, without dispute, that at the time of the institution of these proceedings the defendant, Katie Lemmer, was the owner of the following property: Four sections of "hill land," of which one section was encumbered by a mortgage of $7,000 and accrued interest thereon, with unpaid taxes; one section encumbered by a mortgage of $4,000, accrued interest and unpaid taxes thereon; two sections without mortgage, but subject to delinquent taxes in the sums of $736.37 and $621.99, respectively. She also owned a house in town, in which she lived, mortgaged to the extent of $1,500, on which there was two years' interest

accrued and unpaid, and two years' taxes delinquent. With the exception of household goods, these four sections of land and the dwelling-house constitute defendant's entire possessions. She testified she has no money.

Plaintiff's testimony is to the effect that, after the commencement of this action in April, 1934, an attempt was made on behalf of defendant, in which she was represented by her attorney of record in this case, to procure a sale of her unencumbered land for cash, and negotiations for this purpose were had with Ed Kreitz. An offer to purchase upon terms other than cash was unconditionally refused and payment of cash was insisted upon. These negotiations thereafter had proceeded to a point where it was agreed that if Kreitz could raise $10,000 the two unencumbered sections would be sold to him for that price. The representative of the defendant thereupon insisted that the examination of the abstract of title, preliminary to closing up the deal, should be made by some attorney other than the attorney representing plaintiff bank in the pending suit; and when it was suggested by Kreitz that he would secure a part of the consideration by securing a Federal Land Bank loan, it was objected to by Mrs. Lemmer's representative for the reason that, due to the connection of Mr. Roberts (an executive officer of plaintiff bank) with the federal institution, this application for a loan would come to the latter's notice, and thus plaintiff would be advised of the pending negotiations.

Kreitz testifies on this matter, in part, as follows: "A. He (Mrs. Lemmer's attorney) made the statement, there was a suit pending, and he said not—I suggested to get the money from the Federal Land Bank, with Mr. Roberts. He said not to do that; I didn't know about this suit pending at that time. He said not to see Mr. Roberts about it or you, as you were handling the case; that was the first time I knew you were in it. Q. What did he say, if anything, about Mr. Roberts? A. He said it was the Farmers State Bank that had charge of the—had the suit pending, and not to get it through that bank, it would probably create a

disturbance. Q. In getting the loan through Mr. Roberts or the Federal Land Bank? A. Yes, sir. Q. Because the Farmers State Bank was a plaintiff in this action? A. Yes, sir."

Later Joe Lemmer, defendant's son, made an application to secure a loan of $5,000 in his mother's behalf. As part of the application he orally stipulated that he would furnish an abstract showing good title and have it examined and approved by an attorney selected by himself, at his own expense. This application was pending at the time of the trial of the attachment proceeding in the trial court, and held up pending the disposition of the case to be made by the trial court. Mrs. Lemmer, appearing as a witness, testified that she knew nothing about the attempted sale of the land to Mr. Kreitz, but admitted she would sell any of the land if she got a good offer for it; admitted that she knew her son Joe was attempting to secure the loan of $5,000; and stated that out of the proceeds of this loan as made she expected to pay interest and back taxes, the amount she owed to her son Joe, and provide for the relief of another son. The amount of the indebtedness due her son Joe is not stated, and the particulars as to its creation are omitted; the amount proposed for relief of the other son does not appear. In this connection it may be conceded that at common law a debtor may prefer certain of his creditors. Further, an intention to defraud may not be justly inferred from the due exercise of this right or the declared intention so to do. *Farwell Co. v. Wright,* 38 Neb. 445, 56 N. W. 984; *Robinson Notion Co. v. Foot,* 42 Neb. 156, 60 N. W. 316.

Nevertheless, this court, in the case of *Morse v. Steinrod,* 29 Neb. 108, 46 N. W. 922, announced the rule: "The common-law right of a debtor to prefer creditors is very much restricted in this state by virtue of the attachment, assignment, and other laws, and will not be applied in any case where a just and fair distribution of the proceeds of the debtor's property can be made among all his creditors."

While this principle so announced was referred to and discussed in *Jones v. Loree,* 37 Neb. 816, 56 N. W. 390, it

was not there repudiated or overruled, nor has its application since been expressly limited by any of our decisions.

Indeed, without reference to the cases last referred to, the proposed transactions contemplated by defendant, being with, or for the benefit of, her sons, and necessarily having the effect of hindering, delaying, or defrauding her existing creditors, of which class the plaintiff bank was one, she, in this proceeding, must carry the burden of showing by satisfactory evidence the *bona fides* of the transaction in view of all the attendant circumstances. This has not been done. *Bartlett v. Cheesbrough,* 23 Neb. 767, 37 N. W. 652; *Ayers v. Wolcott,* 66 Neb. 712, 92 N. W. 1036; *Kirchman v. Kratky,* 51 Neb. 191, 70 N. W. 916.

In consideration of all the evidence before us, we are unanimously of the opinion that the district court erred in sustaining the defendant's motion to dissolve the attachment in the instant case.

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

REVERSED.

IN RE ESTATE OF HERMAN H. BADBERG.
E. F. TONSING, APPELLANT: C. L. KELLY, COUNTY TREASURER, APPELLEE, V. CARL BADBERG, ADMINISTRATOR, APPELLANT.

FILED JANUARY 15, 1936. No. 29429.

1. **Taxation.** Taxes assessed upon personal property are a first lien upon the personal property of the person to whom assessed until they are paid. Comp. St. 1929, sec. 77-204.
2. **Executors and Administrators:** CLAIM AGAINST ESTATE. In case of the death of the party liable for such taxes, it is proper to file a claim therefor against his estate on the theory that the filing of such a claim is not an action. *Millett v. Early,* 16 Neb. 266, 20 N. W. 352, followed.
3. ———: ———: PRIORITIES. A valid claim for personal taxes is a lien against the assets of an estate, derived from a sale of

the personal property of the deceased, and has priority over the preferred claims provided for in section 30-615, Comp. St. 1929.

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

Mueller & West and *Peterson & Devoe,* for appellant Tonsing.

Bernard M. Spencer, for appellant Badberg.

Moran & James and *George H. Heinke, contra.*

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

GOSS, C. J.

The district court ordered the claim of C. L. Kelly, county treasurer, for personal taxes, to be paid prior to the claim of E. F. Tonsing, the undertaker, for funeral expenses, and prior to the payment of any other claim. The administrator and the undertaker appeal.

Herman H. Badberg's personal taxes were duly assessed in Otoe county and were unpaid in the following amounts: For 1930, $101.13; for 1931, $63.95; and for 1932, $42.44. He died intestate February 29, 1932. Carl Badberg was appointed administrator. The county treasurer duly filed claims for the above amounts with statutory interest from the dates of the respective delinquencies. December 1, 1932, the claims were allowed in the total sum of $234.03, to bear 10 per cent. interest per annum.

E. F. Tonsing, the undertaker, duly filed his claim for $225 for funeral expenses. It was allowed in that sum on July 23, 1932, to bear interest at 7 per cent. Dr. C. T. Gritzka's claim for services in the last illness, duly filed, was allowed on the same day for $35, bearing 7 per cent. interest. Other claims were allowed in the aggregate amount of $2,223.18.

The administrator's report showed that he had sold the personal property left by the deceased for several times the total personal taxes allowed as above indicated. The report showed in detail that, after a sale of all the property of the deceased and the payment of the necessary costs of

administration, he had $485.45 to pay all the claims allowed and to pay any further costs of administration. The estate is therefore insolvent. He made written application for directions to pay out the amount on hand as follows: First, for any balance of costs; second, to pay the Tonsing claim; third, to pay the Gritzka claim; the balance, if any, to be applied in payment of the claim of the county for personal taxes. On appeal in the district court the administrator was ordered to pay the claim for personal taxes allowed in favor of the county treasurer prior to any other claim allowed against the estate.

The evidence shows that no distress warrant was ever issued for the collection of the personal taxes. No question is raised by appellants as to the validity of the taxes. It is argued by appellants (1) that the statutory remedy for collection of personal taxes is by distress warrant and sale; (2) that where the law provides a remedy it is exclusive; (3) that the county treasurer has only a general claim against the estate; and that, therefore, the claim of appellant Tonsing for funeral expenses has preference over all claims except costs. *Contra,* appellee argues that personal taxes are a continuing first lien, that when the personal property of decedent was taken charge of by the administrator it was in the custody of the law and beyond the power of distraint, but that the lien remained not only upon the personal property but upon its proceeds when reduced to cash, and that it was the duty of the administrator to pay this lien, subject to costs, prior to payment of preferences fixed by the statute of distribution of insolvent estates.

Section 30-615, Comp. St. 1929, says: "If the assets which the executor or administrator may have received and which can be appropriated to the payment of debts shall not be sufficient, he shall, after paying the necessary expenses of administration, pay the debts against the estate in the following order: First. The necessary funeral expenses, which shall be a preferred claim only to an amount not exceeding Two Hundred and Fifty Dollars

($250.00) for casket and services of undertaker. Second. The expenses of the last sickness. Third. Debts having a preference by the laws of the United States. Fourth. Debts due to other creditors."

Section 77-204, Comp. St. 1929, reads as follows: "Taxes assessed upon personal property shall be a first lien upon the personal property of the person to whom assessed from and after the first day of November of the year in which they are assessed, until paid."

Section 77-1915, Comp. St. 1929, provides for collection of personal taxes by distraint and sale in the manner provided by law for the levy and sale of personal property on execution.

It is argued by appellants that, where the statute provides a remedy for the collection of taxes, that remedy is exclusive. They cite in support thereof *Nebraska City v. Gas Co.*, 9 Neb. 339, 2 N. W. 870 (decided in 1879), wherein the city sought to set off taxes against the gas company in an action by the company for gas furnished the city under a contract. The court sustained plaintiff's demurrer to defendant's answer, and in support thereof cited cases from other jurisdictions to the effect that, where a summary method of collecting the personal taxes against a party is given by statute, "No action can be maintained to compel the payment of * * * taxes, except in the particular cases in which an action is given by statute."

In 1884, in *Millett v. Early*, 16 Neb. 266, 20 N. W. 352, this court decided that, under the revenue law of 1869, wherein personal taxes were not a lien but were to be collected "in the manner provided by law for the levy and sale of property upon execution," yet "That in case of the death of a party liable for such taxes a claim for the same was properly filed against his estate." The opinion expressly adhered to the ruling in *Nebraska City v. Gas Co., supra,* but bottomed the particular rule here upon the ground that "The act of filing a claim against an estate is not in a proper sense an action. The statute requires all claims against the estate which are to be paid out of the

general assets to be filed and allowed; and as taxes upon personalty are to be collected from any personal property of the person against whom they were assessed that can be levied upon, they certainly constitute a claim against the estate."

In *Richards v. County Commissioners, Clay County,* 40 Neb. 45, 58 N. W. 594 (also cited by appellants), the precise situation involved the right of the county commissioners to enforce by an action in attachment against the lands of Richards (who had become a nonresident) taxes which had been duly assessed against his personalty in Clay county. He had removed the property and his residence to another state. It was held, in an opinion by Judge Irvine, that the action would not lie, but that, as the legislature "has prescribed a remedy by action under certain circumstances in a particular forum and in a particular manner, no action will lie, except under the circumstances prescribed, in the forum provided, and after the manner defined." The writer of the opinion carefully distinguished *Millett v. Early, supra,* and stated that the decision of the court therein was upon the ground that the filing of a claim against an estate is not an action.

We do not review the other citations by appellants because we find nothing in them which militates against the distinguishing feature of *Millett v. Early, supra,* nor do we find that the principle set forth in that case has been overruled or modified.

Section 77-1901, Comp. St. 1929, says: "No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the treasurer's office and pay his taxes." Accordingly, this court, in *State v. Ord State Bank,* 117 Neb. 189, 220 N. W. 265, held that personal taxes are a first lien upon the assets of an insolvent state bank in the hands of the receiver and that a claim need not be filed as ordinary claims of creditors. The opinion cites *Millett v. Early, supra,* as holding "merely that it was proper for the county to file a claim in estate proceedings."

Section 4, art. 8, Nebraska Constitution, says: "The legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever." Under the rule described in this section, it is doubted that the legislature would have power to make the first lien of personal taxes subject to the claim of the undertaker and subject to the expenses of the last sickness, as appellants seek to have done here by section 30-615, Comp. St. 1929. However, because the point was not raised, we do not decide it, but base our decision upon the rule in *Millett v. Early, supra,* that the filing of the claim was not an action, and upon our interpretation of the applicable statutes.

It seems to us to be clear that, under statutes which make personal taxes a first lien upon the personal property of one against whom they are assessed until they are paid, which make it the duty of the person subject to taxation to pay his taxes, under the unreversed principle of *Millett v. Early, supra,* and perhaps under the rule of the Constitution heretofore quoted, the taxes sought to be impressed by the county upon the personal estate of the deceased was a first lien, notwithstanding the provisions of section 30-615, Comp. St. 1929, providing for preferred claims in the payment of "debts against the estate." "The statute requires all claims against the estate which are to be paid out of the general assets to be filed and allowed; and as taxes upon personalty are to be collected from any personal property of the person against whom they were assessed that can be levied upon, they certainly constitute a claim against the estate. While such taxes are not a debt in the ordinary meaning of the word, they do constitute an obligation imposed by law, for which the estate is liable." *Millett v. Early,* 16 Neb. 266, 20 N. W. 352.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. PAUL F. GOOD, ATTORNEY GENERAL, V. PLATTE VALLEY STATE BANK, E. H. LUIKART, RECEIVER, APPELLEE: SUSAN V. REEVES, INTERVENER, APPELLANT.

FILED JANUARY 15, 1936. No. 29492.

1. **Banks and Banking:** TRUST FUNDS. "A bank becomes agent of depositor and holds the deposit as a trust fund when, with knowledge of the fact, it accepts a deposit made for the purpose of paying a specific obligation." *State v. Farmers & Merchants Bank*, 125 Neb. 800, 252 N. W. 316.
2. ———: ———. Where a bank accepts a check, drawn upon it by a customer who has funds to his credit in the bank in an amount equal to the check, and the bank, having the cash available with which to pay the check, charges it to the account of the customer and retains the money for the purpose of paying a specified obligation of the customer, the transaction is equivalent to the payment of the money to the customer and a redeposit of the amount by him for the specified purpose.

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

Morrow & Morrow, for appellant.

F. C. Radke, Wright & Wright, L. T. Fleetwood and *Barlow Nye, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and RAPER and PROUDFIT, District Judges.

GOOD, J.

In this proceeding Susan V. Reeves, intervener, seeks to have a claim against the insolvent Platte Valley State Bank adjudged to arise from a trust and entitled to preference over claims of general depositors. From an adverse judgment in the district court, she has appealed.

The record discloses the following pertinent facts: In March, 1931, there came into the possession of William S. Trumbull, as clerk of the district court for Scotts Bluff county, Nebraska, the sum of $1,904.75, the property of

intervener, which represented her share of the proceeds of lands sold in partition proceedings. On the same day Trumbull deposited the fund so received in the Platte Valley State Bank to his credit as such clerk, where it remained until the 30th of January, 1933.

Trumbull, as clerk of the district court, drew a check upon the Platte Valley State Bank, bearing date January 28, 1933, payable to the order of the Platte Valley State Bank, for $1,904.75, with this written memorandum on the face of the check above his signature: "Case No. 4684. Bates vs. Lacy, et al. For transfer to credit of Susan V. Reeves." On the same day that the check bears date Mr. Trumbull wrote the following letter to Mrs. Reeves:

"My Dear Mrs. Reeves:

"Re: Bates vs. Lacy (No. 4684)

"This is to advise you that we have placed the sum of $1,904.75, due you in the above case under the Court's decision therein rendered, to your credit in the Platte Valley State Bank of Scottsbluff, Nebraska. Under the order of the Court in this case finding that you were entitled to this sum of money this office was required to get your receipt for the same. We are enclosing a copy of the receipt, the original of which we are leaving at the bank with instructions at the bank to require you to sign this receipt upon turning the money over to you.

"Yours very truly,
"W. S. Trumbull,
"Clerk of the District Court."

Mr. Trumbull took the check and the original of the receipt, referred to in the letter, to the bank, and the vice-president of the bank made out a duplicate deposit slip showing deposit to credit of "Susan V. Reeves @ Bates vs. Lacy et al. Check By W. S. Trumbull, Clk. of Dist. Court $1,904.75." The duplicate was given to Mr. Trumbull. The receipt delivered at the same time to the bank was as follows:

"In the District Court of Scotts Bluff County, Nebraska.

"Celeste Bates and Ruben Bates,
Plaintiffs,
vs. Receipt
John H. Lacy, Mary A. Riege and
Fred Riege, wife and husband, et al.,
Defendants.

"I, Susan V. Reeves, do hereby acknowledge receipt of the sum of $1,904.75 due me under the Court order in the above entitled case, which sum of money was placed at my credit by W. S. Trumbull, Clerk of the District Court of Scotts Bluff County, Nebraska, in the Platte Valley State Bank on January 28th, 1933.

"Dated this —— day of ————, 193—."

Thereupon the check was charged against the account of Trumbull as clerk of the district court, and an account was opened upon the ledger of the bank in the name of Susan V. Reeves, showing a deposit of $1,904.75, with this notation at the top of the ledger sheet: "To be paid upon execution of receipt attached," being the form of receipt given by Trumbull to the bank.

Some time after March 4, 1933, Mrs. Reeves called at the bank and asked if there was money there for her. She was informed that the money was to the credit of Mr. Trumbull and that she would have to see him. Thereupon she went to see Mr. Trumbull and he informed her that the money was not to his credit but to her credit. Incidentally, it may be noted that this was after the bank holiday when the bank was under restrictions, as were all other state banks at that time. Mrs. Reeves was later informed that she could receive 5 per cent. of the amount. This she refused. Matters stood thus until the 4th of April, 1933, when the bank was taken over by the department of trade and commerce of Nebraska, and on April 20, 1933, was adjudged insolvent and a receiver appointed. The receiver classified the claim in favor of Mrs. Reeves as one for general deposit. Mrs. Reeves thereupon filed in the receivership proceedings a petition in intervention, claiming that the fund was held in trust by the bank,

and that she was entitled to a preference over the claims of general depositors. As above indicated, the trial court entered an order denying her the relief for which she prayed.

Whether a trust arose must be determined, under well established principles of law, as applied to the circumstances disclosed by the record, including the purpose and intent of the clerk and the bank in the transaction, where the check was presented to the bank and charged against the account of the clerk.

Deposits of funds in a bank have various characteristics. For instance, a deposit of funds in a bank to the credit of the depositor ordinarily is termed a general deposit. In such case, the title to the funds deposited passes to the bank, and the relation of debtor and creditor exists between the bank and the depositor. Then there is another class known as special deposits, where the property, securities or funds are left with the bank for safe-keeping only, and the specific property or fund to be returned to the depositor. In such case, the bank is a mere bailee. The title to the deposit does not pass to the bank but remains in the depositor. Then there is another class of deposits where the deposit is made for a specific purpose, as where the fund is delivered to the bank for a particular, specific purpose. Where a fund is deposited in a bank for purpose of paying a specific obligation, it is termed a deposit for a specific purpose. In such case, the bank acts as the agent of the depositor, and if the bank should fail to apply it as directed, or should misapply it, it may be recovered as a trust deposit. 7 C. J. 628, 630, 631.

This court has held on numerous occasions that, where a deposit of funds is made in a bank for paying a specific debt of the depositor, and the bank fails or neglects to apply the fund to the purpose for which the deposit was made, and thereafter becomes insolvent, a trust arises. See *Scotts Bluff County v. First Nat. Bank,* 115 Neb. 273, 212 N. W. 617; *State v. State Bank of Touhy,* 122 Neb. 582, 240 N. W. 925; *Nutrena Feed Mills, Inc., v. Superior Whole-*

sale Grocery Co., 122 Neb. 728, 241 N. W. 522; *State v. Citizens State Bank*, 124 Neb. 562, 247 N. W. 345; *State v. Bank of Otoe*, 125 Neb. 530, 251 N. W. 111; *State v. Farmers & Merchants Bank*, 125 Neb. 800, 252 N. W. 316; *Davis v. Polak*, 126 Neb. 640, 254 N. W. 246.

It is the contention of the receiver that no deposit of funds was made by the clerk of the district court for the benefit of the intervener; that it was merely a shifting of credits, and, hence, no trust could arise. We think this view cannot be sustained. In *Bartley v. State*, 53 Neb. 310, 73 N. W. 744, this court held: "The giving of credit as a deposit for the amount of a check, by the bank upon which it is drawn, is, in contemplation of law, a payment of the check in money, to the same extent as though the currency had been paid over the counter on the check and immediately redeposited by the payee." See, also, *State v. Bank of Otoe, supra.*

In the instant case, it is conceded that the clerk of the district court was indebted to Mrs. Reeves in the sum of $1,904.75. The clerk desired to discharge that obligation. The clerk had to his credit in the Platte Valley State Bank funds far in excess of the amount of the check. The bank had the cash in its tills and vaults with which to pay the check, and, when the bank accepted the check of the clerk for the purpose of discharging his obligation to Mrs. Reeves, and charged the amount of the check against his account, it was equivalent to the payment of the amount of the check to the clerk and a redeposit by him of that amount for the purpose of paying a specific obligation that he owed to Mrs. Reeves. Under the circumstances disclosed, the bank then became the agent of the clerk. It accepted the deposit from him for the purpose of paying a specific obligation. The bank had but one duty to perform and that was to pay that amount over to Mrs. Reeves upon her signing a receipt for the fund. The bank had no right to create, as it attempted to do, the relation of debtor and creditor between itself and Mrs. Reeves. She then had no knowledge that the money had been

deposited in the bank for her. She never consented to become a mere creditor of the bank. Under the circumstances, we think it clear that a trust was created. The clerk, as depositor, was creator of the trust; the bank was the trustee, and Mrs. Reeves was the beneficiary of the trust. True, she might have refused to become the beneficiary of the trust and have claimed the fund from the clerk of the court. However, she was privileged to accept, and has accepted, the provisions of the trust created by the clerk for her benefit.

Under the facts disclosed by the record, the trial court erred in not allowing Mrs. Reeves her claim as one arising out of a trust and entitled to preference over the claims of general depositors.

The judgment of the district court is reversed and the cause remanded, with directions to enter a decree allowing the claim of Mrs. Reeves as one arising out of a trust and entitled to payment in preference over the claims of general depositors.

REVERSED.

HOWARD KENNEDY, TRUSTEE, APPELLANT, V. DAWES COUNTY ET AL., APPELLEES.

FILED JANUARY 15, 1936. No. 29294.

1. **Taxation: VOID TAXES: RECOVERY.** The liability of a county to the holder of a tax sale certificate for a refund upon taxes illegally assessed by the county is measured solely by the statute relating thereto.
2. **Limitation of Actions.** If the action against the county is barred on its face by the statute of limitations, such petition will not stand against a demurrer.

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

Dysart & Dysart and *G. T. H. Babcock,* for appellant.

R. R. Wellington, contra.

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

PAINE, J.

This is an appeal from the ruling of the district court in sustaining a general demurrer to the petition of the plaintiff and appellant and dismissing the petition.

The action was brought as an appeal from the disallowance of a claim by the board of county commissioners of Dawes county. The claim rejected was for the refund of a portion of money paid to the county treasurer for the purchase of certain tax sale certificates duly issued by the county treasurer, and covering various tracts of land in Dawes county, Nebraska.

Tax certificate No. 10518 described the southeast quarter of section 3-32-51 and other lands, and tax certificate No. 10517 included the southeast quarter of section 35-33-51 and other lands, in Dawes county. All other described lands set out in said certificates having been redeemed, foreclosure was commenced in the district court for said county on above described lands by Peters Trust Company, a corporation, trustee, the owner and holder of said certificates, such foreclosure being started just a few days before the five years expired. Issues were duly raised by, and joined with, the owners and occupants of the above described land. It is to be noted, however, that Dawes county, the defendant and appellee herein, was not made a party to such foreclosure action, and that the Whitney Irrigation District, of Whitney, Dawes county, Nebraska, was the intervener and claimant, who secured the setting aside of certain lands from said tax sale certificates, upon the claim that the land had been condemned and title acquired by the irrigation district, and, although this fact was not alleged in the petition, a part of each tract was exempt from taxation by reason of being a reservoir site for storage of water for irrigation purposes. After hearing thereon, the court found that 145 of the 160 acres covered by certificate No. 10517, and 25 of the 40 acres covered by

certificate No. 10518, were therefore exempt from taxation, except only 15 acres in each tract, and that the balance of the tax was illegally assessed against the same and void, and canceled said tax on said exempt portions in the sum of $389.82.

A duly verified claim, with a copy of the decree of the district court attached, was thereupon filed with the county commissioners of Dawes county for a refund of the amount of taxes so found and decreed to be void by the court, in the sum of $389.82. Said claim was disallowed by the county commissioners, and an appeal was thereupon taken to the district court for Dawes county from said disallowance, and, the petition on appeal being duly filed, a general demurrer was filed to said petition, and was sustained by the district court, and the action dismissed.

Section 77-2030, Comp. St. 1929, provides, in brief, that if land has been sold for taxes by the wrongful act of the treasurer, or other officer, by error in describing land upon which no tax was due, the county shall hold the purchaser harmless by paying him the amount of the principal, interest, and costs; and section 77-2054 is another statutory provision relating to the same matter, and providing that the county need only pay 6 per cent. interest in making such refund.

Several actions to recover taxes from a county for illegal taxes assessed and paid have recently been before our court. In *Haarmann Vinegar & Pickle Co. v. Douglas County,* 122 Neb. 643, 241 N. W. 117, it was held that an absolutely void tax, though paid voluntarily, may be recovered in an action brought for said purpose.

In limiting this statement, it was said in *Monteith v. Alpha High School District,* 125 Neb. 665, 251 N. W. 661, that such taxes can only be recovered by virtue of some statute permitting it; also, that the statute of limitations begins to run from the time of the payment of the tax. In *Dorland v. City of Humboldt,* 129 Neb. 477, 262 N. W. 22, it was held that, while the legislature could change statutes prescribing limitations to acts, yet it could not remove the

bar which had already become complete, even by a curative act.

Then our court, in the case of *Gibson v. Dawes County*, 129 Neb. 706, 262 N. W. 671, held that an action by the holder of a tax sale certificate for a refund of illegal taxes, and subsequent taxes paid thereon, is barred by the statute of limitations, unless presented in some form to the county for allowance within five years from the date of the sale.

From an examination of section 77-2030, Comp. St. 1929, and these recent decisions of our court, it is clear that statutes of limitation relative to tax refunds are to be strictly construed.

The appellant cites us to *Fuller v. County of Colfax*, 33 Neb. 716, 50 N. W. 1044; *Farm Investment Co. v. Scotts Bluff County*, 125 Neb. 582, 251 N. W. 115, and *Wilson v. Butler County*, 26 Neb. 676, 42 N. W. 891, and insists that the reasoning in these cases is more persuasive than in our later cases. We are unable to agree with this contention, and must hold that this case is clearly supported by the later cases discussed above, as well as by the case of *Wetzel v. Dawes County*, 129 Neb. 711, 262 N. W. 674.

In the case at bar, the public tax sale certificate was issued on November 3, 1923, to the Peters Trust Company, and subsequent delinquent taxes were also paid thereon. The claim was filed January 21, 1931, and disallowed by the board of county commissioners on February 7, 1934, and the petition on appeal against Dawes county was filed in the district court on March 3, 1934.

The action for such refund was clearly barred in five years from the date of the tax sale certificate, and the ruling of the district court, in sustaining the demurrer to the petition, was right, and it is

AFFIRMED.

AMERICAN LAW BOOK COMPANY, APPELLANT, V. FERRIN VAN & STORAGE COMPANY: JOSEPH C. COOK, INTERVENER, APPELLEE.

FILED JANUARY 15, 1936. No. 29463.

Mortgages: FORECLOSURE: SALE: "PURCHASER." A mortgagee who in good faith buys the mortgaged property at a proper foreclosure sale becomes a purchaser within the terms and meaning of section 36-208, Comp. St. 1929.

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

Byron W. Hunter, for appellant.

R. E. McCormack, Cook & Cook and *J. F. Morehouse, contra.*

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

KROGER, District Judge.

In 1929 the American Law Book Company, appellant, sold to one Goldman a set of Corpus Juris under a conditional sales contract, which contract was never recorded in Douglas county, Nebraska, the county where Goldman lived. Volumes 50 to 58, inclusive, were not paid for. On May 11, 1934, appellant sued out a writ of replevin in the municipal court of Omaha to recover possession of the books in question. In this action Joseph C. Cook intervened and in his petition of intervention alleged that he was the owner and in possession of the books in controversy, having obtained the same by foreclosure of a chattel mortgage given him by Goldman. Trial was had in the municipal court, which resulted in a judgment in favor of intervener. An appeal was taken to the district court for Douglas county, which also resulted in a judgment in favor of intervener. From this latter judgment appellant, plaintiff in the court below, prosecutes this appeal.

There is no dispute as to the facts, which were all stipulated. According to the stipulation, the mortgage from

Goldman to intervener was recorded in Douglas county on October 17, 1932, and on January 29, 1934, in a replevin action, intervener obtained judgment in the municipal court of Omaha for possession of said books. After obtaining said judgment, the books were duly advertised for sale by intervener under and by virtue of his chattel mortgage, and on March 20, 1934, a sale was had, at which sale intervener became the purchaser.

It is the contention of appellant that a mortgagee of a conditional vendee is not a purchaser within section 36-208, Comp. St. 1929, and cannot by his mortgage acquire any rights superior to those of the conditional vendee, though the contract of conditional sale is not filed as required by that section.

Intervener admits that, as mortgagee of the conditional vendee he was not a purchaser within section 36-208, *supra,* but contends that, when he purchased the books at foreclosure sale, he became a purchaser or a judgment creditor within the terms and meaning of that statute.

By a long line of decisions, beginning with *Aultman, Miller & Co. v. Mallory,* 5 Neb. 178, it is established that the rule of *caveat emptor,* except as modified by statute, applies to sales of personal property in this state, and one purchasing personal property from another in actual possession thereof, in good faith and for a valuable consideration, purchases at his peril and takes only such title as his vendor has.

Section 36-208, Comp. St. 1929, makes an exception in that it provides that no sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any purchaser or judgment creditor of the vendee or lessee in actual possession, etc., unless a copy of such contract be filed in the office of the clerk of the county within which such vendee or lessee resides.

This court has held that a mortgagee of a conditional vendee is not a purchaser within the meaning of the above exception. *Campbell Printing Press & Mfg. Co. v. Dyer,* 46

Neb. 830, 65 N. W. 904; *Racine-Sattley Co. v. Meinen,* 79 Neb. 33, 114 N. W. 602.

It has been held that, at a foreclosure sale, the thing offered and sold, unless the decree otherwise provided, was every right, title and interest of all the parties to the action. *Hart v. Beardsley,* 67 Neb. 145, 93 N. W. 423.

If Goldman had made an outright sale of the property in controversy to the intervener, such sale would have been valid as against appellant's claim. It has been held, and we believe the better reasoning supports the position, that statutes making conditional sales void as against *bona fide* purchasers from the vendee, unless the contract is recorded, are not restricted to purchasers at voluntary sales made by the vendee, but include judicial or execution sales against him. 55 C. J. 1250; 35 C. J. 84; *Pugh v. Highley,* 152 Ind. 252, 53 N. E. 171.

Had appellant instituted this action prior to the foreclosure sale, its claim, would have been superior to the interest of intervener; but, after the foreclosure sale, intervener was a purchaser of the vendee within the terms and meaning of section 36-208, *supra.*

The judgment of the district court was right and is

AFFIRMED.

JOHN BOEHLER, APPELLANT, V. CECIL KRAAY ET AL., APPELLEES.

FILED JANUARY 24, 1936. No. 29448.

1. **Appeal.** In a jury trial, where the finding is based on conflicting evidence, the verdict will not be disturbed unless clearly wrong.
2. **Landlord and Tenant.** A lease of a farm, in the absence of exceptions therein, includes the right to occupy buildings on the farm.
3. ———. The use of the word "summer," in describing the term of an oral lease of a farm on which seasonal crops are to be raised, is intended to be used in its broadest sense and means the farming season.
4. **Forcible Entry and Detainer.** "The plea of 'not guilty,' in an

action of forcible entry and detainer, requires the plaintiff to prove every fact necessary to entitle him to recover." *Galligher v. Connell*, 23 Neb. 391, 36 N. W. 566.

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

Earl E. Walker and *J. F. Ratcliff*, for appellant.

Charles E. McCarl, contra.

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

GOSS, C. J.

Plaintiff appeals from a judgment on a verdict against him in his action of forcible entry and detention against defendants. He claims that he employed defendant Cecil Kraay, about November 1, 1933, to shuck corn and, as a part of the consideration, allowed defendant the use of certain rooms in the dwelling on the farm until the completion of the employment. Defendants, under a plea of not guilty, based their defense upon an oral agreement between the parties that Kraay was not only to shuck the corn but was to rent the farm, except the land theretofore planted to wheat by plaintiff, for the following year under a crop share rental of one-third of the crop. There is no dispute that Kraay lawfully began to occupy the dwelling in the fall of 1933, shucked the 1933 crop of corn and was paid for it. There is a very sharp conflict in the evidence as to any agreement that he leased the premises for 1934.

Cecil Kraay testified that the latter part of September, 1933, he went to see plaintiff at the farm and talked about renting it. Plaintiff said if he rented the place to Kraay the latter would have to shuck the corn. Kraay said he had a job and would not quit it to shuck the corn and plaintiff stated he would let him know. Later plaintiff wrote him he could have the place. He moved in on October 16, 1933, and shucked the corn. Early in January, 1934, they had a conversation and agreed that Kraay was to rent the place, except the land plaintiff planted to wheat, for one-third of

the crop delivered in town. Kraay asked when they could fix up the contract to that effect. Plaintiff said he was busy that day. On March 12, 1934, they were together in a field topping cane and plaintiff said, "We must get around and fix up this contract. The age I am, I am not healthy and my family would not treat you nice." Kraay said, "Why not fix it up this noon?" Plaintiff said, "It is so nice, and I want to finish topping this cane," so nothing was done about putting the contract in writing. Asked as to the length of time he was to have the place, Kraay testified, "He said for the summer."

Plaintiff testified that he merely hired Kraay to shuck the 1933 corn and let him occupy the rooms in the farm dwelling as a neighborly accommodation. He let Kraay stay in the house and do work for the neighbors, but when he was there after March 1, 1934, he served notice to quit and this action resulted.

The jury resolved the evidence in favor of defendants. The evidence was sufficient to support the verdict and resulting judgment. In a jury trial, where the finding is based on conflicting evidence, the verdict will not be disturbed unless clearly wrong.

Plaintiff claims the court erred in several particulars in an instruction (too long to quote) in which the court, after setting out the claims of each party and after setting out what appears from the evidence to be uncontradicted, told the jury what the burden was upon plaintiff to prove. One complaint is that the court said defendant claimed that plaintiff leased to him the premises (except such as had theretofore been planted to wheat) "for the summer or season of 1934 by the terms of which the defendant was to have the privilege of occupying said premises and the buildings thereon." Plaintiff argues that nothing should have been said about the buildings as there was no testimony about the buildings. There was testimony about the buildings. There was evidence that there was a dwelling-house on the farm, that plaintiff let defendant have the use of certain rooms under defendant's engagement to shuck the

1933 corn for him, and that plaintiff wanted to rent the farm for 1934 to some one who would live in the house so that plaintiff could live in town. A lease of the "premises" would include occupancy of the buildings, and we see no error in the court making plain to the jury that a lease, if any, of the premises included the right to occupy the buildings on those premises.

Plaintiff argues that it was erroneous for the court to inform the jury that the term of the lease claimed was "for the summer or season" of 1934; that the word "season" was not used in the evidence and therefore should not have been used in the instruction. It is true that defendant in his testimony used only the word "summer," but the agreement as to a lease, if made, contemplated, as shown by the evidence, that seasonal crops would be planted. Every one in this agricultural section, including judges, knows that crops like corn are not harvested in the "summer." So we see no error in the employment by the trial court of the word "season." See *Vanderhoef v. Agricultural Ins. Co.*, 46 Hun (N. Y.) 328.

Finally, it is claimed that the instruction was erroneous in that it failed to place the burden of proof on Kraay to establish his lease. It must be remembered that this was a suit for unlawful and forcible detention. Defendants' only plea was that of "not guilty." The first point of the syllabus in *Galligher v. Connell*, 23 Neb. 391, 36 N. W. 566, says: "The plea of 'not guilty,' in an action of forcible entry and detainer, requires the plaintiff to prove every fact necessary to entitle him to recover." In the body of the opinion it is said: "The action of forcible entry and detainer in this state is a civil remedy, although to some extent criminal in form; thus the plea of not guilty shifts upon the plaintiff the burden of proof, and requires him to establish every material fact on which his right to recover depends."

In the instruction complained of, the trial court placed the burden upon plaintiff to prove the material allegations of the complaint, stating them, and then instructed the jury: "If the plaintiff has failed to prove the foregoing

material facts by a preponderance of the evidence, or if you believe from the evidence that the plaintiff leased the premises in controversy herein to the defendant Cecil Kraay (describing the terms), you should return a general verdict finding the defendants not guilty." This instruction did not place upon plaintiff the burden of disproving Kraay's lease, nor did it place upon defendants the burden of proving the lease. If a preponderance of the evidence showed the existence of the lease, it defeated plaintiff's claim that he was entitled to the possession of the property at the time he served the notice to quit. That was the naked issue, stripped of all verbal clothing, upon which the cause was based. Comp. St. 1929, sec. 21-1405; *Moore v. Parker*, 59 Neb. 29, 80 N. W. 43; *Blachford v. Frenzer*, 44 Neb. 829, 62 N. W. 1101. The instruction was not erroneous.

The judgment of the district court is

AFFIRMED.

OMAHA PRINTING COMPANY, APPELLEE, V. CHARLES E. MACK ET AL., APPELLEES: PAUL MILLS, APPELLANT.

FILED JANUARY 24, 1936. No. 29512.

1. **Reward.** In equity, all parties are entitled to share in a reward for the apprehension of a criminal whose apprehension was a result of their combined efforts.
2. ———. Record examined, decree of distribution of reward modified, and judgment reversed, with directions.

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

R. H. Olmsted, for appellant.

Smith & Schall, Gerald M. Vasak, Mapes, Johnson & Maynard and *N. H. Cornell, contra.*

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

GOSS, C. J.

Omaha Printing Company offered a reward of $500 for the apprehension of the murderer of its salesman, Russell Goodwin. The murderer was apprehended and confessed. Thereupon so many parties claimed the reward, or a share of it, that Omaha Printing Company brought a suit in equity interpleading those parties known to it as claimants and deposited the reward in court to be paid to the claimant or claimants equitably entitled to it. After a trial the court decreed as follows:

"That after the payment to plaintiff of its costs of $11.00 that the following defendants be paid the following proportions of the $489.00 balance of said reward: Charles E. Mack, $150.00; Louis H. Stecher, $150.00; Stanley Ondracek, $150.00; Louis Alperstedt, Edward Dewey Dau and Elmer Schwab, each $13.00.

"That the defendants Paul Mills, Hans F. Boll and Wesley Pace are not entitled to any part of said reward."

Paul Mills, one of defendants, appealed. While the case is for review *de novo,* the other defendants appear satisfied as to the awards made in the district court.

The inquiry is as to whether Paul Mills is equitably entitled to the reward or any part of it.

Paul Mills, residing at Lincoln, and general agent for an Iowa insurance company, was in Oakland, Nebraska, on business, September 7, 1934, intending to stay there over night. He read in an Omaha evening paper an account of Goodwin's murder, on the morning of September 6, a description of the man suspected, the fact that he had abandoned Goodwin's car when it ran out of gas, and was going east and north on foot. So he ate an early supper and left Oakland for Hooper, in the hope of finding the accused. When about two miles north of Hooper he passed the suspect and intended to offer him a ride but changed his mind when he saw that the party, who proved later to be Malmberg, the murderer, had his hand in his coat pocket, evidently carrying a gun. Mills drove to a filling station at the north edge of Hooper and engaged Wesley Pace, the attend-

ant, to telephone to Mack, the city marshal, the fact that the suspect was coming from the north and his description and that Mills would go to the office of Meyer, the justice of the peace. Mills then drove down-town, found Meyer, and went with him to Meyer's office in the city hall. In a few minutes Charles Mack, the marshal, came, told him Pace had telephoned him the description of the suspect, asked and received from Mills a further description, left and returned shortly afterward with Malmberg. He had taken a gun from Malmberg and Mills asked for it and examined it. Pace and Meyer corroborate Mills as to the testimony of Mills concerning his part in getting notice to the marshal. Mills was not present at the arrest.

It is to be noted that the reward was not offered for the arrest, or for the arrest and conviction, but for the apprehension of the murderer.

Janvrin v. Exeter, 48 N. H. 83, is cited by appellant. There, however, the reward was offered by the town under a state statute for the "apprehension and securing of a person charged with a capital or other high crime." In the opinion it is said: "It is obvious that two or more persons may join in detecting and apprehending an offender, and if they do so, they are jointly entitled to the reward, and should join in the suit. It is like other cases of joint service, and is governed by the same rules. If, indeed, sundry persons separately undertake to secure a culprit, and one without concert with others succeeds in apprehending him, he alone is entitled to the reward, and alone should sue. There may be cases where it might be difficult to determine whether certain persons did act in concert or not, but this cannot affect the rule that those who have jointly performed the service should join in the suit."

The foregoing was quoted with approval in *Elkhorn Valley Lodge v. Hudson,* 59 Neb. 672, 81 N. W. 859. In that case many persons were engaged in the search for a dead body for the recovery of which a reward was offered. One acting on his own account, independent of others and for the purpose of securing the reward, found the missing body.

The district court found that this party was entitled to the whole of the reward, but said: "In a controversy over the right to such reward, or to a portion of it, whether a person acted independently of others and on his individual account, or whether the discovery was the result of the joint action and combined efforts of several, is a question of fact to be tried as all other controverted questions of fact." That was a law case and, while the facts are somewhat different from those in the instant case, the principles are quite applicable here.

Stanley Ondracek, the Schuyler marshal, was of great service in bringing about the apprehension of Malmberg. The morning Goodwin was shot he drove to the place where he was shot and his car taken from him; he learned that Goodwin had been taken to a hospital in Columbus and proceeded there, where he secured from Goodwin, who was still conscious, a description of the assassin; he telephoned the facts to various sheriffs, to radio stations and to newspapers; he drove that day and the next in search of Malmberg and on his track; his prompt and intelligent action was responsible for the apprehension of Malmberg as much as that of any of the parties even though he was not in at the arrest. It was responsible for exciting the interest and changing the plans of Mills.

The action of Mills brought notice to Stanley Mack that Malmberg was in the immediate neighborhood and caused him to go out and arrest him. Stecher, too, had notice of the description of Malmberg and was looking for the marshal to take him into custody. Mack was aided by Stecher and his associates and arrested Malmberg a few minutes after he had connected up with Mills and secured a further description of Malmberg.

Can it be said that Mills was not acting in concert with Mack in the apprehension of the prisoner? Or that Ondracek was not acting in fact in concert with him and Stecher and the rest and primarily responsible for the publication of the description of Malmberg which led to his apprehension? The trial court awarded Ondracek a large share

though he was not present at the arrest. The facts are so different from the finding of a dead body in the case of *Elkhorn Valley Lodge v. Hudson, supra,* that we think all parties who helped to publish the information, to carry it to the arresting officer and who participated immediately in the arrest ought to share in the reward. The decree of the trial court distributed it among all of these but Mills. We think this did not do equity as to Mills and that he ought not to have been omitted entirely from the award. Of course the fact that he apparently lost active interest after contacting the marshal and did not attend the marshal when the marshal went out to find and take Malmberg into custody does not put him on an equality with Stecher, who likewise identified Malmberg on the road, who kept track of him, pointed him out to Mack and was present when Mack made the arrest; nor with Mack, who was the arresting officer; nor with Ondracek, who was initially responsible for making the identification of Malmberg possible. It seems that he was entitled to about half as much of the reward as each of the three actors above named—that is, $75.

The judgment of the district court is reversed, with directions to so modify it as to distribute the $489 as follows: To Alperstedt, Dau and Schwab, each $13; to Mills $75 and his taxable costs on appeal; after the payment of all taxable costs on appeal to the parties entitled thereto, and such other costs as may be taxed in the district court, the balance to be divided equally among Mack, Stecher and Ondracek.

REVERSED.

FRANK NOCITA, APPELLEE, V. ANTONIO GUILIANO ET AL., APPELLANTS.

FILED JANUARY 24, 1936. No. 29479.

Appeal. Instructions which withdraw from the consideration of the jury material issues of fact presented by the pleadings and the evidence are erroneous.

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

Morgan, Sutton & Fromkin, for appellants.

Paul J. Garrotto, contra.

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

ROSE, J.

Frank Nocita, plaintiff, claimed that at the special instance and request of Antonio Guiliano and Rosa Guiliano, defendants, he lent to them for necessaries of life $35 on February 24, 1928, and $205 on March 20, 1928; that, in spite of many demands for repayment, no part of the loans has been repaid by them except $40 on July 14, 1931, and $100 on August 31, 1932. In the petition there was a prayer for judgment for the balance of the loans with legal interest.

In a joint answer by defendants, Antonio Guiliano denied he borrowed any money from plaintiff or paid him anything after March 20, 1928, and pleaded the lapse of four years between that date and the commencement of the action and the barring of plaintiff's claim by the statute of limitations. Rosa Guiliano pleaded coverture, and alleged that, if she agreed to pay plaintiff any money, she did not contract with reference to, or intend to bind, her separate estate, trade or business; had no property, trade or business March 20, 1928, nor since, with reference to which she could contract or bind herself. In addition to other defenses the answer contained a general denial. The reply to the answer was also a general denial.

Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $185. From a judgment therefor, defendants appealed.

Pending litigation Antonio Guiliano, defendant, died and the action was revived in the supreme court in the name of Sebastiano Basso, administrator of the estate of Antonio Guiliano, deceased.

Among many assignments of error, it is insisted on

appeal that the district court erred to the prejudice of defendants in failing to submit to the jury issues raised by the pleadings and evidence and material to the defense. In the first instruction to the jury the claim of plaintiff as pleaded in the petition was properly stated. The second instruction was as follows:

"Defendant Antonio Guiliano for answer denies all the allegations of the petition, and defendant Rosa Guiliano alleges that she is a married woman and that if she entered into an agreement whereby she agreed to pay any sums of money, that she did not intend to bind her separate property and alleges that she has no separate property, and denies liability."

The third instruction charged:

"The burden is upon the plaintiff to prove his case by a preponderance of the evidence. If you find that he has made such proof, then your verdict will be in favor of the plaintiff. If you find that he has failed to make such proof, then your verdict will be for the defendants."

The fourth instruction was in this form:

"You are instructed that this is a case in contract, wherein the plaintiff alleges that he loaned money to the defendants in February and March of 1928, and the case simmers down to a question of credibility of the witnesses. If you believe the testimony of the plaintiff and his wife, that the two defendants visited the home of the plaintiff and made arrangements for the loan of the money in question, then you are instructed that you would be justified in finding that the defendant, Rosa Guiliano, acted as the agent of the defendant Antonio Guiliano in procuring the money from the plaintiff through his wife. You are further instructed that if you believe the testimony of the plaintiff and his wife, your verdict will be in favor of the plaintiff in the sum of $185, which includes principal and interest. If you believe the testimony of defendants, then your verdict should be in favor of the defendants."

There was no further instruction on the issues. Defendant Antonio Guiliano specifically denied in his answer that

he borrowed any money from plaintiff or made any payment to him after March 20, 1928—the date of the last loan as alleged in the petition. It was alleged in the answer that the cause of action, if any, was barred by the statute of limitations. The facts to which Antonio Guiliano testified were the same as alleged in his answer to the petition. The instructions as a whole, therefore, omitted a vital issue or withdrew from the jury an issue material to the defense. Furthermore, the law on the defense of coverture was not stated to the jury, though the evidence on that issue was in conflict. It is familiar law that instructions which withdraw from the consideration of the jury material issues of fact presented by the pleadings and the evidence are erroneous. *Levy v. Cunningham,* 56 Neb. 348, 76 N. W. 882; *Hayden v. Frederickson,* 59 Neb. 141, 80 N. W. 494. For the prejudicial errors explained, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

STOCKMENS STATE BANK, APPELLEE, V. LEWIS POLLAT: ANNA S. DRAKE, APPELLANT.

FILED JANUARY 24, 1936. No. 29490.

1. **Bills and Notes:** ACCOMMODATION MAKER. "One to be an accommodation maker of a promissory note must not receive any benefit or consideration directly or indirectly by way of the transaction of which the note was a part, and the transaction must be one primarily for the benefit of the payee." *Farmers Nat. Bank v. Ohman,* 112 Neb. 491, 199 N. W. 802.
2. ———: CONSIDERATION. "A consideration moving to one of several joint makers of a promissory note is good as to all." *First Nat. Bank v. Golder,* 89 Neb. 377, 131 N. W. 600. Followed in *Farmers Nat. Bank v. Ohman,* 112 Neb. 491, 199 N. W. 802.
3. ———. In an action on a promissory note, evidence outlined in opinion *held* insufficient to sustain a verdict in favor of defendant on the issue of accommodation maker.
4. **Trial:** DIRECTION OF VERDICT. Where the evidence is insufficient to sustain a verdict in favor of defendant, a directed verdict in favor of plaintiff is not erroneous.

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

Hoagland, Carr & Hoagland, for appellant.

Halligan, Beatty & Halligan and *Lowell C. Davis, contra.*

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

ROSE, J.

This is an action on a promissory note for $1,900, dated April 16, 1932, and payable 60 days thence. The Stockmens State Bank, payee, commenced the suit, but S. D. Ralston, present owner of the note, was substituted plaintiff pending litigation. The note was executed and delivered by Lewis Pollat and Anna S. Drake, defendants, and contains this provision:

"Each hereby pledges his or her separate property and estate for the payment of this note."

In a separate answer defendant Anna S. Drake pleaded in substance that the note was a renewal of a 2,500-dollar note reduced by payments to $1,900; that no consideration for the execution of either note ever passed to her; that her signatures were procured to make the notes bankable for the accommodation of the bank with the assurance of S. D. Ralston, its president, that no liability for payment would attach to her; that she was a married woman and did not bind, or intend to bind, her separate estate. In addition to a general denial, the reply to the answer contained the allegation that the answering defendant executed the note in suit for a valuable consideration, agreeing to bind herself and her separate estate for payment.

Upon a trial of the issues the district court gave the jury a peremptory instruction in favor of plaintiff. From a judgment for $2,189.50 against both defendants on the directed verdict, they appealed.

The controlling question presented by the appeal is raised by the assignment that the district court erred in directing a verdict for plaintiff, because, as defendant Anna S. Drake

contends, she made a defense for the consideration of the jury on the issue that she signed the note in suit without any consideration as an accommodation to the payee, the Stockmens State Bank, within the meaning of the following rules of law:

"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." *Luikart v. Meierjurgen,* 124 Neb. 816, 248 N. W. 379.

"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, 207 N. W. 673.

The following facts are shown by the evidence without dispute: Lewis Pollat and Anna S. Drake, defendants, are brother and sister. In the summer of 1930 Pollat negotiated with S. D. Ralston, president of the Stockmens State Bank, for a bank loan of $2,500 with which to purchase the stock and equipment of the Cozad Auto Company, and was distinctly told that an offer of a chattel mortgage on that property, if purchased, would not be accepted as security and that a bankable note with two signers would be required as a condition of the loan. Pollat asked Ralston if his sister would do, if she signed a note with him, and was told that she would. Pollat afterward called on her and asked her if she would sign with him the original note for $2,500. Within two or three days she went to the bank and signed the note which had been previously signed by her brother. He received in cash from the bank $2,500 and with it paid the purchase price of the stock and equipment of the Cozad Auto Company. There were several renewal notes, each signed by both defendants. The last of the series was the note in suit for $1,900, the debt having been reduced by payments to those figures.

Pollat made no defense for himself. His sister called him as a witness. On cross-examination he admitted he

told Ralston, before the loan was made, that his sister "would come down to see him and sign the note." Defendant Anna S. Drake was a witness in her own behalf and said she had a conversation with her brother about signing a note with him and, pursuant thereto, went to the bank and conversed with Ralston on the subject. Asked what the conversation was, she testified as follows:

"I don't remember just the exact words, but my brother had asked me to sign some notes, and Mr. Ralston asked me if I would, and I asked him if I would be liable for the note and he said I wouldn't be, and he said he could not let my brother have the money because the banking law required two signatures and he wasn't taking a chattel mortgage so he wanted two signatures on the note. So I told him if that was the case I would sign with my brother."

By the same witness there was other testimony of a similar import to the effect that Ralston said her brother would pay the note; that she would not be liable thereon; that the bank required two signatures to make it bankable and satisfactory to the banking department. Her testimony, in view of facts shown without dispute, did not present a question for the jury on the issue that she signed the note without consideration for the accommodation of the bank. Ralston did not suggest Anna S. Drake as a signer. Her name was proposed by her brother and was acceptable. He asked her to sign the note. Both defendants knew in advance that Pollat could not procure the loan by signing a note and securing it by a chattel mortgage on the property to be purchased; that a bankable note with two signatures was required; that Pollat could not borrow the money without such a note. His sister by her signature enabled him to procure from the bank $2,500 in cash. In the note which she signed she promised to pay the debt evidenced by it and in effect contracted with reference to her separate estate. She went further and signed a property statement, showing a valuable interest in real estate, for the purpose of procuring credit with the bank for her com-

mercial paper. After she had been reminded of her liability and notified to meet her obligation she deeded her interest in her real estate to her husband. A fatal defect in the defense of accommodation maker was the failure to prove that the transaction was primarily for the benefit of the payee—the bank. In a former case it was ruled:

"One to be an accommodation maker of a promissory note must not receive any benefit or consideration directly or indirectly by way of the transaction of which the note was a part, and the transaction must be one primarily for the benefit of the payee." *Farmers Nat. Bank v. Ohman,* 112 Neb. 491, 199 N. W. 802.

The record shows conclusively that the person primarily benefited by the transaction was Pollat, who procured $2,500 in cash by virtue of his sister's signature. Without it the bank would have kept its money and Pollat would not have procured his loan. The evidence will not admit of any other conclusion. Under the circumstances, consideration moving directly to the sister was not necessary to a binding obligation on her part. The law has been stated as follows:

"A consideration moving to one of several joint makers of a promissory note is good as to all." *First Nat. Bank v. Golder,* 89 Neb. 377, 131 N. W. 600. Followed in *Farmers Nat. Bank v. Ohman,* 112 Neb. 491, 199 N. W. 802.

A bankable note was required by the bank as a condition of the loan. Both signers understood that in advance. An unsecured note bearing the signature of Pollat alone as maker was not bankable. The mere additional signature of an accommodation maker without liability would not supply the defect. The evidence is insufficient to sustain a verdict in favor of Anna S. Drake on the issue of accommodation maker. There was therefore no error in the refusal to submit that question to the jury. With the controlling issue thus determined on appeal, there is no prejudicial error in the proceedings and judgment of the district court.

AFFIRMED.

AUGUSTA ERWIN, APPELLANT, V. ELIZABETH KUHLMAN ET AL., APPELLEES

FILED JANUARY 24, 1936. No. 29496.

Deeds: PAROL EVIDENCE. Parol evidence is inadmissible to prove that grantor in a warranty deed conveying real estate to grantee without exception, condition or reservation retained a life estate therein by a contemporaneous oral agreement.

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

Charles W. Haller and *Birginal & Kersbergen,* for appellant.

George Evens, contra.

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

ROSE, J.

This is an action to quiet in Augusta Erwin, plaintiff, title to, and restore to her possession of, lots 5 and 6, block 1, in Clark Redick's Addition to Omaha. Elizabeth Kuhlman, and her guardian, Dorothy Layne, are defendants. Augusta Erwin and Dorothy Layne are daughters of Elizabeth Kuhlman, a widow who is more than 80 years of age and now too feeble physically and mentally to manage her own property. The mother, by her guardian, is in possession of the lots described, pays the taxes thereon, keeps buildings on the lots in repair and collects and uses the income therefrom. By warranty deed dated June 8, 1932, without restriction, condition or reservation therein, Elizabeth Kuhlman, the mother, grantor, conveyed each of the lots to her daughter, Augusta Erwin, grantee, for the recited consideration of one dollar. The deeds were recorded, but, with the abstracts of title, were subsequently kept in possession of grantor. The petition stated facts sufficient to constitute a cause of action to quiet the title in plaintiff.

The answer contained pleas to the effect that the deeds

were gifts from mother to daughter on condition of the right of grantor, during the remainder of her life, to retain possession of the property, to manage it and to enjoy the income therefrom. The reply put in issue facts pleaded as an affirmative defense.

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

On appeal plaintiff contends that the judgment in favor of defendants is erroneous and cannot be permitted to stand, because the life estate pleaded as the sole defense depends alone on inadmissible, oral testimony contradicting written terms of the duly executed and delivered warranty deeds which conveyed to plaintiff without conditions, restriction or reservation the absolute title to the real estate in controversy.

Copies of the warranty deeds are in the record. As drawn and executed they convey to plaintiff the absolute title to the real estate described therein without reserving a life estate or any other interest for the benefit of grantor. Parol evidence is inadmissible to prove that grantor in a warranty deed conveying real estate to grantee without exception, condition or reservation retained a life estate therein by a contemporaneous oral agreement. With the inadmissible oral testimony disregarded, as it should be on the issues as the record now stands, the judgment below is without support in the evidence. It does not necessarily follow, however, that defendants are wholly without a remedy in equity. If the testimony adduced by them is true, the warranty deeds do not express the entire contracts between the parties to them. The judgment of the district court is reversed, with permission to defendants, if so advised, to amend their answer to plead facts essential to, and pray for, reformation of the deeds to conform to the conditions on which they were executed.

REVERSED AND REMANDED.

ERMA MAE STERNS, APPELLEE, V. ADOLPH HELLERICH, APPELLANT.

FILED JANUARY 24, 1936. No. 29491.

1. **Automobiles:** FAMILY-PURPOSE DOCTRINE. Owner of family-purpose automobile may be liable for personal injury to guest riding therein, resulting from gross negligence of owner's son in operation of the automobile.
2. ———: GROSS NEGLIGENCE: QUESTION FOR JURY. Whether the driver of an automobile is guilty of gross negligence, who, after warning of a dangerous place in the road, continues to drive, at night, down a long, steep hill on a curving road at the rate of 50 miles an hour, with the automobile weaving from side to side, and who fails to decrease the speed, and runs off a bridge at the foot of the hill and injures a guest, presents a question for the jury.
3. ———: ———. The term "gross negligence," as used in the automobile guest statute, signifies a degree of negligence greater than want of ordinary care or slight negligence, but not necessarily extending to wanton, wilful or intentional disregard for the guest's safety. *Gilbert v. Bryant*, 125 Neb. 731, 251 N. W. 823.
4. **Gross Negligence.** "The existence of gross negligence must be determined from the facts and circumstances in each case." *Morris v. Erskine*, 124 Neb. 754, 248 N. W. 96.
5. **Trial.** It is proper practice for court to refuse to submit to jury defense not supported by evidence.
6. **Evidence.** An intelligent person, who has driven an automobile and has observed the speedometer and the rate of speed at which a car is traveling, is competent to testify as to his opinion of the speed of the car in which he is riding.

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

Baylor & Tou Velle, George Healey and *C. V. Dunnuck,* for appellant.

Chambers & Holland and *Clyde Worrall, contra.*

Heard before GOOD, EBERLY and PAINE, JJ., and RAPER and PROUDFIT, District Judges.

GOOD, J.

Plaintiff recovered a judgment for personal injuries sus-

tained while riding as a guest in defendant's automobile. Defendant has appealed.

About 8:30 o'clock p. m., November 24, 1933, defendant's son Adolph was using defendant's car to transport himself and four other young people to a "wiener roast." Plaintiff and another girl were in the front seat, Adolph on the left at the wheel, plaintiff next to him, and the other girl on the right-hand side. Two boys, or young men, were in the rear seat. The car ran off the left-hand side of a bridge, and Adolph and one of the boys in the rear of the car were killed. Plaintiff sustained crushed vertebræ and practically severance of the spinal cord at about the twelfth dorsal vertebra. She is paralyzed from her waist down and is a helpless invalid as long as she may live.

The road over which the young people were traveling was a dirt road that was dragged about once in every ten days or two weeks. Adolph had previously been over the road at least twice. Plaintiff had never been over the road before. The car was traveling west. East of the bridge where the accident occurred is a long, rather steep hill, extending from the bridge eastward 430 feet. The road down this hill curves first to the south and then back to the section line before reaching the bridge. Thus far the facts are not in dispute.

The evidence on behalf of plaintiff is that a very short distance before the crest of the hill was reached one of the boys in the rear seat of the car warned Adolph, the driver, that there was a bad place ahead in the road, and that Adolph responded that "we were in a hurry;" "that there were kids waiting." Plaintiff's evidence is that Adolph was driving the car at the rate of 50 miles an hour; that, notwithstanding the warning, he did not slacken the speed of the car going down the hill on the curving road, and that the car was weaving somewhat from side to side before it reached the bridge; that it plunged through the left-hand side of the bridge, with the result above indicated. The bridge was 16 feet wide and 55 feet long. The evidence shows that the car left the bridge 11 feet from the east end

and shot through the air for a distance of about 47 feet, striking the opposite or west bank of the creek.

The evidence on behalf of defendant tends to show that no warning was given to Adolph of the bad place in the road, and that his speed was not more than 20 to 25 miles an hour as he descended the hill. However, the rate of speed and whether the warning was given were questions of fact for the jury. Since the jury found for plaintiff, we must assume that they believed the testimony on behalf of plaintiff, which they had a right to do, and the jury's finding upon these facts, if properly submitted for their consideration, is binding upon this court.

In this court defendant, for reversal, has assigned numerous alleged errors. The first four relate to the sufficiency of the evidence to sustain any recovery by plaintiff.

It is argued that defendant, while the owner of the car, was not the driver, and that it would be an extension of the family-purpose doctrine to permit a recovery in this case. It is admitted that the family-purpose doctrine has been declared applicable to cases where the driver of the car was guilty of simple negligence, but it is claimed that it has not been held to constitute the basis for liability on the part of the owner for the gross negligence of the driver. In this case it is stipulated that the car was owned by defendant, and that the use of the car on the evening in question was with the consent and permission of defendant.

Defendant cites and relies upon *Hogg v. MacDonald,* 128 Neb. 6, 257 N. W. 274, and *Ebers v. Whitmore,* 122 Neb. 653, 241 N. W. 126. In the first of the cited cases the driver of the car was not a member of defendant's family and was not using the car by defendant's direction or for her benefit. In the second case cited an employee of defendant was given permission to use defendant's truck for a specific purpose, but abandoned that purpose and used the car for an entirely different one, and for which he had no permission. Clearly, these cases have no application to the question under consideration. It is difficult to perceive on what theory the owner of a car, used for family purposes, would

be liable for simple negligence of the driver when used by a member of the family, and would not be liable for injury caused by the gross negligence of a member of the family while driving the car. We think that the contention is without merit.

Defendant further contends that he should not be liable, because his son Adolph was confronted with a sudden emergency and was not liable for failing to make a proper choice of courses to pursue. In the instant case, we perceive from the record no sudden emergency with which the driver of the car was confronted. He knew the road; he knew the conditions; he had been warned and disregarded his knowledge of the road and disregarded the warning. No sudden emergency, such as appeared in the cases on which defendant relies, is present in the instant case.

It is further argued that the evidence will not warrant a finding that Adolph was guilty of gross negligence. Gross negligence, within the meaning of the automobile guest law, has been defined by this court in this language: "In the law providing that an unintoxicated motorist shall not be liable in damages to a guest except for 'gross negligence,' that term indicates a degree of negligence greater than want of ordinary care or slight negligence but not necessarily extending to wanton or wilful or intentional disregard for the guest's safety." *Gilbert v. Bryant,* 125 Neb. 731, 251 N. W. 823. Also, in *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96, this court held that gross negligence, within the meaning of the statute, "means negligence in a very high degree, or the absence of even slight care in the performance of a duty." Also, "The existence of gross negligence must be determined from the facts and circumstances in each case."

Adolph was driving the car at night on a curving road down a steep hill and approaching a narrow bridge, of which he was aware, at a speed of 50 miles an hour, when he had been warned that there was a dangerous place in the road ahead. He chose to disregard the warning and continued the reckless driving, with the disastrous results

indicated. We think that, under the circumstances, the question of gross negligence was one for determination by the jury.

Defendant complains because of the failure of the court to submit to the jury the question of contributory negligence on the part of plaintiff. The evidence shows that plaintiff was unfamiliar with the road; had no knowledge of the narrow bridge ahead; had no knowledge of the imminent danger, at least until they were in close proximity to the bridge, and then less than one second elapsed before the accident occurred. In that time there was no opportunity for plaintiff to warn the driver of the car. Moreover, the driver had been warned a few seconds before, and he, and not she, knew of the danger ahead. We fail to find any evidence that would justify a finding that plaintiff was guilty of contributory negligence. The court did not err in refusing to submit the question to the jury where there was no evidence of negligence on the part of plaintiff.

Defendant complains that the court did not instruct the jury on the subject of a sudden emergency, and failed to give a number of instructions relating to that subject. As heretofore determined, there was no sudden emergency that confronted the driver, and there was no need for such an instruction.

It is also contended that the court erred in not submitting to the jury the issue of assumption of risk; in not instructing the jury in relation thereto, and in failing to give one or more of defendant's instructions relative to that subject. We find no warrant in the record that would justify a finding that plaintiff had assumed any risk from the gross negligence of the driver of the car. She had ridden with him on a number of occasions and in some instances where he may have driven as fast as 50 miles an hour, but whether it was in daylight and on a clear highway is not disclosed. There is no evidence that plaintiff had any knowledge that he was a reckless driver or would be guilty of gross negligence. The rule laid down in *Kelly v. Gagnon,* 121 Neb. 113, 236 N. W. 160, is inapplicable to the facts disclosed by the present record.

Defendant complains because the court permitted plaintiff to testify as to the rate of speed and that, in her opinion, the car was being driven at 50 miles an hour as it descended the hill and approached the bridge where the fatal accident occurred. The evidence discloses that plaintiff had ridden in cars many times; that she had driven her father's car, had watched the speedometer and observed the speed and was able to state the approximate speed at which an automobile was traveling. Sufficient foundation, in our opinion, was laid to permit her to give her opinion as to the speed of the car. *Miller v. Central Taxi Co.*, 110 Neb. 306, 193 N. W. 919.

Defendant assigns as error that the verdict is excessive. The recovery was for $7,500. The plaintiff was a girl 16 years of age, bright and intelligent, a junior in high school and at the head of her class, with bright prospects for a happy life. Now she is a helpless invalid for the remainder of her life. The verdict certainly cannot be said to be excessive.

The learned trial judge seems to have conducted this case with great care and to have protected the defendant in all of the rights to which he was entitled. The record discloses no error prejudicial to defendant.

AFFIRMED.

JOHN W. BAXTER, APPELLEE, V. NATIONAL MORTGAGE LOAN COMPANY, APPELLANT.

FILED JANUARY 24, 1936. No. 29274.

1. **Execution Sales:** REVERSAL OF JUDGMENT. Where a defendant appeals from an order confirming a sale to plaintiff of realty under execution issued on a judgment, said order being superseded, and the judgment on which the execution is issued is reversed, an order may be entered quashing the levy and vacating the sale.
2. ———. There is no sale as contemplated by the statute until the order of confirmation is entered and the time for superseding said order has elapsed. Comp. St. 1929, sec. 20-1541.

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

John C. Hartigan and *Peterson & Devoe,* for appellant.

Stewart, Stewart & Whitworth and *Charles B. Paine, contra.*

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

DAY, J.

The appellant, defendant in the district court, moves that the order of confirmation entered in the district court be vacated, the sale set aside, and the levy of execution upon which it is based quashed. The premises levied upon were the property of the defendant; were bid in by the plaintiff; the sale confirmed; the order of confirmation superseded, and this appeal perfected to this court after which the judgment under which the execution was issued has been reversed by this court.

Section 20-1541, Comp. St. 1929, provides: "If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers; but, in such case, restitution shall be made by the judgment creditor, of the moneys for which such lands or tenements were sold, with lawful interest from the day of sale." This provision was enacted in 1866 and has never been amended. It was in full force and effect in 1901 when *Troup v. Horbach,* 62 Neb. 564, 87 N. W. 316, was decided. Where a defendant appeals from an order confirming a sale to plaintiff of realty under execution issued on a judgment, said order being superseded, and the judgment on which the execution is issued is reversed, an order may be entered quashing the levy and vacating the sale.

This rule is supported by the weight of authority. An annotater states: "In the majority of jurisdictions where the question has been judicially determined, the rule has

been laid down that if the judgment creditor, or any other party to the record, purchases at the execution sale, a reversal or vacation of the judgment puts an end to his title." 29 A. L. R. 1078. See cases cited including *Nelson v. City of Beatrice*, 2 Neb. (Unof.) 47, 96 N. W. 288.

This rule does not conflict with the statute herein quoted. There is no sale as contemplated by the statute until the order of confirmation is entered and the time for superseding said order has elapsed. Comp. St. 1929, sec. 20-1541. The judgment which was the basis for the execution and the sale having been reversed, there is no judgment to support either the execution or the sale. There is no substantial practical reason why the execution and the sale should not be set aside and the execution quashed. Even if the sale were confirmed by this court, the plaintiff is required under the statute to make restitution. This will accomplish the same result, and justice will prevail without traveling a circuitous route. The district court is directed to set aside the sale and quash the execution under which it was issued.

REMANDED, WITH DIRECTIONS.

AMANDA ANDERSON, APPELLANT, V. ELBERT LEE, APPELLEE.

FILED JANUARY 24, 1936. No. 29486.

1. **Negligence:** QUESTION FOR JURY. Where reasonable men might draw different conclusions from the evidence, questions of negligence are for the jury.
2. **Automobiles:** NEGLIGENCE. Driving an automobile at night at such a speed that one cannot avoid a collision with an object within the area covered by its lights is generally negligence as a matter of law.
3. ———: ———: QUESTION FOR JURY. The question of negligence is for the jury where a driver, confronted by an emergency, turns his car to the left to avoid a collision, thereby hitting a pedestrian crossing the street.

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

Fradenburg, Webb, Beber, Klutznick & Kelley, for appellant.

Wear, Boland & Nye and *Nickerson & Nickerson, contra.*

Heard before GOOD, DAY and PAINE, JJ., and RAPER and PROUDFIT, District Judges.

DAY, J.

There was an accident at or near a street intersection in the city of Omaha, in which the plaintiff, a woman 44 years of age, a pedestrian, was struck and injured by an automobile driven by the defendant. At the conclusion of plaintiff's testimony, in an action for damages, the trial court sustained a motion for a directed verdict because the plaintiff had failed to establish any act of negligence on the part of the defendant.

The record is a short one and easily and quickly examined. As it stands, the plaintiff and another woman alighted from a south-bound street car, waited for it to pass, and afterwards started across the street intersection. The defendant drove his automobile along the right-hand side of the street, traveling north. The plaintiff was standing still in the middle of the street between the double street car tracks, visible for more than 100 feet to the defendant. The automobile came down the street with plenty of room to pass plaintiff; but, when it approached the place where she was standing, swerved sharply to the left, striking her and injuring her. The plaintiff's companion passed across the street in front of the automobile, and defendant argues that he was confronted with an emergency, and that the rule announced in *Kelly v. Gagnon,* 121 Neb. 113, 236 N. W. 160, applies, that when one finds himself in a position of peril through no fault of his own, he is not required to act with the same degree of care, caution, and circumspection as would otherwise be expected of him. A sufficient answer to this is that, where reasonable men might draw different conclusions from the evidence, questions of negligence are for the jury. *Dougherty v. Omaha & C. B. Street R. Co.,* 113 Neb. 356, 203 N. W. 538; *Leon v. Chicago, B. & Q. R. Co.,* 102 Neb. 537, 167 N. W. 787.

The rule of negligence applicable to this case is that announced in *Roth v. Blomquist,* 117 Neb. 444, 220 N. W. 572. Generally, driving an automobile at night at such a speed that one cannot avoid a collision with an object within the area covered by its lights is negligence as a matter of law. This accident occurred at 11:30 p. m., July 18, 1933. There are certain exceptions to this rule where unanticipated objects are obscured or the visibility is reduced, as "where the object or obstruction or depression is the same color as the roadway and for that reason, or for other sufficient reasons, cannot be observed by the exercise of ordinary care in time to avoid a collision." *Adamek v. Tilford,* 125 Neb. 139, 249 N. W. 300. This case is not within the exception.

Where a driver, confronted by an emergency, turns his car to the left to avoid a collision, thereby hitting a pedestrian crossing the street, his negligence is a question for the jury. *Lammers v. Carstensen,* 109 Neb. 475, 191 N. W. 670; *Abraham v. Clark,* 202 Wis. 451, 232 N. W. 865; *Shotts v. Standard Oil Co. of Indiana,* 181 Minn. 386, 232 N. W. 712.

The evidence of the plaintiff as to the negligence of the defendant was sufficient to require a submission of the question to the jury, and the trial court erred in directing a verdict for the defendant at the close of plaintiff's testimony.

REVERSED AND REMANDED.

ROSE WORACEK, APPELLEE, V. WILLIAM E. SCHUEHART, APPELLANT.

FILED JANUARY 24, 1936. No. 29508.

1. **Automobiles:** DUTY OF DRIVER AT INTERSECTION. An automobile driver should have his car under such control that upon entering an intersection he can avoid a collision with another car which is operated with due care.
2. **Appeal:** REQUEST FOR INSTRUCTION. An instruction which serves only to guide the jury in weighing certain features of the

evidence must be requested before error can be predicated upon failure to so instruct.

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

Johnsen, Gross & Crawford and *G. F. Nye,* for appellant.

A. A. Rezac, contra.

Heard before GOOD, EBERLY and DAY, JJ., and RAPER and PROUDFIT, District Judges.

DAY, J.

There was a collision between the automobiles driven by plaintiff and defendant at a highway intersection several miles west of the city of Omaha. The plaintiff seeks to recover damages both to her person and to her car. A judgment for $824 was entered upon a verdict of the jury, from which the defendant appeals.

The first of three assignments of error is directed to the action of the trial court in overruling the motion for a directed verdict, one at the completion of plaintiff's testimony, and the other when all the testimony had been adduced. The basis of the motion is that "the plaintiff has failed to prove by competent evidence any allegation contained in the petition as to the negligence of the defendant." In substance, the petition alleged that the defendant did not have his automobile under control, was driving it without any regard to the rights and safety of others using the highway, and was driving it in a reckless, unlawful manner and at an excessive speed.

The plaintiff testified upon the question of defendant's negligence. According to her testimony, she approached the intersection from the north on Ninetieth street, stopped at the stop sign, and looked up and down the Pacific street road. She saw no car approaching from either direction and then proceeded across the highway. She never saw the defendant's car, and when she was almost entirely across the intersection, it hit the right rear wheel of her car. She did not know what part of the cars came together, but knew

that her back right wheel was hit. After the impact, she did not remember anything until she was at home. Since she did not see the car at any time, she could not testify as to speed, or as to control or lack of control, or as to the movements of defendant's car at the slow sign which was placed on the Pacific street road.

J. S. Woracek, father of the plaintiff, testified that he went to the scene of the accident shortly after it occurred. Upon his arrival at the scene, he talked with Mr. Schuehart, and testified to the conversation as follows: "I says to Schuehart, * * * 'Who hit her?' And he says, 'I hit her, but I am covered with insurance and I will see that everything is settled O. K.'" Mr. T. J. Green, who accompanied J. S. Woracek to the scene of the accident also testified to this conversation.

There is the testimony of a number of witnesses about the physical aspects of the intersection as to the bank obstructing the view of a driver coming from the north on the Ninetieth street road and a driver east-bound on the Pacific street road, from which it appears that a bank obstructs the view so that a driver approaching on one road could not be seen easily by a driver along the other. In addition to this testimony, pictures of the plaintiff's car taken after the accident were introduced in evidence. These pictures and the other evidence are sufficient to require a submission of this case to the jury. The jury could reasonably infer that the plaintiff stopped at the stop sign before entering the intersection, that the defendant was driving too fast and did not have his car under control because his car hit the right rear wheel of plaintiff's car, overturning it when she was almost across the intersection. Defendant could have seen plaintiff during the entire time she was passing almost the entire distance of the intersection. If he was not driving at an excessive rate of speed and had his car under control, he could have avoided hitting her, and if he did not see her, he must have been driving recklessly and without a due regard for the safety of others. The jury could infer from this evidence that the defendant was neg-

ligent and that his negligence was the proximate cause of the accident. An automobile driver should have his car under such control that upon entering an intersection he can avoid a collision with another car which is operated with due care. *Thrapp v. Meyers,* 114 Neb. 689, 209 N. W. 238; *Smith v. Coon,* 89 Neb. 776, 132 N. W. 535.

When the motion for a directed verdict was urged at the close of all the testimony, much of this testimony was disputed by defendant's witnesses, but, of course, disputed questions of fact are for the jury. True, the evidence in this case is not overwhelming upon the question of negligence, but it is, we think, sufficient under the circumstances to require a submission of the question of negligence to the jury.

Another assignment relates to the failure of the trial court to give a cautionary instruction as to defendant's liability insurance. This is not argued in appellant's brief, and the nature of the instruction desired is not indicated. Furthermore, there was no request for such an instruction to the trial court. An instruction which serves only to guide the jury in weighing certain features of the evidence must be requested before error can be predicated upon failure to so instruct. *Osborne v. State,* 115 Neb. 65, 211 N. W. 179.

There was some argument orally before the court and to a lesser extent in the briefs as to the admissibility of the testimony as to the statement alleged to have been made immediately after the accident by the defendant. It is quoted from the testimony of J. S. Woracek heretofore. An examination of that statement convinces us that, even if any error relates to it, which we do not decide, it was error without prejudice. It was unnecessary to determine whether it was an admission of negligence sufficient alone to require submission of the issue to the jury because in our view the physical facts required such submission on the question of negligence.

The last assignment of error is that the verdict is contrary to law in that while the plaintiff's petition sets out

two causes of action, "and produced evidence as to damage, both as to her person and as to her automobile, the verdict is in one sum, and in no way specifies the amount of damages as to each cause of action." We know of no rule, in the absence of a request for a special verdict possibly, which requires a verdict to specify and designate the amount assessed on account of each separate cause of action. Our attention has not been directed to any authorities for such a rule. An examination of the entire record does not disclose any prejudicial, reversible error.

AFFIRMED.

JAMES W. PARSONS, APPELLEE, V. L. E. BERRY ET AL., APPELLANTS.

FILED JANUARY 24, 1936. No. 29422.

1. **Negligence:** QUESTION FOR JURY. Conflicting evidence of negligence in a law action is for the jury.
2. ———: LAST CLEAR CHANCE. The doctrine of last clear chance applies in those cases where there is negligence of the defendant subsequent to the negligence of the plaintiff and the defendant's negligence is the proximate cause of the injury.
3. **Automobiles:** NEGLIGENCE: LAST CLEAR CHANCE. If the jury believed that the defendant had the last clear chance to avoid this automobile collision, she could be held responsible therefor if, by the exercise of ordinary care, she could have averted the injury to plaintiff.

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

Baylor & Tou Velle and *George Healey,* for appellants.

Comstock & Comstock and *I. D. Beynon, contra.*

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

PAINE, J.

This is an appeal from an action brought to recover

damages for personal injuries received in an automobile collision, in which a judgment was entered for the plaintiff and appellee for the amount of the verdict of $7,500.

This accident occurred on September 28, 1933, just north of the city of Lincoln, at the intersection of Twenty-seventh street and Adams street, at which point U. S. Highway No. 77 runs on Adams street. The plaintiff, aged 63 years, was driving his Model T Ford automobile, and seated with him in the front seat were his son and niece. The rear part of this Ford automobile had been made over into a box for carrying things. It is the testimony of the plaintiff that he was not running over 15 or 20 miles an hour at any time as he approached the intersection of Twenty-seventh and Adams streets, and that he came to a full stop at the stop-button. It was about 4 o'clock in the afternoon of a clear day. He looked to the west and saw the car of the appellant, Mrs. Edith Berry, just crossing a bridge located about 1,000 feet west of the intersection, and he slowly started from the stop-button, and upon looking again to the west he discovered that the 1930 Chevrolet sedan in which Mrs. Berry was approaching him was being driven at between 60 and 70 miles an hour, and that she was then within 500 feet of him. He continued on across the center of the intersection to turn west on No. 77, and when his car was turning west, he testified, she lost control of her car and ran directly into his car, which was on the north side of No. 77. His car was turned completely over and landed against a telephone pole. The plaintiff was picked up, terribly injured, and taken to the Bryan Memorial Hospital, where it was found that he had a cut over his right eye, a cut finger, fractures of four ribs, and a fracture of a part of each of the third and fourth vertebræ, and he laid in a cast in the hospital for some weeks, and then wore a body brace.

The evidence on the part of the appellants is to the effect that Mrs. Berry was driving east on Adams street, going approximately 35 miles an hour, was unaccompanied; that she was immediately followed by two other cars. All three of these cars were driving east, and there were also three

other cars approaching the same intersection, so there were a number of witnesses of this collision. Mrs. Berry testifies that she assumed that the plaintiff was going to stop at the intersection, but testifies that he did not, and drove into the intersection in front of her, and that she then did everything she possibly could to avoid a collision. She also insists that she had her car under reasonable control, and that if she diverged any to the left it was caused by the plaintiff driving onto the intersection without stopping. The appellant insists in her argument that all of the injuries of the plaintiff were minor in their nature, and that, if there was any angulation of the spine to the left, such curvature was a result of his occupation, and not a result of the accident.

There was evidence tending to support the claims of each party. It would be of no particular value to review all of the evidence of each of these witnesses as set out in 500 pages of the bill of exceptions, and it is sufficient to say that the jury must have believed the evidence of the plaintiff and his witnesses as to how the accident occurred, the respective speed of the cars, and the cause of the collision, for the jury returned a verdict in his favor for $7,500, and we find there is ample evidence to support the verdict. Therefore, we hold against the appellants on their contentions that there is not sufficient evidence to sustain the verdict, and that the verdict is contrary to the clear weight of the evidence.

The next objection is that the verdict is excessive. However, in our opinion the evidence supports the plaintiff's evidence as to the nature of the injuries, and as to the suffering, and time spent in the hospital in a cast, and the wearing of the Taylor spine brace for months, and this was fairly submitted to the jury, and we believe the evidence would warrant the amount of the verdict.

In the motion for a new trial, the defendants set out 101 errors of the court, but in the brief but 18 errors are listed. In the argument in this court, the defendants' counsel appeared to place considerable reliance upon the alleged error

of the court in the giving of instruction No. 13, in accordance with the doctrine of the last clear chance. It appears that in the trial of the case the late Judge Comstock, as attorney for the plaintiff, offered but one instruction, and this instruction was given by the court as its No. 13, and reads as follows:

"Plaintiff, in his petition, invokes the rule of the last clear chance.

"This rule is based upon the idea that, when any person is in a place of danger, whether negligent or not, one who knows, or who might know, and under the circumstances ought to know of the danger, must use ordinary care to avoid injuring him.

"Therefore, if you find from the evidence that the plaintiff drove his Ford automobile into the intersection of Twenty-seventh and Adams streets and thus placed his automobile and himself in a position of danger in front of the oncoming automobile driven by the defendant, Edith Berry, where he could not extricate himself, and if the defendant, Edith Berry, observed plaintiff's position of peril or by the exercise of reasonable diligence could have observed his peril and failed to use reasonable and ordinary care, under the circumstances, to prevent colliding with the plaintiff's car, and plaintiff was injured thereby, then your verdict should be for the plaintiff."

This instruction was based upon ample allegations in the petition to the effect that the defendant negligently omitted to stop or slacken the speed of the Chevrolet automobile after observing the perilous position of the plaintiff and his Ford automobile in the street intersection, and negligently omitted to keep a proper lookout to observe the plaintiff's perilous situation.

The rule of the last clear chance has been before this court a number of times, and may be stated generally that the rule implies that one charged with negligence knew the person injured was in a place of danger and negligently failed to avoid injuring him. The evidence discloses that the defendant driver of the car knew that the plaintiff had

driven into the intersection with his slow-moving Model T Ford car, when she was many feet away from the intersection, and saw the perilous position in which the plaintiff was, in time to have avoided the accident if she had her car under proper control. *Zitnik v. Union P. R. Co.*, 91 Neb. 679, 136 N. W. 995.

It appears that instruction No. 13 follows rather closely the language used in the opinion of the court in *Johnston v. Delano*, 100 Neb. 192, 158 N. W. 1034, and is supported as well by the recent opinion of this court in *Wilfong v. Omaha & C. B. Street R. Co.*, 129 Neb. 600, 262 N. W. 537, in which many authorities are reviewed and discussed.

An examination of some of the cases cited by the defendant shows that the doctrine of the last clear chance did not apply in those cases, because there was not sufficient time for reflection and avoidance of the danger, while in the case at bar Mrs. Berry testified that she saw the Model T Ford automobile approaching this intersection when she was approximately 1,000 feet back from the intersection, and she must have realized that the Ford was proceeding into the intersection several hundred feet before she reached it, and she had sufficient time to have controlled the speed of her car to have avoided the crash, and by the pleadings and the evidence it was proper for the trial judge to give the instruction submitted by the plaintiff upon the doctrine of the last clear chance.

The doctrine of last clear chance applies where there is negligence of the defendant subsequent to the negligence of the plaintiff and the defendant's negligence is the proximate cause of the injury. In this case, if the jury believed that the defendant had the last clear chance to avoid the collision, she was responsible if in the exercise of ordinary care she failed to do so.

Other instructions given by the court, and criticized by the defendant, might have been improved somewhat, but we are unable to find reversible error in the record before us, and the judgment is therefore

AFFIRMED.

GEORGE ZIMMERMAN V. STATE OF NEBRASKA.

FILED JANUARY 24, 1936. No. 29686.

1. **Criminal Law**: INSTRUCTIONS: REASONABLE DOUBT. Ordinarily, it is not prejudicial error for the trial court in instructing on reasonable doubt to state that the jury were not at liberty to disbelieve as jurors, if from all the evidence they believe as men.
2. **Intoxicating Liquors**: POWER OF LEGISLATURE. The legislative power to prohibit the manufacture, sale, giving away, barter, carriage, possession and use of malt, spirituous, vinous, alcoholic and intoxicating liquors was not dependent upon section 10, art. XV of the Constitution of Nebraska, and the repeal of said section did not repeal existing statutes on that subject.
3. **Evidence** examined and *held* sufficient to sustain a conviction for the unlawful possession of intoxicating liquor.

ERROR to the district court for Gage county: FREDERICK W. MESSMORE, JUDGE. *Affirmed.*

Frank A. Dutton, Foster & Yates and *S. D. Killen,* for plaintiff in error.

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

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

CARTER, J.

Plaintiff in error, who will be referred to herein as the defendant, was convicted in the district court for Gage county for the unlawful possession of intoxicating liquor. From the overruling of his motion for a new trial, the defendant prosecutes error to this court.

The defendant first contends that the verdict is not sustained by sufficient evidence. The record shows that on the evening of December 15, 1934, the police officers of the city of Beatrice searched the apartment of one Lola Kelly and found between 40 and 50 bottles of whiskey and 2 one-gallon cans of alcohol. The defendant was present when the officers came in and at the time was holding a pint bottle of whiskey in one hand and the cap in the other. A third person, a stranger to the officers, was present and informed the officers in the presence of the defendant that

he was there for the purpose of purchasing liquor. The officers testified that the defendant told them at the time that they "might just as well pour that out, that's moonshine whiskey and the tax isn't paid on it." The defendant testified that he had known Lola Kelly for six years or more and had been taking many of his evening meals at the apartment during that period. He denied ownership of the liquor in question, stating that he had gone to the pantry, observed the bottle and was merely examining it when the officers came in. Upon a consideration of all the testimony and circumstances of this case, we are convinced that the evidence is sufficient to support a finding by the jury that the defendant was aiding and abetting in the unlawful possession of intoxicating liquor by Lola Kelly, even though he may not have been the owner thereof. This is sufficient under the law of this state to sustain a charge of unlawful possession of intoxicating liquor. *Stumpff v. State,* 122 Neb. 49, 239 N. W. 212.

Defendant complains that the court's instruction on reasonable doubt is erroneous because it contained the following sentences: "You are not at liberty to disbelieve as jurors, if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered." While it is true that this court has criticized the use of this language in instructions to a jury, we have repeatedly held that it is not prejudicially erroneous. *Liesenfeld v. State,* 129 Neb. 802, 263 N. W. 213.

The defendant further contends that the repeal of section 10, art. XV of the Constitution, which prohibited the manufacture, sale, keeping for sale or barter of intoxicating liquors, repealed all existing statutory provisions of like tenor. To this contention we cannot agree. The theory of our government is that the federal government is one of delegated powers which are expressly stated in or can reasonably be implied from the language of the federal Constitution itself. Each state has all of the governmental powers that have not been delegated to the federal govern-

ment by the Constitution of the United States, and such that have not been denied to the states or reserved to the people themselves. The suppression or regulation of the liquor traffic has always been considered in this state as a proper legislative function under the police power. *Pleuler v. State,* 11 Neb. 547, 10 N. W. 481. Prior to the adoption of section 10, art. XV of the Constitution, there was no constitutional expression of the will of the people with reference to the absolute prohibition of intoxicating liquors. There being no constitutional inhibition, the legislature had authority, under the police power, to select the method of regulation which it desired. With the adoption of section 10, art. XV of the Constitution, the legislature was directed by the people to enact laws providing for absolute prohibition. Its adoption meant that the power of the legislature to enact laws of less severity was withdrawn from it, and, as the writer of the brief for the state well says, "It was not a source of power, it was a limitation of power." The legislature thereupon enacted laws prohibiting the manufacture, sale, giving away, barter, carriage, possession and use of malt, spirituous, vinous, alcoholic and intoxicating liquors. Laws 1917, ch. 187. This act could have been lawfully enacted by the legislature even if section 10, art. XV of the Constitution, had not been adopted. The repeal of section 10, art. XV of the Constitution, merely meant that the limitation on the power of the legislature to enact laws with reference to the liquor traffic had been removed. The legislature then had the power to leave the enacted laws with reference to the control of the liquor traffic as they were, or it could make any changes it desired so long as they were consistent with the general police power of the state. The limitation on the power of the legislature to regulate the liquor traffic having been removed by the repeal of section 10, art. XV of the Constitution, and there being no other constitutional inhibition inconsistent therewith, the act of the legislature under consideration remains in full force and was in no way affected by the repeal of said section 10, art. XV of the Constitution.

In considering a similar situation, the supreme court of North Dakota said: "The repeal of that section was not an abrogation of a power conferred upon the legislative assembly, but the repeal of a mandate to enact laws. The power to legislate remained precisely the same as it was before. Hence, the repeal of section 217 does not present a situation at all like that presented where a constitutional provision, which constitutes the source of legislative power, is repealed. In such case, of course, legislation which has its basis of validity in the power granted to the legislative assembly is repealed when the power itself is withdrawn." *In re Aipperspach*, 63 N. Dak. 358, 248 N. W. 488.

The defendant cites *Massey v. United States*, 291 U. S. 608, 78 L. Ed. 1019, and *United States v. Gibson*, 5 Fed. Supp. 153, in support of his contention. These cases hold that the powers delegated to congress by the Eighteenth Amendment to the federal Constitution are effective, and acts of congress in keeping therewith are valid only during the life of such amendment and that legislative acts existing by virtue of the Eighteenth Amendment become inoperative with its repeal. This is true because, without the Eighteenth Amendment, the congress was without power to act, during peace times at least, on the subject of the prohibition of the use of intoxicating liquors. It was the source of power upon which the congress could act. With the adoption of the Twenty-first Amendment, the power delegated by the Eighteenth Amendment was withdrawn. The source of their power being withdrawn, all acts passed under it must of necessity fall with it. But this can have no application to the case at bar where the repealing amendment voids a constitutional provision limiting a preexisting power that the legislature already had.

Until appropriate legislative action is taken, the acts of the legislature, existing at the time section 10, art. XV of the Constitution, was repealed, must necessarily remain in full force and effect.

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

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. VERDIGRE STATE BANK, E. H. LUIKART, RECEIVER, APPELLANT: R. E. KOUBA, ADMINISTRATOR, INTERVENER, APPELLEE.

FILED JANUARY 31, 1936. No. 29437.

1. **Banks and Banking:** DIVERSION OF DEPOSIT. Where the president and dominant officer of a bank draws in its favor unauthorized, spurious checks against the account of the administrator of the estate of a deceased person, marks them paid, charges them against the account and turns the proceeds of them over to the bank, the deposit, as such, remains a liability of the bank and of a subsequently appointed receiver, though the administrator was also cashier of the bank, but innocent of any wrong-doing in connection with the illegal transactions.
2. **Replevin:** ISSUES. In absence of a specific lien or other special interest, the issues in replevin are ownership, right of possession and unlawful detention of the property replevied.
3. ———: JUDGMENT. A judgment in replevin, awarding to plaintiff, receiver of an insolvent bank, the ownership and possession of proceeds of checks drawn by an administrator against an account for the deposit of funds of a decedent's estate, on a plea that the checks and the payments thereof were voidable as creating an unlawful preference over other depositors, *held* to leave undisturbed the liability of the bank and its receiver for the deposit against which the checks were drawn.
4. **Judgment:** RES JUDICATA. Matters once litigated and judicially determined will not generally be reexamined in a subsequent action between the same parties.

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

Howard Saxton and *F. C. Radke,* for appellant.

W. A. Meserve, contra.

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

ROSE, J.

In a proceeding by the state in the district court for Knox county to wind up the affairs of the Verdigre State Bank, an insolvent corporation, R. E. Kouba, administrator of the estate of Barbora Tusha, deceased, intervened and

presented for allowance a claim for an unpaid deposit in the sum of $4,831.40. E. H. Luikart, receiver of the bank, classified the claim as invalid. Upon formal pleadings the depositor and the receiver tried to the district court the issues involving the validity of the claim, which was allowed in full as a deposit on a par with other deposits. From the judgment below the receiver appealed to the supreme court.

The bank's accounts of deposits showed that R. E. Kouba, administrator, had on deposit May 28, 1931, $4,831.40 belonging to the estate of Barbora Tusha, deceased. On appeal the receiver contends that, prior to May 28, 1931, the estate had lost by peculation from former deposits of its funds $3,000 February 24, 1930, and $414.52 October 8, 1930, or a total of $3,414.52, leaving a balance of only $1,416.88 belonging to the estate as a valid deposit; that R. E. Kouba was also cashier of the bank and his father, A. V. Kouba, was president of it; that the two of them, acting as individuals, by conspiracy and connivance looted the deposit of the estate by extracting therefrom and embezzling $3,414.52; that the sum thus unlawfully extracted was never restored to the bank; that there is no valid claim for a deposit in excess of $1,416.88.

On the other hand, Rudolph Tusha, now administrator of the estate of Barbora Tusha, deceased, instead of R. E. Kouba, resigned, insists that the $3,000 unlawfully taken from the deposit of the estate February 24, 1930, and the $414.52 October 8, 1930, were not drawn by or for the estate, nor by the administrator who did not authorize or ratify the unlawful transactions.

The bank did in fact receive from the funds of the estate and credit to the administrator, in the form of deposits, the full amount of the claim in controversy. The $3,000 taken from the deposit of the estate February 24, 1930, was drawn by means of a check on the "Verdigre State Bank," payable to the "Bank" and bearing as drawer the name "R. E. Kouba." On its face the check was marked "Paid" February 24, 1930, by the stamp of the Verdigre State Bank. The evidence is that the check was not drawn by the

administrator or by R. E. Kouba, but by his father, A. V. Kouba, the president and dominant officer of the bank. R. E. Kouba testified positively to the effect that he did not write the check or authorize it or ratify the transactions in connection with it, and that he had at the time no knowledge of the fact. The evidence does not justify a finding that he was in a conspiracy with his father or with others to loot the estate. The other item of $414.52 taken from the estate has no better standing. It was also withdrawn on an unauthorized, spurious check bearing the ostensible signature, "R. E. Kouba, Admr.," written by A. V. Kouba. The check was marked "Paid" by the stamp of the bank. Where the proceeds went is not shown, but they did not go into the estate or into the hands of the administrator. The funds deposited did not belong to R. E. Kouba. They were trust funds in his care and he, as administrator, was a trustee. The bank books of account showed these facts. The knowledge of R. E. Kouba, cashier, and of A. V. Kouba, president, as to the nature and ownership of the fund, was imputable to the bank. At least $3,000 of the proceeds of the spurious checks went into the bank. It is a fair inference that the bank received also the proceeds of the forged check for $414.52. No part of the proceeds of this fictitious check went into the estate or into the hands of the administrator or of R. E. Kouba as an individual. Neither law nor equity awards the bank or its other depositors the benefits of these lawless acts nor thus destroys property rights of innocent beneficiaries of the trust, since the administrator and trustee did not perpetrate or participate in any of the wrongs. The conclusion is that the estate did not lose any part of its deposit by the peculations described. Rules of law under somewhat analogous situations were stated as follows:

"Where money is deposited in a bank by the executor of an estate, who is also president and manager of the bank, and where false entries are made which indicate that the money has been withdrawn from the bank, when in fact it was not so withdrawn, but diverted to other accounts for

the benefit of the bank, such false entries do not terminate the relationship of depositor and banker." *State v. Farmers & Merchants Bank of Kennard,* 118 Neb. 495, 225 N. W. 669.

"Where a trustee deposits in a bank, in the name of a corporation of which he is manager, trust funds belonging to others, the bank at the time having knowledge of the facts, any balance remaining on deposit, when the bank is closed on account of insolvency, inures to the benefit of the beneficiaries of the trust and may be protected in the hands of the receiver as a deposit." *State v. American State Bank,* 108 Neb. 111, 187 N. W. 762.

Whether the estate lost its deposit by the payment of checks subsequently drawn by the administrator requires consideration. While the bank was still open for business, R. E. Kouba, administrator, drew against the account of the estate four checks on dates and in amounts as follow: May 27, 1931, $1,630.66; May 27, 1931, $1,000; May 28, 1931, $1,938; May 29, 1931, $262.74; total, $4,831.40—the amount of intervener's claim. These checks were all payable to "Bank" and were marked "Paid" with the stamp of the bank. They were charged against the account of the estate on the books of the bank. The administrator procured from the assets of the bank by means of these four checks $1,630.66 in school district warrants; $1,000 in cash; $1,938 in note and mortgage; $262.74 in cash, or $4,831.40 in all. The department of trade and commerce took charge of the bank June 1, 1931. Luikart was appointed receiver June 20, 1931.

In a separate action at law against R. E. Kouba in the district court for Knox county the receiver filed a petition and an affidavit in replevin August 6, 1931. Under the writ the sheriff seized and delivered to the receiver the entire proceeds of the administrator's four checks, being $1,630.66 in school district warrants; $1,262.74 in cash; $1,938 in note and mortgage, all of the face value of $4,831.40. The right of the receiver to the property replevied was based on pleas in his petition and affidavit to the effect that the issu-

ance and payment of the checks, just before the bank was closed for insolvency, were attempts to create an illegal preference of the estate's account over the accounts of other depositors. In the affidavit for the writ of replevin, it was alleged in substance that R. E. Kouba, administrator of the estate of Barbora Tusha, deceased, had an account in the Verdigre State Bank in which there was a credit of $4,831.-40. In absence of a specific lien or other special interest, the issues in replevin were ownership, right of possession and unlawful detention of the property replevied. *Peterson v. Lodwick,* 44 Neb. 771, 62 N. W. 1100. The parties waived a jury and tried the cause to the district court. The allegations of the petition and affidavit in replevin were found to be true. The judgment was that the ownership and right of possession of the property replevied were in the receiver; that the value of the property replevied was its face value. From the judgment there was no appeal. The necessary effect of the final adjudication was to annul the checks drawn by the administrator against the checking account of the estate and to leave the liability of the bank and the receiver for the deposit of $4,831.40 undisturbed. The receiver was not entitled to both the proceeds of the checks and the charges against the deposit on which the checks were drawn. The checks did not benefit the estate or the administrator or R. E. Kouba. With the judgment in replevin in force, the entire consideration for the checks failed.

In the action of replevin the receiver as a party represented the bank and its creditors. To that action R. E. Kouba as an individual and as administrator was a party. All parties are bound by the judgment. The parties are the same as in the present controversy over the claim of the intervener. The annulment of the checks of the administrator was adjudicated in replevin. The judgment therein left the liability of the bank and of the receiver for the deposit undisturbed. By the former adjudication the receiver is estopped to question that liability. Matters once litigated and judicially determined will not generally be reexamined in a subsequent action between the same parties. *Wood v.*

Carter, 67 Neb. 133, 93 N. W. 158. Under the law and the facts Rudolph Tusha, present administrator of the estate of Barbora Tusha, deceased, is entitled to the allowance of the claim for the deposit of $4,831.40 on a par with other deposits. In so determining the district court made no mistake.

AFFIRMED.

IN RE ESTATE OF JOSEPH GIBSON.
RUTH GIBSON ET AL., APPELLANTS, V. ANNA MARY GIBSON, APPELLEE.

FILED JANUARY 31, 1936. No. 29470.

1. **County Courts:** JURISDICTION. County court is vested with original jurisdiction to construe wills in so far as it is necessary to enable the personal representatives of decedent to properly administer his estate.
2. **Courts:** JURISDICTION. An appellate court does not acquire jurisdiction of a cause by appeal, unless the court from which the appeal was taken also had jurisdiction.
3. **Descent and Distribution:** ADVANCEMENTS. In the absence of statutory provision, where a parent pays debt of a child and takes from such child a promissory note, payable at a definite date, such payment cannot be treated as an advancement.
4. ———: ———. The doctrine of advancements applies only to estates of persons dying intestate, unless otherwise provided by statute.

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

Hoagland, Carr & Hoagland, for appellants.

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

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

GOOD, J.

This proceeding originated in the county court of Lincoln county, Nebraska, and involves the construction of a will

and extent of the jurisdiction of the county court to construe wills.

Joseph Gibson paid the debt of his son Harry and took a promissory note for the amount thereof ($1,784.34), signed by Harry and his wife, due one year after date, and bearing interest at 6 per cent. per annum. Subsequent to this transaction, Joseph Gibson made a will in which he bequeathed all of his personal property to his wife, and devised to her a life estate to all of his realty. At the time of making the will, he had a foster daughter, three living children and grandchildren by a deceased child. To each of two of his living children and the foster daughter he devised a one-fifth interest in the remainder of his realty, and to the children of the deceased child a one-fifth interest therein. The will contained this further provision: "Out of Harry E. Gibson's share a note made to me is to be deducted from his share should he not pay same, said note amounts to Seventeen Hundred Eighty-four Dollars thirty-four cents this date interest six per cent."

When the executors filed petition for final settlement of the estate, several of the devisees under the will filed objections to the jurisdiction of the court to construe the will, alleging that the promissory note in question was an advancement and to be treated as realty, and should be deducted from the share of the realty devised to the son Harry. If this contention is sustained, the $1,784.34 interest in real estate was not devised or disposed of by the will, and the objectors, as heirs-at-law, would take a share therein. The county court construed the will; held that the promissory note was not an advancement but was personalty and, by a provision of the will, became the property of the widow, and further determined that it was a charge and lien upon Harry's one-fifth interest in the remainder of the realty. The objectors appealed to the district court, where, upon a trial, that court determined that the promissory note was not an advancement but was personalty and became the property of the widow, but further held that the county court was without jurisdiction to declare it a

charge and lien upon Harry's share in the remainder of the realty. The district court then decreed that the note, in fact, was a lien and a charge upon the share of Harry. The objectors have appealed to this court.

The rule is well established in this jurisdiction that the county court is vested with original jurisdiction to construe wills in so far as it is necessary to enable the personal representatives of the decedent to properly administer decedent's estate.

In *Youngson v. Bond*, 69 Neb. 356, 95 N. W. 700, it was held:

"Where a suit in equity is to be regarded as a part of the proceedings for settlement of the estate of a deceased person, it must be brought in the county court, which has exclusive original jurisdiction of such matters.

"Hence a suit by an administrator with the will annexed for construction of the will in order to enable him to administer the estate properly, is not maintainable in the first instance in the district court. * * *

"Section 16, article 6, of the Constitution does not preclude a county court from construing a will, in a proper case, and determining the effect and meaning of a devise of lands so far as is necessary to give proper directions to an executor or administrator with the will annexed.

"The construction of the will in such a case, is for the information and benefit of such executor or administrator only, in order to advise him what course to pursue. It adjudicates nothing beyond his rights and liabilities in the execution of his office; controversies between adverse claimants under the devise or between the executor or administrator and persons claiming adversely to the estate, will not be affected thereby."

In the course of the opinion it was said (p. 358): "It is well settled that the county court has full and complete equity powers as to all matters within its exclusive jurisdiction. Clothed with these powers, its authority to construe a will, when necessary to enable its officers to settle an estate properly, is as clear as its authority to set aside

on equitable grounds an order admitting a will to probate. Is its jurisdiction in such a case exclusive? This, we think, must depend upon the purpose and end of the proceeding. * * * The obvious purpose of the statute is to give all powers necessary to complete and speedy settlement of estates to one court, and to require all proceedings toward that end to be brought in that court in the first instance. * * * Such a suit is in reality a part of the proceedings for settlement of the estate."

In *Bennett v. Bennett,* 65 Neb. 432, 91 N. W. 409, it was held: "The county courts of this state are courts of general jurisdiction as to all matters of probate, settlement of estates and guardianship." Reaffirmed on rehearing, 65 Neb. 441, 96 N. W. 994.

In *Boales v. Ferguson,* 55 Neb. 565, 76 N. W. 18, 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." This holding was followed in *Pinn v. Pinn,* 108 Neb. 822, 189 N. W. 371.

In the instant case, the executors found themselves in possession of the promissory note that belonged to the estate of the decedent. To whom should it be assigned? To the widow as personalty, or be held as realty? Under the circumstances, it was necessary to place a construction upon the will to inform and direct the executors as to what disposition they should make of the promissory note. In so far as the county court undertook to declare that the promissory note was a lien and charge upon the share of Harry E. Gibson, it was unnecessary for the guidance of the executors in the discharge of their duties. This, we think, was beyond the jurisdiction of the county court, and the district court rightly so held.

But it is a fundamental rule that an appellate court does not acquire jurisdiction by appeal, unless the court from which the appeal was taken also had jurisdiction. A district court cannot acquire jurisdiction of a case on appeal from the county court if the county court had no jurisdic-

tion of such cause. *Brondberg v. Babbott*, 14 Neb. 517, 16 N. W. 845; *Keeshan v. State*, 46 Neb. 155, 64 N. W. 695; *Jacobson v. Lynn*, 54 Neb. 794, 75 N. W. 243; *Allen v. State*, 114 Neb. 676, 209 N. W. 236.

Since the county court was without jurisdiction to decree the note to be a charge upon the share of real estate devised to Harry E. Gibson, the district court was, on appeal, likewise without such jurisdiction, and in so holding the court exceeded its jurisdiction. We do not wish to intimate that the construction placed upon the will was not the proper one, but only that the court was without jurisdiction, in that particular action, to construe it.

We come now to the contention of the objectors that the note in question was an advancement and should be construed to be realty because of the provision in the will.

The doctrine of advancements was known to the common law and to the civil law centuries ago. It was a subject of statutory enactment in England in the reign of Charles II, and seems to have existed in England as a custom at an earlier date. The statute of Charles II became a part of the common law of the United States and is binding except where the question is controlled by statute. It rests upon the supposed desire of an ancestor to equalize his estate among his heirs, not only as to the property left at the time of his death, but as to all property that came to him, so that one child should not be preferred to another child in the final settlement of his estate. 1 R. C. L. 655, sec. 3; 18 C. J. 918. It is said that the term "advancement" is difficult of strict definition. In a strictly technical sense, an advancement is a perfect and irrevocable gift, not required by law, made by a parent during his lifetime to his child, with the intention on the part of the donor that such gift should represent a part or the whole of the portion of the donor's estate which the donee would be entitled to on the death of the donor intestate. Strictly speaking, it is not a gift, because if it were a gift it would not be repayable nor chargeable against anything that might be coming to the donee. An advancement does not carry with it the obliga-

tion of repayment; nor is it founded upon a valuable consideration; while a debt or loan carries with it the obligation of repayment and gives the creditor the right to enforce the same in the courts. The enforceable obligation against the donee would, therefore, be contrary to the character of an advancement and must be viewed in the light of a debt. See 1 R. C. L. 653, sec. 1.

In the instant case, when Joseph Gibson paid the debt of his son and required the son to recognize his obligation by giving his promissory note, bearing interest and payable at a future date, it was not in the nature of a gift, but was treated as a debt owing by the son to the father. It lacked the characteristics of an advancement. The doctrine of advancements applies only to estates of persons dying intestate unless otherwise provided by statute. Our legislature has acted upon the question of advancements, but has apparently limited the doctrine of advancements to intestate estates; at least it has not gone so far as to apply it to estates of those dying testate, and, under this rule, the note could not be treated as an advancement. We think that the county court and the district court rightly held that the note was not an advancement but was personalty, and, as such, passed by the will of testator to his widow.

Whether or not the provision of the will makes this note a charge and lien upon the share of the real estate that was devised to the son Harry is not for disposition in this action. The widow, if she sees fit, may go into the proper court and seek to establish the note as a lien and ask for its foreclosure, and when, and if, such an action is begun the proper court may determine the question.

From what has been said, it follows that the judgment of the district court, in so far as it determines that the note in controversy is made a lien upon the share of the real estate devised to Harry E. Gibson, is erroneous, because the court lacked jurisdiction in that particular action so to determine. In other respects the judgment is right and is affirmed.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF CHARLES BOSCHULTE.
FRED BOSCHULTE ET AL., APPELLEES, V. H. W. SCHOETTGER, EXECUTOR, APPELLANT.

FILED JANUARY 31, 1936. No. 29444.

1. **Principal and Agent.** When an agent voluntarily admits receipt of his principal's property or money, the burden of showing that he made proper disposition of it rests upon the agent.
2. ———. Where a trustee or agent deals with his trust in the name of another, or by means of an agency, corporate or otherwise, which he himself controls, he will be deemed in legal effect to have transacted such business as in his individual name, and as in his proper person.
3. ———. "Unless otherwise agreed, an agent receiving or holding things on behalf of his principal is subject to a duty to the principal not to receive or deal with them so they will appear to be his own, and not so to mingle them with his own things as to destroy their identity." Restatement, Agency, 900, sec. 398.
4. ———. Unless the circumstances indicate otherwise, it is inferred that an agent employed to act for the principal is to act in the principal's name, and is to have title to anything obtained for the principal vested in the principal's name.
5. ———. "If the agent violates his duty to keep the funds of the principal distinct from his own and in the principal's name and if, while so improperly mingled (invested) or deposited in the agent's name, the fund suffers loss, whether or not the loss is due to the agent's wrongful act, he is subject to liability to the principal for the amount of the original fund with interest from the time of the breach of duty." Restatement, Agency, 900, sec. 398.
6. **Payment.** Where the obligation to pay and the right to receive are united in the same person, in absence of affirmative proof of insolvency, the law operates the appropriation of the fund to the discharge of the debt.
7. **Executors and Administrators.** Where one is indebted to a person who dies testate, and afterwards becomes executor of his creditor's estate, if he be solvent and able to pay the debt at the time of his appointment, or any time during the administration of his office, and before his final settlement and discharge, he will be required to pay over to the estate, in cash, the amount of his antecedent debt.
8. ———. If an executor places or continues the title to property belonging to his trust in his individual name, or in the name of an agency, corporate or otherwise, of which he is an owner and has control, without any designation or indication of the ca-

pacity in which the title is held, or enters into any arrangement which substantially limits or surrenders his control over it, such act renders the executor personally liable in event of loss, notwithstanding that otherwise he may not have been guilty of negligence or bad faith.

APPEAL from the district court for Washington county: CHARLES LESLIE, JUDGE. *Affirmed as modified.*

Montgomery, Hall & Young, for appellant.

Harry E. Stevens and *Abbott, Dunlap & Corbett, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and RAPER and PROUDFIT, District Judges.

EBERLY, J.

This action comes to this court as an appeal by H. W. Schoettger, late executor of the last will and testament of Charles Boschulte, deceased, from adverse rulings of the district court for Washington county made on two items in his final report in that capacity, viz., appellant charges that the district court erred in charging "H. W. Schoettger, executor, with money of estate claimed (by him) to have been invested in Jungbluth loan in the sum of $5,000," and likewise erred in charging him "with advancements to the Equitable Investment Corporation in the sum of $1,200," alleged to have been made for the proper protection of the interests of the estate in this $5,000 asset.

It is the contention of the objectors that this Jungbluth note and mortgage were not owned by Charles Boschulte, Sr., at the time of his death, and that in no event do these items constitute a proper credit, but that the action of the district court in charging the late executor with them was in all respects justified by the evidence in the record.

It may be said that the final order of the district court merely adjudged that, with reference to the two items above referred to, the appellant "should be charged therefor." There is no special finding of facts, and the reasoning upon which the trial court based its judgment does not appear from the record before us.

It appears admitted that, commencing before 1920 and covering the period of time occupied by the transactions relating to this claim, H. W. Schoettger was the owner of a large block of stock in, and the managing officer of, the Arlington State Bank of Arlington, Nebraska; that Charles Boschulte died in the state of California, at the age of 80 years, on October 14, 1928, testate, and by his last will H. W. Schoettger was named as sole executor thereof. The deceased was born in Germany and came to this country at the age of 6 years. He served in the Civil war and settled in Washington county at the termination of that conflict. He continued to farm from the date of his arrival until his removal to California in 1920. Henry W. Schoettger was a brother-in-law of Charles Boschulte, and when the latter removed to California in 1920 he appointed Schoettger as his agent, and all his property in Nebraska was then entrusted to and thereafter managed by the brother-in-law as such agent, until the death of his principal in 1928. The will of the deceased was duly filed in the county court of Washington county, Nebraska, on December 6, 1928. On January 5, 1929, this will was, on the petition of H. W. Schoettger, duly admitted to probate. Thereupon Schoettger qualified by taking the oath and giving an approved bond as required by law, which was properly filed on January 11, 1929. His final report as executor was made and filed on April 24, 1933. See, however, Comp. St. 1929, sec. 30-611. Objections to this report were presented in the county court, and from the adverse order of the county court Henry W. Schoettger appealed to the district court for Washington county, where a trial was had which resulted in findings and judgment against him, and the same are now presented for the consideration of this court.

It also appears that on March 24, 1933, Henry W. Schoettger was removed as executor of this estate, and Philip O'Hanlon was duly appointed as administrator with the will annexed, and he thereupon gave bond and qualified as such, as by law provided.

The present litigation arises out of a series of connected

transactions commencing during the lifetime of Charles Boschulte, when the relation existing between him and Schoettger was that of principal and agent, and which were concluded after Schoettger became the executor of the last will of Boschulte. As to the manner of conducting this business, both as agent and as executor, Schoettger testifies: "Q. Now, Mr. Schoettger, what record do you have showing the investments that you made for Mr. Boschulte during his life? A. I have no records. Q. Did you keep any record at all of the way in which you handled his money and investments you made for him during his life? A. No, I did not. Q. Did you keep any record of the interest you collected for him? A. Only as I sent him a statement of his account. Q. How often would you send them to him? A. Once and twice a year. Q. Send them to California? A. Yes, sir. Q. And do you have copies of those statements? A. I have not. Q. Did you keep copies? A. I did not. Q. Do you have any record of any kind showing the transactions between yourself and the Arlington State Bank and Mr. Charles Boschulte during his life? A. The only record I have is Mr. Boschulte's ledger sheets."

The ledger sheets of the Arlington State Bank were introduced in evidence, and purport to show only the amounts and dates of deposits made, and the amounts and dates of withdrawals therefor, together with daily balances in the "Boschulte account." These records, given full force and effect, in no manner qualify the testimony of Schoettger above quoted. We are thus restricted in our sources of information as to the actual facts of the transactions involved to the testimony of Schoettger, unaided and unsupported by the usual contemporaneous records, but to be considered in the light of the circumstances disclosed in the bill of exceptions.

As applicable to the condition here disclosed, the general rule appears to be: "When the agent voluntarily admits the receipt of the property or money, the burden of showing that he made a proper disposition of it rests upon the agent. In making this showing, moreover, the agent must

be ready with vouchers and particulars; he cannot compel the principal to be satisfied with the agent's general statement, even under oath, that he knows he made a proper disposition of it, though he cannot give particulars. Moreover, the agent's failure to keep correct accounts, in violation of his obvious duty, 'authorizes,' it is said, 'unfavorable inferences, and subjects him when called on for an account to a heavy burthen of suspicion as well as of proof.' " 1 Meecham, Agency (2d ed.) 981.

In this situation Schoettger testifies that the first Jungbluth note was an unsecured obligation and was the property of the Arlington State Bank; that certain moneys belonging to Boschulte were collected by him as agent, which his principal directed him to invest. While the exact time is not definitely established, it appears that about the year 1923, as such agent, Schoettger purchased from the Arlington State Bank, in which he was then a large stockholder and the managing officer, the Jungbluth note of $5,000 and placed it in the "Boschulte box" then kept in that bank, and to which the bank employees at all times had access. There are no records in the bill of exceptions corroborating these facts, and we necessarily infer that no bank records embodying the same now exist. It thus appears without dispute that Schoettger wholly failed to properly discharge his duties to his principal. See 1 Meecham, Agency (2d ed.) 970-972.

Nevertheless Schoettger testifies, with reference to the acquirement of this first note of $5,000, that, regardless of how or when the note got out of the bank, money from the Boschulte property in the sum of $5,000 went into the bank, and the note came out of the bank.

The record further discloses that on October 11, 1926, Julian E. Jungbluth and wife executed and delivered to the Arlington State Bank a real estate mortgage for $12,195 covering certain lands in Washington county, Nebraska, subject to two first mortgages to the Lincoln Joint Stock Land Bank, evidenced by three promissory notes of even date, all payable to the Arlington State Bank on October

11, 1936. It is evidently the theory of appellant that the evidence establishes that the unsecured $5,000 Jungbluth note, then owned by Boschulte but by its terms payable to the Arlington State Bank (but not bearing the indorsement of that institution), had been withdrawn from the "Boschulte box" by the agents of the bank, surrendered to the maker, and the $5,000 note secured by this second mortgage payable in 1936 as a renewal had been substituted therefor. In this connection Schoettger testifies as follows: "Q. You did not indorse the notes at all? A. No, sir. Q. What did you do with that original note in 1923 when you said it came out of the bank? A. Turned it over to Mr. Boschulte—Mr. Boschulte's files. Q. Well, you mean you just took it and put it in his box? A. I just took it and put it in his box. Q. And that is the only indication that it belonged to him? A. Yes, sir."

However, the archives of the Arlington State Bank contain no records which tend to substantiate this testimony as to this second $5,000 note. It does not appear that Boschulte, who was a resident of California, ever received any interest on this investment, and Schoettger appears to be unable to show, either from bank records or otherwise, any remittance to him or credit to his account covering any interest on this note. It stands admitted that there was no record or entry on the books of the Arlington State Bank or anywhere else that this note and mortgage, in whole or in part, had ever been transferred to Charles Boschulte, or belonged to him during his life, or to his estate after his death. Neither do any facts appear in the record from which it can be inferred that Boschulte ever saw the note thus claimed to have been purchased in his behalf, or knew the form thereof, or the form of the renewal note, or that he ever knew or had reason to believe that these obligations were at all times by their terms payable to the Arlington State Bank and had never been indorsed or assigned to him in writing by that institution.

On December 8, 1928, the Arlington State Bank commenced a proceeding to foreclose the real estate mortgage

executed and delivered to it by Jungbluth and wife. In this petition the Jungbluth note of $5,000 here in suit is set forth as the property of the Arlington State Bank, and a foreclosure and sale of the mortgaged premises were prayed for to secure the payment thereof. No outstanding interest on the $5,000 is in any manner alleged. It will be noted in this connection that Charles Boschulte departed this life on October 14, 1928; that his last will had been filed in the probate court of Washington county accompanied by a petition of H. W. Schoettger, named in said will as executor, for the due probate of the same; and that said will was duly admitted to probate on January 5, 1929; that the official oath as such executor was executed on January 5, 1929, and his official bond was approved and filed on January 11, 1929. A decree of foreclosure and sale was duly entered in the foreclosure proceeding of Arlington State Bank v. Jungbluth et ux. for the sole benefit of the plaintiff bank on January 14, 1929. It appears that subsequently a sale was had pursuant to this decree, and the mortgaged premises bid in by the plaintiff bank; that by order of the district court for Washington county duly made on December 16, 1929, this sale was confirmed and a deficiency judgment in favor of the Arlington State Bank and against the Jungbluths, makers of the three notes there in suit, was entered on December 16, 1929, for the sum of $4,584.71.

Thereafter in February, 1930, the Arlington State Bank settled the judgment of $4,584.71 with the judgment debtors for $1,000; released a chattel mortgage which it held to secure the indebtedness merged into the judgment, and finally discharged the judgment debtors from further liability thereon. No part of this $1,000 thus received by the bank was paid to the Boschulte estate.

Schoettger testifies in this connection, as follows: "Q. Did you make any report to the heirs at that time? A. I did not. Q. What did you do with the $1,000? A. It was turned over to the bank. Q. The bank got all of it? A. Yes, sir."

In passing, it may be said that while the compromise of

the deficiency judgment appears to have been effected by Schoettger, then managing officer of the bank, if it was intended to include a compromise of the interests of the Boschulte estate in that obligation, the action taken it appears was not "with the approbation of the judge of the county court" (Comp. St. 1929, sec. 30-410), and was not one which Schoettger as executor was then authorized and empowered to perform.

Notwithstanding the requirement that "every executor * * * shall, within three months after his appointment, make and return, under oath, into the county court from which he received his letters, a true inventory of the real estate, and of all the goods, chattels, rights and credits of the deceased which shall have come into his possession or knowledge" (Comp. St. 1929, sec. 30-401), it was on February 21, 1930, more than thirteen months after his appointment and qualification, that the first inventory of the estate of Charles Boschulte was filed by H. W. Schoettger as its executor. There was included therein the following entry: "Note J. E. Jungbluth, interest from Oct. 13, 1926, at five per cent." This appears as the first public record made by Schoettger, as executor, of the existence of the rights of the Boschulte estate in and to this asset thus scheduled.

It does appear in the record that the Arlington State Bank was subsequently reorganized, and the real estate obtained by it through the Jungbluth foreclosure was by it transferred to the Equitable Investment Corporation of Arlington. It further appears that this investment corporation was owned by the former stockholders and directors of the Arlington State Bank, and organized to take over the real estate formerly owned by that bank. Nothing in the conveyances by the Arlington State Bank to the investment corporation, however, discloses the existence of any interest therein vested in the Boschulte estate; but on May 12, 1932, the Equitable Investment Corporation executed a declaration of trust, which recites, with reference to the Jungbluth land hereinbefore referred to, "that five-twelfths of the interest in said land it holds in trust for

H. W. Schoettger, executor of the last will and testament of Charles Boschulte, deceased." Further, the record before us also sustains the conclusion that the first mortgage on this Jungbluth land, owned and held by the Lincoln Joint Stock Land Bank, was subsequently foreclosed, and the premises sold pursuant to such decree to the mortgagee, and the sale confirmed. As the amount realized from this proceeding was not in excess of the amount due on such decree, together with the costs of the action, no sum remained to apply on the claim of the Boschulte estate. The Jungbluth note of $5,000, therefore, ultimately proved to be worthless to the Boschulte estate.

In view of the history of this transaction, it is quite evident that the judgment of the district court is, in all respects, correct, except so far as the subject of interest is concerned.

Schoettger's admission that, as agent of the Boschulte estate, he received the original $5,000 for investment is unqualified. His testimony as to the investments made, and how these investments were handled by him, both as agent and as executor, in the light of the surrounding circumstances, in view of the burden of proof imposed thereby, presents a serious question as to whether the Jungbluth notes were at any time to be considered as the property of Boschulte or of his estate, or whether we have before us a mere excuse of an unfaithful agent and a delinquent executor. Under the practically admitted facts, however, we are impressed with the view that a decision of these questions is not necessary to the proper disposition of this case. The appellant's testimony, taken as true, is an admission that the original investment of the $5,000 was made by him as Boschulte's agent in the name of the Arlington State Bank by the purchase of an unindorsed note payable to that institution which was then largely owned and admittedly controlled by him as its managing officer. The record amply sustains the conclusion that this control thereafter exercised by appellant over this note and its renewal, by and through the Arlington State Bank, was as absolute and

unqualified as though title thereto had been taken in his own name.

This jurisdiction appears committed to the view that where a trustee actually deals with his trust in the name of another, or by means of an agency which he himself controls, he will be deemed to have transacted the business as in his individual name and as an individual. *In re Estate of Bush,* 89 Neb. 334, 131 N. W. 602; *Westover v. Carman's Estate,* 49 Neb. 397, 68 N. W. 501.

In the evidence before us there is no attempt to establish that Boschulte in his lifetime knew the methods followed by Schoettger, his agent, or knew the form of the obligations in which his funds were invested. It follows that Schoettger is squarely within the rule, viz.: "Unless otherwise agreed, an agent receiving or holding things on behalf of his principal is subject to a duty to the principal not to receive or deal with them so that they will appear to be his own, and not so to mingle them with his own things as to destroy their identity." Restatement, Agency, 900, sec. 398.

In a discussion of this principal in this Restatement on Agency, it is said: "Unless the circumstances indicate otherwise, it is inferred that an agent employed to act for the principal is to act in the principal's name, and is to have the title to anything obtained for the principal vested in the principal's name." Restatement, Agency, 900, sec. 398.

As to the result of the violation of this principle, the following is given in the same text as an example: "If the agent violates his duty to keep the funds of the principal distinct from his own and in the principal's name and if, while so improperly mingled or deposited in the agent's name, the fund suffers loss, whether or not the loss is due to the agent's wrongful act, he is subject to liability to the principal for the amount of the original fund with interest from the time of the breach of duty. * * * Illustration: 4. A receives money for P which it is his duty to put in the T bank in P's name. He puts the money in the T bank in his own name. The following day the bank fails. A is

subject to liability to P for the entire amount." Restatement, Agency, 900, sec. 398. See, also, 1 Meecham, Agency (2d ed.) sec. 1335.

It is obvious that when H. W. Schoettger became executor of this estate on January 11, 1929, because of the transactions heretofore narrated, there was actually due to himself as executor from himself in his individual capacity, because of his conduct above set forth, the amount of money represented by the $5,000 note secured by the Jungbluth second mortgage, with interest at the legal rate from the date thereof. Certainly as executor, in the absence of ratification by proper parties, he could do nothing by his sole act or default to divest, as against himself in that capacity, the rights of the heirs and devisees which his own default and derelictions as agent for the deceased had created. Certainly there appears in this record no sufficient evidence of any ratification binding upon the appellees in this case. 2 C. J. 719.

Under these circumstances, the general principle controlling is: "Where the obligation to pay and the right to receive are united in the same person, the law operates the appropriation of the fund to the discharge of the debt." 2 Woerner, American Law of Administration (3d ed.) 845.

This rule was expressly approved by this court in *Howell v. Anderson,* 66 Neb. 575, 92 N. W. 760, subject only to a qualification or exception therein announced and formulated. Barnes, C., author of the opinion in the *Howell* case, adopted by this court, says, in part, on this subject: "The Massachusetts rule, as we will call it for convenience, is based on a legal fiction, and the presumption that all men are solvent and able to pay their obligations. It was but a short cut to say that one who was an administrator could not sue himself, therefore he would be required to account to the estate for his individual debt as so much cash. *It was an easy way of solving a difficult problem, and one which we fully approve of, where the fact of insolvency is not satisfactorily made to appear.* In case the adminis-

trator was solvent at the time of his appointment, or any time during the administration of his office, and before his final settlement and discharge, he should be required to pay over in cash the amount of his antecedent debt. In such a case the rule contended for by plaintiff is a salutary one. It results in no hardship to any one, and for that reason should be invoked and enforced. But it seems to us that this rule should have no application where it is made to appear that the administrator was wholly insolvent when appointed, while acting, and at the time of settlement." (Italics ours.) This conclusion is also formulated in the syllabus. While the doctrine of this case may properly be said to be in the nature of a limitation on the general rule which we have quoted, it must also be conceded that, except as thus qualified or limited, the general principle is by this court approved. It may further be said that in the instant case the executor has wholly failed to carry the burden of proving facts to bring himself within this exception or limitation. In other words, there is no showing in the instant case that Schoettger, from the date of his appointment and qualification to the date of his final discharge or removal, was continuously and "hopelessly insolvent."

But, aside from the liabilities originally created by Schoettger by his acts of omission and commission, as agent for Boschulte, it appears to be a rule well established by authority that, if an executor, trustee, or guardian places the title to property belonging to the trust in his own name, or in the name of some third party without any designation or indication of the capacity in which the title is held, or enters into any arrangement which limits or surrenders his control over it, such act renders the executor or trustee liable in the event of loss, notwithstanding that otherwise he may not have been guilty of negligence or bad faith. This is but a proper application of the principles of agency already discussed to the relationship of the executor to his trust. See *Estate of Wood,* 159 Cal. 466, 114 Pac. 992; *In re Arguello,* 97 Cal. 196, 31 Pac. 937; *In re Bane,* 120 Cal. 533, 52 Pac. 852; *Breit v. Yeaton,* 101 Ill. 242; *Allen v.*

Leach, 7 Del. Ch. 83, 29 Atl. 1050; *Knowlton v. Bradley,* 17 N. H. 458, 43 Am. Dec. 609; *Cornet v. Cornet,* 269 Mo. 298, 190 S. W. 333; *Duffie v. Williams,* 148 N. Car. 530, 62 S. E. 611; *Booth v. Wilkinson,* 78 Wis. 652, 47 N. W. 1128.

We thus conclude that the allowance of appellant's claim for credit in his final report of $5,000 represented by the Jungbluth note, and for $1,200 advanced by him as his share of the expenses of foreclosure, may not be allowed in whole or in part; and that in addition to these two items he is properly chargeable as executor with interest on the sum represented by the Jungbluth note and mortgage securing the same from the date thereof, viz., October 11, 1926, as provided by law.

We have carefully considered the other assignments of error in behalf of the cross-appellants. In consideration of the views of this court announced in *In re Estate of Wilson,* 97 Neb. 780, 151 N. W. 316, and the limitation of the record before us, we are of the opinion that the disposition of these matters as made by the trial court was correct. In view of the length of the present opinion, we arrive at the conclusion that an extended discussion of these matters would serve no good purpose.

Therefore, we are confirmed in our view that, under the undisputed facts in this case, aided by the necessary inferences which the surrounding circumstances established by the proof require, the judgment entered in the trial court must be modified by the addition of interest as herein determined. Judgment will accordingly be entered in this court in conformity with this finding, and, as thus modified, the judgment is

AFFIRMED AS MODIFIED.

FRANCES BROWN, APPELLEE, V. MARTIN ECHTENKAMP, APPELLANT.

FILED JANUARY 31, 1936. NO. 29468.

1. Bastards. Bastardy is a civil proceeding, even though it may be enforced by arrest and imprisonment.
2. ———: ORDER FOR SUPPORT: IMPRISONMENT. The putative father may be committed to jail, under section 9-106, Comp. St. 1929, until he shall comply with his moral obligation, and furnish security to support his child in the amount fixed by the trial court.
3. ———: ———. The payment by the father of a bastard child of the amount fixed in the judgment is to indemnify the public against its possible liability for the care and maintenance of said child.
4. ———: ———: MODIFICATION. It would be proper in any case in which the trial court was clearly convinced of the utter inability of the defendant to furnish a bond, or to meet the payments fixed, to grant a defendant some modification of the terms thereof.

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

Kingsbury & Kingsbury, for appellant.

Robert G. Fuhrman, contra.

Heard before GOOD, DAY and PAINE, JJ., and RAPER and PROUDFIT, District Judges.

PAINE, J.

This is a proceeding, brought in the district court for Dixon county, wherein the defendant and appellant, Martin Echtenkamp, sought to be released from custody after having been committed to the county jail for failure to comply with the terms of a judgment entered against him in a bastardy proceeding.

In the original proceeding the jury returned a verdict of guilty on October 9, 1933, and he was adjudged to be the father of the bastard child of the plaintiff and appellee, Frances Brown, which was born in June, 1932. On December 13, 1933, judgment was entered by the trial court

for the payment of $1,500, $500 to be in cash and the balance at the rate of $100 each year, payable quarterly, and further provided that within 30 days he was to furnish a bond to comply with this judgment.

On January 16, 1934, on the motion of plaintiff's attorney, defendant was committed to jail for failure to comply with the judgment. On April 16, 1934, a hearing was had on his application for a release from jail, after which hearing the district court reduced the first payment to be made to only $200 in the place of $500, and, as so modified, defendant failed to comply therewith, and was remanded to the custody of the sheriff. The trial court denied his application for a release.

At the time of the hearing, October 9, 1934, defendant filed an application for release from custody, basing the same on the ground that he had no money or property to pay the judgment, and was entirely unable to obtain assistance from any relatives or other persons, and was unable to furnish a bond therefor, and on the same day filed a motion for a release from custody.

An answer was filed by the plaintiff, admitting the confinement of the defendant, and charging that the question of the defendant's ability to comply with the judgment of the district court has been fully adjudicated and is closed and determined; that the present application is an attempt to relitigate a question which is *res adjudicata*.

On October 12, 1934, a trial was had upon the issues thus presented. Evidence of a number of witnesses was taken on behalf of the defendant, but no evidence was introduced by the plaintiff. The evidence indicated that the defendant was a farm laborer, and that his father was a farmer, who owns two quarter-sections of land, subject to mortgages of $12,000, with delinquent taxes and interest, and who claims to owe, in addition, other debts of $4,600. The father of the defendant testified that he was in poor health, was about 60 years of age, needed a hired man to help him on the farm, and would be willing to give his son a job on the farm, but has refused to sign a bond for his son, insisting

that he is in such poor financial condition that it would not be accepted. The defendant's father-in-law testified that he owned 185 acres of land, mortgaged for $14,000, and that his personal property was mortgaged for $700.

Defendant's attorney insisted that the defendant is a pauper, and that he has no relatives who can assist him in giving a bond to pay this judgment, and that he has been compelled to remain in jail under section 9-106, Comp. St. 1929, which provides that, in case the defendant shall neglect or refuse to give security and pay the costs of the prosecution, he shall be committed to the county jail to remain till he shall comply with the order of the court. It is argued by the defendant that, under the evidence in this case, this constitutes a life sentence, and that in other states having similar bastardy statutes there is usually another provision in the statute under which the defendant can be relieved of the payment of the judgment when he has shown to the court that he has nothing out of which to pay, and he insists that, under authority of the case of *Brown v. Hendricks,* 102 Neb. 100, 165 N. W. 1075, it is held that a neglect to comply with an order means a careless omission of duty, and not an omission from necessity.

On the other hand, the attorney for the plaintiff insists that, while some 270 days had elapsed up to the time of the hearing, defendant had actually only been in jail 135 days, being allowed to go home when he was sick, and certain other privileges granted him, and calls attention to the fact that when he was first arrested he provided a bond for his appearance at the preliminary hearing, and on June 19, 1932, he was bound over to the district court, and he then provided a bond; that in January, 1933, while he was out of jail pending this bastardy charge, he was married to another girl, and some five months later, in May, 1933, she had their first baby, and this was while defendant was out of jail pending trial on the first charge, and later his wife had another child, and the father of the defendant is supporting his wife and her two children.

The attorney for the plaintiff says that after the hearing,

as hereinabove set out, the trial judge cut the first payment required to be made in cash to $200, and spread all of the balance of the judgment out to be paid at the rate of $25 a quarter, and plaintiff's attorney insists that the defendant's father owns a good farm, and although it has a mortgage against it, he owns personal property that is not mortgaged, and has already furnished three bonds for this same son; that defendant has had four trials or hearings, in all of which he has been ably represented by counsel, and has brought in medical testimony, as well as other testimony, and has brought a transcript and bill of exceptions to this court, and in spite of all these expenditures the defendant has never paid one penny toward the support of the plaintiff's bastard child.

A careful reading of the case of *Brown v. Hendricks, supra,* shows that in some other states provision is made for the discharge of a prisoner in a bastardy case when he is absolutely unable to pay, and that imprisonment of the defendant in such circumstances is solely for the purpose of coercing the defendant to perform the duty which the judgment of the court requires of him, but imprisonment is never continued after it is made to appear impossible to perform the thing required, citing *Ex parte Donahoe,* 24 Neb. 66, 38 N. W. 28, in which an application for a writ of *habeas corpus* was denied, and a similar application was denied in *Ex parte Cottrell,* 13 Neb. 193, 13 N. W. 174.

Bastardy is a civil action, although it may be enforced by arrest and imprisonment to require the putative father, in compliance with his moral obligation, to furnish support for his child, and to indemnify the public against liability for its care and maintenance. *In re Application of Walker,* 61 Neb. 803, 86 N. W. 510.

In *Campion v. Gillan,* 79 Neb. 364, 112 N. W. 585, defendant had a judgment entered against him in the sum of $1,000, and while he was in jail in Seward county Governor Mickey issued an order to the sheriff for his release. In this opinion, *Ex parte Donahoe, supra,* and *Ex parte Cottrell, supra,* are each discussed at length.

Bastardy is not a crime, and, therefore, imprisonment therefor is not considered as imprisonment for a crime. The question is asked, "Can a governor remit a civil obligation? Can he relieve the reputed father from his obligation to support his illegitimate child?" The answer is, no.

In all of these cases the question of the ability of the defendant to comply with the judgment is committed to the sound discretion of the trial court, who, in the case at bar, had the advantage of this court in that he had all of the witnesses before him, especially the defendant. This court cannot presume that the trial court was convinced of the utter inability of the defendant to meet the judgment, or any part thereof, and refused to grant him some relief; but, on the other hand, it appears that the trial court made a very generous modification of the original judgment, and required but the sum of $200 to be paid at once and the balance to be paid in small payments of $25 every three months.

The attorney for the defendant calls our attention to *Maryott v. State*, 124 Neb. 274, 246 N. W. 343, which was a contempt proceeding growing out of a divorce case, and it was held that a husband should not be committed to jail for his refusal to pay alimony unless his refusal is wilful and contumacious, but we do not believe that this holding in a divorce case is a precedent for a similar holding in a bastardy case where the defendant has not yet paid one cent toward the support of his child.

The evidence indicates that the defendant has usually worked for his father, and that when working for his father he has earned $20 a month. The evidence of the defendant does not convince this court that it is absolutely impossible for him to either furnish a bond or to comply with the judgment of the court, but rather indicates to the contrary, and the action of the trial court in this matter is hereby

AFFIRMED.

BEECHER JONES, APPELLANT, V. ROSSBACH COAL COMPANY ET AL., APPELLEES.

FILED JANUARY 31, 1936. No. 29453.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW. Remedy under compensation law is exclusive where employee operating thereunder sustains an injury by reason of an accident arising out of and in the course of his employment.
2. ———: ———: "EMPLOYER." Owner of building, used in conducting owner's business, who enters into contract with contractor for certain repairs to said building, is an "employer" within the terms of section 48-116, Comp. St. 1929, unless it be shown that the contractor was required to procure compensation insurance for protection of his employees.
3. ———: INJURY TO EMPLOYEE: ACTION. In common-law action by employee of contractor against owner to recover damages for a negligent injury, it is necessary to allege and prove that the provisions of the compensation law do not apply.

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

Emmet L. Murphy and *M. J. Gardiner,* for appellant.

Francis P. Matthews and *William P. Kelley,* for appellee Rossbach Coal Co.

Kenneth G. Harvey, for appellee Gate City Erection and Supply Co.

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

KROGER, District Judge.

This is an appeal from a judgment of dismissal in an action for damages for personal injuries, entered after demurrer to plaintiff's petition had been sustained and plaintiff had elected to stand on his petition.

The petition alleged, in substance, that on the 6th day of September, 1933, appellee, Rossbach Coal Company, owned and maintained its offices and business of selling coal at retail in a certain store building in Omaha, Nebraska, and at that time was engaged in remodeling and repairing

the same; that the main floor of said building was of concrete construction, and some ten feet below the main floor was the basement floor, also of concrete; that, shortly prior to the date of the accident complained of, Rossbach Coal Company had caused an opening, some three feet by six feet in size, to be made in the main floor of said building; that appellee, Gate City Erection and Supply Company, had entered into a contract with Rossbach Coal Company to do some metal lath work in said building, and that appellant, an employee of the Gate City Erection and Supply Company, was doing some work pursuant to said contract on the upper part of the walls and ceiling of the main floor room; that appellant worked on a platform consisting of planks laid across wooden horses, the top of this platform being some five feet above the floor; that, because of the location of the opening in the floor, the end of the planks extended over this opening; that, while working on said platform, appellant's foot slipped beyond the outer horse and onto the outer end of the planks, causing them to up-end and causing appellant to fall from the scaffolding, through said opening and onto some iron sewer pipes on the basement floor, a distance of some 15 feet, resulting in serious and permanent injuries to him. Negligence of the Rossbach Coal Company is predicated on failure to protect said opening as required by an ordinance of the city of Omaha, section (f) of which reads, as follows: "(f) All openings in floors and wall shall be properly protected, and it shall further be the duty of all owners, contractors, builders or persons having control of the erection, alteration or removal of any building, or other structure within the corporate limits of the city of Omaha, to comply with an act of the state legislature providing for the protection and safety of persons in and about the construction, repairing, alteration or removal of buildings, bridges, viaducts and other structures."

Gate City Erection and Supply Company, the employer of appellant, was made a party defendant for the purpose

of protecting its subrogation rights under section 48-118, Comp. St. 1929.

To this petition the appellee Rossbach Coal Company filed a general demurrer on the ground that the petition did not state facts sufficient to constitute a cause of action.

In its brief, and on oral argument, Rossbach Coal Company contends that the petition shows on its face that it was an employer, and consequently not liable in tort to an injured workman, and for the further reason that the danger confronting appellant was patent and obvious and in exposing himself to such patent and obvious danger he was guilty of such negligence as would bar a recovery.

It is the universal rule that, where employer and employee are operating under the workmen's compensation law, and the employee suffers injury by reason of an accident, arising out of and in the course of his employment, he must look exclusively to the compensation act for his remedy. *Freese v. Morrell & Co.*, 58 S. Dak. 634, 237 N. W. 886.

It is the contention of appellant, however, that Rossbach Coal Company was not an "employer" within the provisions of the compensation law, but was a "third person," and that consequently the workmen's compensation law of this state does not apply.

Section 48-116, Comp. St. 1929, provides: "Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this article, shall be included in the term 'employer' and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this article. This section, however, shall not be so construed as to cover or mean an owner who lets a contract to a contractor in good faith, or a contractor who, in good faith, lets to a subcontractor a portion of his contract, if the owner or principal contractor, as the case

may be, requires the contractor or subcontractor, respectively, to procure a policy or policies of insurance from an insurance company licensed to make such insurance in this state, which policy or policies of insurance shall guarantee payment of compensation according to this article to injured workmen."

In construing the foregoing section, this court, under a state of facts similar to those pleaded in this case, held the owner of a building undergoing repairs to be an "employer." *Sherlock v. Sherlock*, 112 Neb. 797, 201 N. W. 645.

Since the provisions of the compensation law are exclusive of all other liability as to those subject to it, it follows that, in a common-law action by the employee against his employer, it is necessary to allege and prove that the compensation law does not apply. *Beveridge v. Illinois Fuel Co.*, 283 Ill. 31, 119 N. E. 46; *Sheban v. A. M. Castle & Co.*, 185 Wis. 282, 201 N. W. 379.

In his petition, appellant has pleaded no facts from which it can be inferred that the compensation law of this state does not apply to this case. His petition is silent as to whether the Rossbach Coal Company required the contractor, Gate City Erection and Supply Company, to procure compensation insurance as by our statute provided for the protection of its employees, and in that situation it will be presumed that the Rossbach Coal Company was an "employer" as provided in section 48-116, *supra*, and plaintiff would be required to look to the provisions of the compensation law for his remedy.

For the reasons given, plaintiff's petition failed to state a cause of action and the demurrer was properly sustained.

It follows that the judgment of the trial court dismissing appellant's action was right and is

AFFIRMED.

MARY A. SELLECK, APPELLANT, V. I. O. MILLER, APPELLEE.

FILED JANUARY 31, 1936. No. 29441.

1. **Judgment:** COLLATERAL ATTACK. A judgment of a court of general jurisdiction cannot be attacked collaterally except for fraud in the procuring of said judgment, or on the ground of lack of jurisdiction on the part of the court.
2. ———: INJUNCTION. The holder of a valid judgment may not be enjoined from proceeding in an orderly and lawful method to collect the amount due on said judgment.
3. **Record** examined and *held* to support the judgment of the trial court.

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

Nye & Nye, for appellant.

George A. Munro, contra.

Heard before GOOD, DAY and PAINE, JJ., and RAPER and PROUDFIT, District Judges.

PROUDFIT, District Judge.

This action, brought in the district court for Buffalo county by the plaintiff, Mary A. Selleck, appellant, against the defendant and appellee, I. O. Miller, seeks to have set aside a certain judgment held by the appellee against the appellant to vacate and set aside a deed to an interest in real estate purchased by the appellee at execution sale, and to enjoin the said appellee from any further proceeding seeking the collection of said judgment. Trial in the court below resulted in a judgment for the appellee and against the appellant, and she brings her cause to this court on appeal.

The amended petition sets forth that one Jay M. Riley, receiver of the City National Bank of Kearney, Nebraska, recovered a judgment in the district court for Buffalo county against Herbert H. Selleck and Mary A. Selleck, plaintiff and appellant herein, which said judgment was finally reduced by payments to $254.53, when the same was sold as a part of the assets of said City National Bank, and that the defendant, appellee herein, purchased said judg-

ment. The amended petition further recites various efforts on the part of appellee to collect said judgment, and appellant alleges that she signed the note at the request of the president of the City National Bank of Kearney as an accommodation to said bank, and that she received no consideration for the same; that the execution of said note had no reference to her separate property or estate, and none of the proceeds received by her or used by her was for the benefit of her separate property or estate, and that at no time was she indebted to said bank in any sum whatsoever, and alleges that judgment had been satisfied so far as plaintiff, appellant, is concerned. Plaintiff further alleges repeated attempts on the part of appellee to collect the judgment, and that the defendant annoys and harasses the plaintiff and threatens her with extortion and duress, and asks for payment of a large sum of money on account of said judgment; prays for the cancelation of the said judgment and the sheriff's deed obtained by the appellee on execution, and to enjoin him from further proceedings to collect on account of said judgment.

The answer to the amended petition is in substance a general denial of the allegations of the matters set forth therein, except that the defendant admits that he obtained a sheriff's deed to an interest in certain real estate sold under execution in the attempt to satisfy his said judgment, and that the appellant appeared in said proceedings and objected to the confirmation of sale of said interest, and that at the hearing the court overruled her said objections and confirmed the sale and no appeal was taken from the findings of said court, and that the questions therein presented and which might have been presented at said hearing are now barred by the doctrine of *res judicata.* The defendant further says that the plaintiff, at the time of signing said note, was not a married woman; that said note has been merged in judgment; that appellant received due notice of the pendency of said action and did not defend against same nor appeal from said judgment and is now estopped to urge the matters set forth in her amended

petition as a defense to said original indebtedness. Defendant prays that the amended petition be dismissed.

In her amended reply to the answer the appellant denies all allegations contained in the answer of the defendant not specifically admitted in her amended petition, and further replying alleges the facts to be that the receiver of the City National Bank of Kearney recovered judgment against her and her son, Herbert H. Selleck, but that defendant has never had execution issued upon said judgment against Herbert H. Selleck, who was the principal maker of the said note, that said judgment made no distinction as to the liability of the appellant upon said note as surety only, and that appellee is estopped to proceed against appellant for the reason that appellant was only a surety upon said note and is only liable upon said judgment as surety, in any event, and not then until the property of Herbert H. Selleck has been exhausted by execution, which has not been done by appellee.

The errors upon which appellant relies for reversal are: (1) The findings of the trial court are contrary to law. (2) The decision of the trial court is contrary to law. (3) The trial court erred in overruling the motion for new trial.

This action was brought by Mary A. Selleck as plaintiff and appellant against the defendant and appellee herein, I. O. Miller, in which it appears that a judgment was rendered against the appellant and another in an action had in the district court for Buffalo county some years before in favor of the receiver of the City National Bank of Kearney. The judgment does not disclose that the appellant was other than a joint maker of the note, nor does it appear that she made any defense to the action, and no appeal was taken from the judgment. In the course of time the receiver of the failed bank sold the assets remaining in his hands to the appellee herein, including therein the said judgment. No objection is made to the sale, and for aught that appears in the record it was the ordinary sale of assets under order of the comptroller of the currency. The only objection to

the ownership of the judgment on the part of the appellee, and it is more of a criticism than an objection, is the fact that he paid a very trifling amount to secure the judgment. After the judgment came into the possession of the appellee he undertook to collect the same, and in due course of time, having failed to collect from the personal property, he caused an execution to be issued against certain real estate in which the appellant had an interest. It was sought in this proceeding to sell a seven-ninths interest in a certain tract of real estate in Buffalo county as the property of the appellant, and in the usual course of procedure a levy was made, the sale was advertised and the undivided seven-ninths interest of said real estate was sold to the appellee. The appellant appeared in this proceeding and objected to the confirmation of sale, and hearing being had upon confirmation, the court found that of the interest so sold the appellant was the owner of but three-ninths interest only, instead of seven-ninths, and the sale was confirmed as to the three-ninths interest and vacated as to the four-ninths. No appeal was taken from the order confirming said sale. It further appears that, the judgment not being fully satisfied by the sale of said real estate, the appellee sought to collect the balance of the judgment, but, so far as the record discloses, no further proceedings were had and the judgment remains unsatisfied.

The action is brought by the appellant to have the original judgment in the case brought by the receiver of the City National Bank of Kearney against the appellant vacated, alleging as a ground for same that she was only surety on the note and not the principal maker. She also seeks in this action to have the sale of the real estate vacated for the same reason, and she further prays that the appellee be enjoined from further annoying or harassing her in his effort to collect the balance due on said judgment; her main contention throughout being that she was only the surety on the note and not the principal maker.

To state this case is to decide it, for it is elementary that a judgment cannot be attacked collaterally except for fraud

in procuring said judgment, or for lack of jurisdiction on the part of the court that rendered the judgment. There is no charge here that there was any fraud in procuring the judgment, nor is there any assertion of a lack of jurisdiction on the part of the court that rendered the judgment. No appeal was taken from the judgment and it became final and cannot now be attacked collaterally.

The cases cited by the appellant are not in point. The case upon which most reliance is placed as a basis for this proceeding is *Drexel v. Pusey*, 57 Neb. 30, 77 N. W. 351. The fourth paragraph of the syllabus in that case recites:

"The rendition of a judgment against principal and surety on a note, without having judicially determined on the record which defendant was the principal debtor and which the surety, * * * does not extinguish the relation of suretyship between the parties, and the duties of the creditor with reference thereto."

This action is not brought for the purpose of requiring the creditor to proceed against the principal debtor, who is alleged to be Herbert H. Selleck, but is brought to cancel a judgment which has not been paid, and to cancel a deed that was issued as the result of a judicial sale. The *Drexel* case is clearly not authority for the exercise of any such power on the part of the court and can easily be distinguished from the case at bar. So far as the record goes in this case, the principal debtor, Herbert H. Selleck, may have been proceeded against and his property may have been exhausted. The sheriff's return to the execution under which the real estate of appellant was levied upon sets forth that the officer was unable to find any goods or chattels of the said defendants, Mary A. Selleck and Herbert H. Selleck, in his district liable to execution; therefore he levied on the real estate therein described.

What is said in regard to a collateral attack on the main judgment applies with equal force to the judgment on confirmation of sale of the real estate. The appellant appeared in that proceeding, objected to the confirmation, her objections were overruled, and the sale confirmed as to three-

ninths of the real estate, and no appeal was taken, and that judgment has become conclusive against appellant; no charge of fraud being made, nor of lack of jurisdiction on the part of the court. As to the charge of duress, extortion and oppression and threats on the part of the appellee against the appellant, which are charged as the basis for an injunction, the evidence discloses a total failure to establish such charge, and the injunction was properly denied. No error appears in the record, and the judgment of the trial court should be and is

AFFIRMED.

CHARLES A. OSS ET AL., APPELLEES, V. HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT.

FILED JANUARY 31, 1936. No. 29445.

1. **Indemnity Bond**: ACTION: PARTIES. The indemnity bond, the conditions of which are set forth in the opinion, *held* to be sufficient to support an action by mortgagees claiming liens on certain live stock sold by the marketing agency named as principal in said bond.
2. ———: ———: ———. In an action on said bond for damages sustained by the breach thereof, the mortgagor and mortgagees may properly join as plaintiffs.
3. **Quære.** The effect of the bankruptcy proceedings relating to plaintiff, mortgagor, not having been put in issue by the pleadings is not considered in this opinion.
4. **Record** examined and *held* that there is not sufficient competent evidence therein to sustain the finding and judgment of the trial court.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

Johnsen, Gross & Crawford, contra.

Heard before GOOD, EBERLY and DAY, JJ., and RAPER and PROUDFIT, District Judges.

PROUDFIT, District Judge.

This action is brought to this court on appeal from the

district court for Douglas county, wherein the plaintiffs sought to recover damages said to accrue to them by reason of a breach in the conditions of an indemnity bond executed by the defendant as surety for the American Live Stock Commission Company as principal. The material conditions of the bond are more fully set out in the opinion.

The plaintiffs in the action are Charles A. Oss, alleged to be the owner of cattle sold by the principal as agent and broker, the receiver of the Newman Grove State Bank of Newman Grove, Nebraska, and George H. Gutru, alleged holders of chattel mortgages on the cattle. The amended petition charges that the plaintiff Oss was the owner of 25 head of cattle, that 6 of these cattle were mortgaged to the Newman Grove State Bank for $1,837.50; that part of the cattle was mortgaged to George H. Gutru for $745.57; that the cattle were consigned in the name of Gullik Oss to the American Live Stock Commission Company for sale on May 18, 1926; that said company sold the cattle for $1,836.09, and failed to remit the proceeds of sale to plaintiffs. The amended petition prays for judgment against the defendant and in favor of the plaintiffs, and each of them, in the sum of $1,836.09, together with interest.

The answer admits the residence of plaintiffs, and that the plaintiff Newman Grove State Bank was duly organized and existing under the laws of the state of Nebraska, and engaged in a general banking business at Newman Grove, and that E. H. Luikart is the duly appointed and acting receiver of said bank; that the plaintiff George H. Gutru is a resident of Newman Grove, and that the defendant is, and was at all times mentioned in this action, engaged in the writing of general insurance and surety and indemnity bonds in the state of Nebraska, and that there had been executed and delivered by the American Live Stock Commission Company as principal, and the defendant as surety, a bond substantially in the form set forth in plaintiffs' amended petition, and the said bond was on said date in full force and effect, and that due notice of claim thereunder

was served upon said defendant, as set forth in said amended petition.

The defendant denies generally all other allegations contained in the amended petition not specifically admitted to be true. By way of further defense, the defendant alleges that neither the plaintiff Luikart, as receiver of the Newman Grove State Bank, nor George H. Gutru may recover in this action for the following reasons:

1. That the said plaintiffs as mortgagees, not being within the terms of the bond, could not recover thereon.

2. That neither the American Live Stock Commission Company nor the defendant ever had any knowledge, actual or constructive, prior to the presentation of claims by said plaintiffs, of the alleged and claimed mortgages.

3. That the Newman Grove State Bank and George H. Gutru had, prior to May 19 and 20, 1926, and since said dates waived any claim under said mortgages.

4. That Charles A. Oss was not on the dates of their alleged execution the owner of the property purported to be described and mortgaged by said mortgages.

5. That the American Live Stock Commission Company did not on May 19 and 20, 1926, or at any other time, deal in any way with any property described in and purported to be mortgaged by said alleged mortgages.

6. That the said plaintiff, Charles A. Oss, was a copartner in the American Live Stock Commission Company on said dates, May 19 and 20, 1926, and liable as a copartner for an accounting to the owner of said cattle for the proceeds of sale of same, and all of the plaintiffs are therefore estopped to maintain this action.

7. That on or about January 1, 1927, for a valuable consideration, the said Charles A. Oss purchased all of the assets, goodwill and name of the American Live Stock Commission Company, including especially all liability for proceeds of sale of live stock previously sold by said commission company as agent and broker, and therefore all of the plaintiffs are estopped to maintain this action.

8. That the American Live Stock Commission Company

did not, on May 19 and 20, 1926, or at any time, deal in any way with any cattle owned or consigned by the plaintiff Charles A. Oss.

9. That the plaintiffs are not the owners of the alleged claim nor cause sued upon.

And defendant prays that the amended petition of plaintiffs be dismissed, and that it recover its costs.

The reply of plaintiffs to said answer amounts to a denial of all facts set forth in the answer except such as are admissions of facts pleaded in the plaintiffs' amended petition.

The cause was tried to a jury, and at the close of all of the evidence, on motion of counsel for plaintiffs, the court discharged the jury over the objection of counsel for defendant and entered a judgment in favor of plaintiffs and against the defendant of $2,461, with interest at 6 per cent. from date of rendition thereof.

Motion for new trial being overruled, the defendant brings the cause to this court on appeal.

Of the errors relied upon for reversal only the following need to be noted: (1) The court erred in overruling the defendant's motion for directed verdict and judgment made at the close of plaintiffs' evidence, for the reasons therein relied upon. (2) The court erred in sustaining the plaintiffs' motion at the close of all the evidence. (3) The court erred in not sustaining the defendant's motion for new trial for the reasons set forth in said motion.

An examination of the record in this case discloses that the plaintiff Charles A. Oss was employed as a yard salesman by the American Live Stock Commission Company in Omaha during the month of May, 1926. At that time this plaintiff was also interested in feeding cattle at Newman Grove, Nebraska, the operations at the feed yard being under the management of his father, G., or Gullik, Oss, and one Frank Johnson; that a shipment consisting of 25 head of cattle was consigned in the name of G. Oss to the American Live Stock Commission Company in Omaha, arriving on the 18th of May, 1926. Part of the cattle was sold that

day and part the next day. The plaintiffs, E. H. Luikart, receiver of the Newman Grove State Bank, and George H. Gutru, are claiming an interest in the proceeds of said cattle by virtue of certain chattel mortgages executed by the said Charles A. Oss, one to the Newman Grove State Bank, and the other to George H. Gutru. It is claimed by the plaintiffs that the American Live Stock Commission Company never accounted for the proceeds of said sale, but that same were misappropriated. The live stock company, in compliance with the federal law known as the Packers and Stockyards Act of 1921, was operating under a bond that provided that, if all the obligations created or incurred by the principal (in this case the American Live Stock Commission Company) are faithfully and promptly performed, then the bond shall be null and void, otherwise to remain in full force and effect. The conditions of the bond further provided that such obligations include (but are not limited by) the faithful and prompt accounting for and payment of the proceeds of sale of live stock received for sale by such marketing agency for or on account of the owner or consignor. And further provides that any person damaged by the breach of any condition thereof may maintain an action on this bond in his own name and recover his damages after first giving written notice to the trustee named therein, or the said trustee may maintain an action in his own name, recovery to be made for the use of the person damaged, and both principal and surety waive every defense, if any there might be, based upon the fact that any person damaged or in whose name the suit shall be brought is not party or privy to this bond. The bond also specifically provides that the principal and surety are held and firmly bound unto the secretary of the Omaha Live Stock Exchange as trustee for all persons who may be damaged through the breach of said bond as obligee in the sum of $5,000.

In the brief filed herein and in the oral argument, counsel for defendant urged strenuously that the mortgagees could not join in this action, that they were not parties to

the bond, and the only right that they had would be to impound the proceeds of any recovery that the plaintiff Oss might secure. It is very clear that the mortgagees had a direct interest in a recovery under this bond, and under the provision of section 20-311, Comp. St. 1929, it would appear that the action was properly brought in the name of the owner of the property involved and the mortgagees. Said section provides: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this chapter."

The contention of the plaintiffs is that the express terms of the bond are broad enough to include mortgagees as well as owners. Among other conditions of the bond is this:

"Any person damaged by the breach of any condition hereof may maintain an action on this bond in his own name to recover his damages, after first giving written notice to the trustee named herein."

And a further condition of said bond is:

"Both principal and surety hereby waive every defense, if any there might be, based upon the fact that any person damaged or in whose name the suit shall be brought is not party or privy to this bond."

The language of this clause is clear and explicit and would seem to exclude any defense based upon the proposition that the mortgagee is not protected. If it be urged that the expression "any person" does not include mortgagee as well as mortgagor or consignor of live stock, reference to the first paragraph of the bond discloses the fact that the obligors bound themselves to the trustee named in the bond for "all persons who may be damaged through the breach thereof." The language of the bond is comprehensive and all inclusive, and the mortgagees are clearly within the protection of the said bond and may properly be joined as parties plaintiff with the owner of the live stock in this action.

Upon the oral argument of this case it was urged by the defendant that the plaintiff Oss was not entitled to appear

in this action as party plaintiff by reason of the fact of his having been adjudged a bankrupt since the accrual of this action, and therefore the cause of action belonged to his estate in bankruptcy and he could not maintain the action. There is no issue presented in the pleadings in relation to the bankruptcy proceedings and the same need not be further considered in this opinion.

In order for the plaintiffs to recover in this action, it was necessary for them to establish by a preponderance of the evidence all of the material allegations of their amended petition, such as the ownership of the live stock, the rights, if any, created by the execution of the chattel mortgages, receipt of the live stock by the commission company, the sale thereof, the amount received therefrom, and the failure to account to plaintiffs for such proceeds. If it be conceded that the evidence of the plaintiffs was sufficient to establish the ownership of the live stock and the rights of the mortgagees under the several mortgages, the shipment and receipt of the live stock by the commission company, and the sale thereof, there still remains the material allegations of the amount received from the sales and the misappropriation thereof.

The plaintiffs sought to establish the amount received from the sale of said cattle by the exhibits Nos. 5 and 6, attached to the bill of exceptions. The plaintiff Oss, who it seems was the salesman, did not keep the record of the sales. The record of the sales was evidently made up by an office man by the name of Burgess. On the cross-examination Mr. Oss is asked as to who prepared exhibits Nos. 5 and 6, same being certain accounts of sales. He says that the writing is that of one Bill Burgess who worked for the American Live Stock Commission Company and is still in the yards. He is then asked if he knows who made the calculations and set down the figures. His answer is: "I suppose Bill did, I think it is his writing; it is either his or Leonard's, I am not so sure." The witness previously testified that exhibits Nos. 5 and 6 were correct and accurate records of the account of sales of those cattle, and on mo-

tion of defendant's counsel his affirmative answer to that question was stricken, as there was no sufficient foundation laid therefor, and there was no further attempt to identify the accounts of sales as a part of the records of the commission company, the man Burgess not being called as a witness in the case.

The plaintiff Oss undertook to explain certain entries appearing in these accounts of sales, exhibits 5 and 6, and then the exhibits were reoffered in evidence, to which the defendant objected as no foundation laid and not properly identified by the party who made the record. The court overruled the objection and the exhibits were admitted. There was not a proper foundation laid for the introduction of these exhibits and their reception in evidence was erroneous. Oss states in his direct examination that he had nothing to do with the books or the office. "I sold the cattle, and that was all I did." As to the mortgages being in fact paid at the time of the sale, the witness Oss testifies as follows: "Q. Was the money, $1,837.50 in one mortgage, and $745.57, in the other, was that owing by you to the Newman Grove State Bank at the time the cattle were sold?" By defendant's counsel: "Objected to as involving a legal conclusion." The Court: "Overruled." Defendant excepts. "A. There might have been part of these mortgages paid off and applied on the notes at the bank before. I don't know as I owed that full amount. Q. Did you owe the amount of the proceeds of the cattle under these mortgages? A. Yes, sir."

In connection with this portion of the record, reference may be had to the cross-examination of this witness on this point. "Q. You have just testified that 38 of the 55 steers on the $745.57 mortgage had been sold and the proceeds credited on this mortgage? A. I had a lot of debts up there. Q. Do I understand that the Newman Grove State Bank took the proceeds of sales which they claimed to have a mortgage on, and credited the proceeds to other mortgages? A. On other mortgages to the same bank. It happens lots of times. If you have done any banking with cattle, you

know it has happened every now and then." In the light of the cross-examination, his answer to the question, "Did you owe the amount of the proceeds of the cattle under these mortgages?" might be strictly true and yet the mortgage under which these specific cattle were pledged might have been satisfied. The only evidence that appears in the record as to these mortgages, whether they were in force or not, is furnished by the witness Charles A. Oss, plaintiff in the action. The mortgagees, Luikart and Gutru, give no testimony on any phase of this case.

The only evidence that the record discloses as to failure to account for the proceeds is by the same witness, Charles A. Oss, and is very brief; quoting from the record: "Now, Charlie, after these cattle were sold to the different buyers, do you know what happened to the money? A. I didn't then. Q. When did you find out about it? A. I found out about it after George was dead (about six months after the shipment). I wrote out a check—I needed some money and I wrote out a check on the Newman Grove State Bank and it came back 'No account.' Of course, there should have been a little bit of this left over. Q. There should have been a little bit left, over the mortgages, from the sale of these cattle? A. Yes, about $150 or so. Q. Then, what did you find out about it? A. I found out that it had been misappropriated, that is all, he had never sent it." Defendant's counsel: "I move that answer be stricken as immaterial." The Court: "That calls for a conclusion, it may go out." There is no further evidence of failure to account for the proceeds, and the answer of the witness having been stricken, it leaves no evidence upon which to base a judgment for plaintiffs in this action.

For the reasons set forth herein, the judgment of the trial court must be reversed and the cause remanded for further proceedings according to law.

REVERSED.

JOHN HAWE, APPELLEE, V. ED JOHNSON ET AL., APPELLANTS.

FILED JANUARY 31, 1936. No. 29497.

Evidence in the record examined *de novo*, and *held* sufficient to sustain the decree of the district court.

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

William Niklaus, Edward P. McDermott and *John E. Mockett,* for appellants.

M. H. Worlock, contra.

Heard before GOOD, EBERLY and PAINE, JJ., and RAPER and PROUDFIT, District Judges.

RAPER, District Judge.

Action brought by plaintiff, John Hawe, on January 20, 1934, to foreclose real estate mortgage, signed by Olava Johnson, since deceased, and Ed Johnson, her husband, in which action Ed Johnson and the heirs of Olava Johnson are named as defendants, and from decree of foreclosure awarded plaintiff, the defendants appeal.

The petition is in the usual form for such proceeding, and alleges that the note and mortgage were given to one O. D. Johnson on December 15, 1930, due December 15, 1933, and sold and assigned to plaintiff on January 20, 1931. Coupons for semiannual interest at 6 per cent. per annum payable semiannually were attached to the note, and all coupons were paid except the last one which matured December 15, 1933. No payments were made on principal.

The defendants denied the execution and delivery of the note and mortgage, denied that plaintiff was a *bona fide* purchaser and owner and holder of the note and mortgage, and further allege want of consideration moving to Olava Johnson, the owner of the mortgaged property; undue influence exercised by Dr. O. D. Johnson upon Ed Johnson who was a patient of Dr. Johnson, while the patient was in extreme physical and mental weakness; and that the alleged note and mortgage were obtained by the duress of

Dr. O. D. Johnson, in that Dr. Johnson would not permit Ed Johnson, his patient, to be removed from the doctor's hospital until said papers were signed.

In his reply plaintiff admits that Olava Johnson and Ed Johnson were husband and wife, and alleges that plaintiff purchased the note and mortgage from O. D. Johnson in the ordinary course of business before maturity, and paid full value therefor, and without any knowledge of any defense which the makers may have had against O. D. Johnson and is an innocent purchaser thereof, and that the defendants have paid interest thereon to plaintiff and defendants are estopped to deny the validity of the note and mortgage.

Ed Johnson for seven weeks before the date of the note and mortgage had been a patient in a hospital conducted by Dr. O. D. Johnson, and had there undergone three operations for appendicitis, the last one was on November 20, 1930, and was weak and suffering from bed sores and was anxious to leave the hospital and go to the home of a relative. The note and mortgage were executed in the late afternoon of December 15, 1930, and Ed Johnson left the hospital very soon thereafter. Ed Johnson's account of the happenings on that afternoon is that he signed something but cannot say what it was, that before December 15 he had been given hypodermics frequently (but does not give the times of such treatments), that he was not able to read, was in bed, had bed sores, could understand but little of what was said, and did not know if any paper was read to him, and was wanting to get out of the hospital. And this question was asked him: "Do you remember of Dr. Johnson saying anything as to what he would do if you signed the paper? A. That he would let me out of the hospital." He further testified that he first learned "that there was a mortgage out" having his signature on it about a year afterwards. Mrs. Johnson was not in the room at the time the mortgage was signed. He did not know at the time he put his signature on the two instruments that he was signing a note and mortgage; that what he did was not his

voluntary act and deed, but could not recall whether Mr. Hollingsworth (the notary) asked him that. There was testimony taken to prove that the mortgaged premises were the homestead of Olava and Ed Johnson, but in view of the conclusion we have reached that is immaterial. The title to the property was in her name. She died November 16, 1931. There were other witnesses who testified as to the physical and mental condition of Ed Johnson at the time and shortly after he left the hospital. Their testimony does not sustain defendants' contention that he was not mentally competent on that afternoon.

There were only two other witnesses aside from Ed Johnson who testified to the occurrences at the signing of the instruments in the hospital, Frank E. Hollingsworth and Dr. O. D. Johnson. Mr. Hollingsworth, the notary who took the acknowledgment and who was manager of the Guaranty Trust Company and city and school district treasurer of Kearney, testified that some time on December 15, 1930, he thinks soon after noon, Dr. O. D. Johnson gave him the abstract to the property described in the mortgage, and asked him to draft the note and mortgage, and later in the afternoon he went to the hospital, where he met Olava Johnson and Ed Johnson in a room, and Mrs. and Mr. Ed Johnson both signed the note and coupons and mortgage, and that he asked them if the signing of the note and mortgage was their voluntary act and deed, and that they each replied it was; that Mr. and Mrs. Johnson told him that they would like to have the papers held for 30 days, as they might be able to pay the debt with other funds. Dr. Johnson was called into the room and their request to hold the papers was repeated, and Dr. Johnson told them he consented, and the note and mortgage were given to Mr. Hollingsworth to hold for the 30 days, and if not then paid, they were to be recorded. Witness Hollingsworth testified that Ed Johnson spoke intelligently and comprehended the nature of the transaction. Dr. O. D. Johnson testified that Ed Johnson owed him $1,000 and on December 15, 1930, Ed Johnson told the doctor that he was

not able to pay the bill, and the doctor suggested that he, Ed, give a mortgage note on his farm, but Ed said: "Well, my farm is mortgaged." And the doctor said: "Well, give me a mortgage on your house." And Ed replied: "That house is in my wife's name, but I guess it would be all right." And the doctor told Ed he would call some one and have the note and mortgage executed, and Ed said that would be all right, and the doctor called Mr. Hollingsworth to draw the papers, and in the meantime the doctor saw Mrs. Johnson who gave him the abstract. Doctor Johnson was later called into the room where Ed Johnson and Mr. Hollingsworth were, and Hollingsworth asked the doctor if it would be all right to hold this mortgage up for 30 days because Ed thought within that time he might make other arrangements, and the doctor said it would be all right.

From a consideration of all the testimony as to the execution of the papers, it appears without serious question that Mr. and Mrs. Ed Johnson knew the nature and effects of their acts on December 15, 1930, and the trial court was fully justified in finding that the note and mortgage were duly and properly executed. It may be observed that on December 24, 1930, Mrs. Olava Johnson procured a policy of insurance on the property in the sum of $2,000, to which policy there was on January 20, 1931, attached a mortgage clause making loss payable to John Hawe. Mrs. Ed Johnson paid the premium.

The testimony shows without contradiction that the mortgage was recorded by Mr. Hollingsworth on January 16, 1931, for Dr. Johnson, and that Mr. Hollingsworth as the agent of Dr. Johnson sold and assigned the note and mortgage to John Hawe on January 20, 1931, for the sum of $1,000, which amount Mr. Hollingsworth paid to Dr. Johnson, less $24 commission on the sale, and an assignment of the mortgage was duly recorded on January 20, 1931. The plaintiff continued to hold the note and mortgage and the interest was paid to plaintiff. Neither Mr. nor Mrs. Ed Johnson nor any one for them ever made any complaint to Dr. Johnson or to plaintiff as to any defense

or irregularity in the execution or delivery of the papers until this suit was begun. The plaintiff purchased the note and mortgage in the usual course of business and is a holder of the note and mortgage in due course.

There was a question asked Dr. Johnson calling for his opinion as to the ability of Ed Johnson to transact ordinary business on December 15, 1930. The court overruled an objection of the defendants that it called for a confidential communication, and permitted the doctor to answer. This is assigned as error. There is ample evidence to sustain the decree aside from the answer of Dr. Johnson to that interrogatory and it is not necessary to pass on that. If it was error, it was without prejudice.

Defendants claim there was no consideration moving to Olava Johnson for the note and mortgage. Her husband owed Dr. Johnson for medical services, and wanted an extension of time to pay the debt. The note and mortgage were given to extend the time of payment. This was sufficient consideration. *Smith v. Spaulding*, 40 Neb. 339, 58 N. W. 952; *Bode v. Jussen*, 93 Neb. 482, 140 N. W. 768; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123, 58 N. W. 734.

The clear weight of the evidence proves that there was consideration for the mortgage and note, that they were duly executed and delivered to the mortgagee, that there was no undue influence or duress exerted to procure their execution, that the defendant Ed Johnson was competent to transact the business at the time they were executed, and that plaintiff is a holder in due course.

The decree of the district court is

AFFIRMED.

LYDIA KLAUS, APPELLEE, V. SOLOMAN VALLEY STAGE LINES COMPANY, APPELLANT.

FILED JANUARY 31, 1936. No. 29434.

1. **Automobiles:** RIGHT OF WAY. A vehicle entering a public highway from a private road or drive must yield the right of way to vehicles upon the highway.
2. ———. A traveler may occupy and use any part of a public highway he desires when not needed by another whose rights thereto are superior to his own.
3. ———: RIGHT OF WAY. A driver upon a public highway at a lawful and reasonable rate of speed has the right of way over vehicles entering the highway from a private road or drive, and is not required to slow down or stop upon the appearance of such other vehicle about to enter the highway until it should appear to a reasonable person in his position that the driver of such vehicle was not going to comply with the law and yield the right of way.
4. ———: ———. A driver upon a public highway having the right of way may assume that drivers of other vehicles about to enter the highway will obey the law until the contrary appears or should appear to a reasonable man in his position.
5. ———: NEGLIGENCE. Under the circumstances shown by the evidence in this case, the driver of defendant's bus cannot be held guilty of negligence in turning to the left across the center line of the pavement in an effort to avoid colliding with an automobile just entering upon the pavement at a speed of five or six miles an hour.
6. **Evidence** examined and *held* not sufficient to support a verdict for plaintiff.

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

C. L. Clark, J. B. Chambers and *Dressler & Neely,* for appellant.

Beghtol, Foe & Rankin, contra.

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

REDICK, District Judge.

The plaintiff, Lydia Klaus, brings this action to recover damages for injuries which she sustained as the result of

a collision between the Chevrolet roadster in which she was riding, driven by defendant Chester Wrightsman, and a bus of the Soloman Valley Stage Lines Company, upon Federal Highway No. 6, opposite a private driveway leading from a roadhouse or tavern known as Fred Hays' Place about a mile west of the city limits of Lincoln. The petition alleges that, as the Chevrolet was being driven across the highway, defendant's bus, driven by its servant, negligently collided with it, causing plaintiff serious injuries. The negligence charged is that the bus was being driven at a high and unlawful rate of speed, to wit, more than 20 miles an hour, that defendant negligently failed to keep a proper lookout, negligently failed to exercise proper care to avoid a collision after he knew that a continuation of his course would so result, and that he negligently drove the bus, while proceeding east, on the north half of the highway at the point of the accident. The answer of defendant denies that its servant was guilty of any negligence causing the accident, and alleges that the proximate cause of the same was the negligence of Lydia Klaus, the plaintiff, in conjunction with that of defendant Wrightsman, that the plaintiff and other occupants of the Chevrolet were pursuing a common purpose and had joint control of said automobile with the driver thereof, that the plaintiff was guilty of contributory negligence in a number of particulars not necessary to enumerate, and that said Chevrolet was being driven in violation of the official state highway rules and regulations of the department of public works formulated and published by legislative authority. Plaintiff filed a general denial in reply. The case was tried to a jury, and when plaintiff rested defendant moved for a directed verdict, but withdrew his motion with leave to renew it at the end of all the testimony, which was done. The motion was overruled, the case submitted to the jury, which returned a verdict for the plaintiff for $12,148, from which $2,148 was remitted by order of the district judge, and judgment rendered for $10,000 against both defendants. Motion of defendant company for a new trial was overruled and appeal

taken to this court. Defendant Wrightsman has not appealed. As the case now stands, Lydia Klaus will be referred to as the plaintiff, and Soloman Valley Stage Lines Company as defendant or the company, the vehicles as the car or the bus.

The following facts are not in dispute: The highway in question runs from west to east to the city of Lincoln and is paved with concrete slabs, and is 22 feet in width; the barbecue tavern is located about a mile west of the city limits of Lincoln, upon the highway, and 32 feet south of the south edge of the pavement; a graveled driveway extends from the pavement south into a parking space connected with the tavern on the east. Defendant Wrightsman was the owner and driver of the Chevrolet at the time of the accident, at which time the car was occupied by five other persons, guests of Wrightsman, two of whom, Combs and Oden, together with Wrightsman, were residents of Beatrice, Nebraska, the three others being young ladies living in Lincoln. The places occupied by these six persons in the Chevrolet were: Wrightsman at the wheel, Helen Vavra in the center and Harold Combs on the right with Olga Munsterman sitting on his lap, the four being in the front seat; plaintiff, Lydia Klaus, sat on the left and Oden on the right in the rumble seat. The Chevrolet was 13 feet 5 inches in length from bumper to bumper, the bus 25 feet; the collision occurred about 8:30 or 8:45 p. m., on October 1, 1933; the night was dark and the headlights on both cars were lighted. The tavern was 40 feet wide east and west and the Chicago, Burlington & Quincy Railroad tracks crossed the highway diagonally in a northeasterly direction at a point 153 feet west of the west line of the tavern or 193 feet west of the east line of the tavern. The parties in the Chevrolet were on their way to a dance hall some distance farther out, and stopped at the tavern where all, except plaintiff, were served with beer, and about 8:45 p. m., with Wrightsman driving and the others seated as above stated, started for the dance hall, emerging from the driveway at a speed of about five miles an hour until the front wheels

were upon the pavement, when the driver speeded up attempting to cross in front of the bus, when the collision occurred at a point on the pavement, the location of which is somewhat in dispute, and as a result plaintiff was thrown out of the car and received very serious injuries, and Oden was also thrown out and injured; in fact, all the occupants of the car were injured more or less except Miss Munsterman. The driver of the bus, Harold Hodges, was the servant of the defendant company, and the bus contained but one passenger, Robert V. Vaupel, who was seated on the front cross-seat with the driver by an open window. That by the rules of the road as adopted and published by the department of public works of the state of Nebraska under legislative authority it is provided: "3. Right of way. * * * A vehicle entering a public highway from a private road or drive must yield the right of way to vehicles on the highway."

The only witnesses to the accident were the six occupants of the Chevrolet and the two occupants of the bus, all of whom were called as witnesses, Wrightsman, Oden and Combs testifying by deposition.

The principal error assigned for reversal is that the verdict is not supported by sufficient evidence, and that the court erred in overruling defendant's motion for a directed verdict, and it will be necessary to set forth in some detail the testimony of the witnesses as to the manner in which the accident happened, particularly those matters as to which there is some dispute.

Wrightsman, called for the plaintiff, testified that, after he got to the street and just before he reached the pavement, he looked in both directions and saw no car coming either way, and drove out onto the street intending to go west, when he saw the bus was close, so just drove on straight across, saying: "I just stepped on the gas and went across, and the bus driver turned and pulled out to his left and struck us over at the north edge of the pavement." He could not give the number of feet the bus was from him when he first saw it, but says it was one and a half or two

car lengths away and he was on the pavement near the center; that his car was nearly off the pavement at the time of the collision; that his back wheel was on; that the bus struck the rear center of his car but did not tip it over; that the bus stopped right against his car with its left front wheel and about half the bumper off the pavement; that he was not very clear as to the location of the cars, that his idea on the point was just a "flash;" that plaintiff was thrown 15 to 20 feet off the pavement onto the ground; that he looked up the road when his car was 10 feet from the pavement and could see 75 feet, but did not know why he did not see the bus; that at the time there were one or two cars parked in front of the tavern, their rear ends being 12 to 15 feet from the pavement.

Witness Oden, called for the plaintiff, testified that there was one sedan parked in front of the tavern, that the Chevrolet on coming out angled a little to the northwest, that he first saw the bus as the car was just on the pavement, partly on and partly off, about 50 feet away, that when we saw we were going to get hit the car speeded up and got across all right and the crash came, that the bus angled sharply when about 10 feet away, that when hit 3 of the bus wheels were on the right side, but he changed this statement and said that 3 were on the north side of the black line; that the Chevrolet did not stop but changed to second gear before it reached the pavement; that when the cars stopped they were touching each other, the left front wheel of the bus was just barely on or off the pavement, I was thrown from the car, the Klaus girl was to the rear of the car about 10 feet away on the dirt, car headed practically west after the accident and bus about parallel.

Harold Combs, called for the plaintiff, testified that they drove out 6 or 7 feet from the east line of the building, later making it 10 or 15 feet, that there was one car parked in front when they came out, that the car did not stop but slowed down and was all on the pavement when witness first saw the bus 50 feet away, that the car went 10 feet after he saw the bus which was coming straight and then

angled to the north, that when the collision took place the car was swung around to the edge of the pavement.

Olga Munsterman, called by plaintiff, testified that she saw the lights of the bus, did not know how far it was away but thought it was on or just over the railroad tracks, did not know distance the tracks were away, the driver speeded up and we just got across to the north side when hit, was all on the north side, part of the bus was on the north side but says she did not know; Lydia was lying on the pavement after being thrown out; the car did not stop but slowed down just as it reached the pavement, was in second gear; it was dark and I saw the bus just as our front wheels were touching the pavement, thought it was coming over the tracks but it could have been quite a little this side, the car was barely moving, under five miles an hour when started on pavement, speeded up when the car was half out on the pavement, did not continue to watch the bus, next saw it when it was 4 or 5 feet away; our car was all on the pavement when hit, front wheels may have been just off; when stopped cars were parallel, the left wheels of our car were on the pavement and the right wheels just off, one maybe on, none of the bus wheels were off the pavement; our car was headed straight north when hit and the rear end pushed around and when stopped the rear of the car and front of the bus were on a line; plaintiff was lying on the pavement, not on the dirt; no other moving cars were around.

Helen Vavra, called for plaintiff, testified that when they came to the pavement the car slowed down and she saw the lights of the bus "just as we were almost to the south edge of the pavement and our car speeded up and the accident happened;" the car speeded up after the driver saw the bus; she kept looking at the bus because it happened so quickly; bus was on the south side of the pavement when it hit the car. On redirect examination she stated she did not mean the accident happened on the south side of the pavement but on the north side; there were several cars parked in front of the tavern.

Lydia Klaus testified that she first saw the bus "as we got to the pavement" and did not see it again until the crash; thought that the bus was at the railroad track because she saw the lights blink, did not know the distance; our car was headed straight north when hit, was going slow, he stepped on the gas and was all on the pavement when hit; the bus might have been very close to our car when we came onto pavement, witness did not know.

Harold Hodges, called for the plaintiff, testified that he was driving 15 miles an hour and by the use of the foot brake could stop his bus in 25 feet, and to use all brakes, within 15 feet, that he had never experimented to determine these distances but that it was just his opinion.

Harold Hodges, called for the defendant, testified that he had been driving a bus 9 years, that on the night in question he stopped 10 feet west of the railroad track, was traveling south of the black line, that the accident happened very shortly after he had shifted into intermediate, that he first saw the Chevrolet car when the bus was approximately in front of the tavern a short distance past the center, that the car was just coming to the south edge of the pavement, front wheels on, moving at 5 miles an hour, that he sounded his horn and swerved to the left and put on his foot brakes, that he swerved away from the car because it was on his right, that the car increased its speed to 8 or 10 miles an hour, that the collision occurred practically in the center of the pavement, at which time the car was across the black line headed a little to the northwest, the front wheels being about 3 feet farther north from the line than the rear wheels were south; when collision occurred front wheels of bus were practically straddle the line headed east and a little to the north, the bus traveled about 4 feet after the collision; when the cars stopped the entire left side of the Chevrolet was on the pavement, the right front wheel off and the right rear wheel on the north edge, the car headed west; the right front wheel of the bus was on the center line, the rear wheel of the Chevrolet and front end of the bus were one foot apart when stopped, the bus did not go

past the Chevrolet. The witness then marked on exhibit 23, a plat of the location, the point where the bus was when he claims first to have seen the car, placing the front end of the bus about 15 feet west of the east line of the tavern and the front end of the car just entering upon the pavement on the east line of the tavern as extended, that the car was not over 15 feet from him, that there were 4 cars parked in front of the tavern, the rear of the nearest being 3 feet from the edge of the pavement, there were no other cars moving, that after the collision the plaintiff was lying on the pavement directly south of the car and in front of the bus a foot or two, that Wrightsman said he did not see the bus until it was right on him and he speeded up to cross in front. Witness described skid marks made by the car when struck saying they started just south of the center mark and continued to the north an arc of about 6 feet ending about 4 feet to the east of where they started.

Robert H. Davis, a policeman who arrived shortly after the accident, testified that he saw the skid marks and that they began right in the middle of the pavement and ran right to the rear of the car.

Glen Anderson, a former driver for defendant, testified to the existence of skid marks right in the center of the pavement, which started just to the south side of the black line and extended in an arc to the north where they faded out; he saw no skid marks of the bus.

Robert V. Vaupel, the passenger in the bus, called for defendant, testified that he was seated at the right side of the driver near an open window, that the bus stopped 10 feet west of the railroad tracks and the driver shifted into high as he passed the west side of the tavern, at which time witness saw the Chevrolet coming out from behind cars on the east side of the tavern at a point 6 feet from the pavement, that the car did not hesitate or stop and was going 8 or 12 miles an hour, and the bus 15 to 20 miles; that when the bus struck the car the front wheels of the car were on the north side of the line angling northwest and the rear wheels a little bit south of the line, the left front wheel of

the bus was a little over the line and the right front wheel on or a little to the right of the line, the left rear wheel on the line; that when he first saw the car it was approximately 6 feet south of the edge of the pavement; that the bus changed its course when the driver noticed the car approaching onto the slab, which was nearly at the center of the front of the inn about 20 feet west of the point of impact; that as the car approached the slab it started at an angle to the northwest and turned to the north, its speed was increased as it reached the pavement, the driver of the car was looking at the occupants and first looked our way as he was just coming onto the south side of the pavement, his front wheels were on the pavement; the bus skidded the roadster around in an arc to the north side of the pavement about 5 to 8 feet. As the bus stopped the roadster was to the side of the pavement, the right side on the dirt shoulder, and the bus stopped with its front and the rear of the car on an even line, the left wheels of the roadster were on the slab a foot or so from the edge, the bus traveled approximately 5 feet after the collision, plaintiff was lying on the pavement to the rear of the Chevrolet and about 3 to 5 feet in front of the bus; that he noticed the skid marks of the car and they started on the black line or a little bit to the south; there were from 3 to 5 cars parked in front of the stand. Witness testified that he lived in New Cambria, Kansas, and was employed by the construction quartermaster of the U. S. army at Fort Riley, Kansas, and had no connection with the stage lines.

The above is a brief résumé of all the material testimony offered in the case relative to the happening of the accident. There was a great deal of testimony received as to the nature and extent of plaintiff's injuries, but in view of our conclusion later to be announced it is not necessary to enter upon that branch of the case. The question for our determination is whether or not the evidence is sufficient to sustain a finding by the jury that defendant was guilty of negligence proximately causing plaintiff's injuries. We will discuss the charges of negligence as set forth in ap-

pellee's brief following the allegations of the petition:

1. That defendant's driver was negligent in not slowing his speed. This involves a consideration of the duties which a driver upon a public highway owes to persons entering upon such highway from a private driveway. Generally speaking they are: To drive at a reasonable rate of speed, to keep a proper lookout, and to avoid a collision if it can be done by the exercise of ordinary care. Plaintiff offered no evidence as to the rate of speed at which the bus was traveling except from such proper inferences as may be drawn from the distance the bus traveled after its driver saw or should have seen the car in which plaintiff was riding entering upon the highway, and the effect of the collision upon the cars respectively. Assuming that the bus traveled 45 feet after seeing the Chevrolet, the latter was not turned over, but the rear end merely slid around about 6 feet and the bus stopped within 4 or 5 feet. There is nothing here to indicate a rate of speed greater than testified to by defendant's witnesses. Two of plaintiff's witnesses place the bus at or about the railroad tracks, a point about 193 feet west of the point of collision, at the time the car was approaching the southern edge of the pavement. The physical facts disclosed by the evidence show the absolute impossibility of these estimates being correct; if the bus was at the railroad tracks at the time the car reached the pavement, in order for them to collide the bus must have traveled at the rate of 85 miles an hour, which is not in accordance with ordinary experience, and the proposition finds no support in the evidence; in fact, the plaintiff does not now claim that the driver of the bus should have seen the car entering upon the pavement at a greater distance than 40 or 45 feet, which is the greatest distance finding any support whatever in the evidence. Assuming then that the driver of the bus, while traveling at 15 to 20 miles an hour, should have seen the car at a distance of 45 feet, what was he charged with observing? The car was approaching the highway from a private driveway at about 5 miles an hour and, according to some

of plaintiff's witnesses, slowing down as it reached the pavement. From these facts the driver of the bus might reasonably conclude, the bus having the right of way, that the driver of the car would stop and not enter upon the highway in front of the bus which was in plain sight, but would stop and yield the right of way. In *Belik v. Warsocki,* 126 Neb. 560, 253 N. W. 689, it was held: "A party driving an automobile lawfully, upon his proper side of the highway, who observes an approaching car, has a right to assume that the driver of the oncoming car will not violate the law in passing." The driver of the bus had a right to assume that the driver of the other car would comply with the law. *Kadlec v. Johnson Construction Co.,* 217 Ia. 299, 252 N. W. 103; *Arends v. DeBruyn,* 217 Ia. 529, 252 N. W. 249; *Zurn v. Whatley,* 213 Wis. 365, 251 N. W. 435. In this situation there was no duty resting upon the driver of the bus to stop or slow down until he should have become aware of the intent of the driver of the car not to yield the right of way. Upon discovering that the car was about to enter upon the highway, the driver of the bus sounded his horn, turned his bus to the left and applied his brakes, and if the driver of the car had stopped, as it seems to us it was his clear duty to do, the bus would have passed in safety to the north of the car. Although the driver of the car testified that as he approached the pavement he looked in either direction and saw no car coming, the evidence is quite conclusive that he did not look until his car was on the pavement in front of the bus, when he turned it directly north and speeded up in a vain effort to avoid the collision which it was impossible at that time for the driver of the bus to prevent.

2. In not continuing to drive on the south half of the highway where he belonged. This amounts to a charge that the driver of the bus was negligent in turning his car to the left. On this point it is pertinent to consider the common experience of mankind in driving automobiles when confronted with similar conditions. In driving upon a street or highway where cars are parked at right angles to the

curb it is a daily and even hourly occurrence that one of the parked cars is backed out or starts to back out into the highway, and the first response to such condition entering the mind of the driver on the highway is to turn his car to the left giving the parked car more room if he continues backing without making the proper observation of the oncoming car. This is what the defendant's driver did when he saw the car approaching the highway at a slow rate of speed, and it is probable that, if the other driver had not speeded up his car, the bus driver would have passed in safety as the result of his turning to the left. By the speeding up of the other car, the bus driver was faced with an emergency owing to the short distance between them, which the evidence seems clearly to indicate could only be met by the application of his brakes in an effort to stop the bus. In this connection we call attention to the claim that the collision took place on the north side of the highway, and two witnesses so testified—one of them, Wrightsman, admitted that he was not clear on the point and he described his recollection in that regard as simply a "flash;" the other one, Helen Vavra, first testified that the bus was on the south side of the pavement when the collision took place, but on redirect stated that she did not mean the accident happened on the south side but on the north side, and again that she did not notice on which side that it occurred. As against this the driver of the bus testified that the Chevrolet at the time of the accident was across the center line, headed directly north, the front part of the car being three feet farther north than the rear part was south, and that the front wheels of the bus straddled the center line, and this is the most favorable view that the evidence offers for plaintiff's claim, although it placed about three or four feet of the rear of the Chevrolet to the south of the center line. But the physical evidence furnished by the skid marks is absolutely convincing that the collision did not take place entirely on the north side. Two witnesses for defendant testified that the skid marks began a little south of the center line, one at the center line or a little south and one

at the center line, and the clear weight of the evidence establishes that the rear end of the Chevrolet was shoved around so that its right front wheel was just off the side of the pavement and the other three wheels still on the slab. While as heretofore stated there is some dispute as to the point where the collision took place, a consideration of all the evidence, especially with relation to the skid marks, as to which plaintiff offered no evidence, affords only one reasonable inference and that is that the Chevrolet was lengthwise substantially half and half across the center line and the front wheels of the bus straddling it, the right wheel on the line. This is agreeable to and substantially corroborates the evidence of defendant's witnesses as to the manner in which the accident happened. The conclusion is irresistible that, if the collision had taken place on the north side of the pavement, the Chevrolet would have been pushed clear off onto the dirt. We conclude that turning the bus to the left at the time and under the circumstances was not a negligent act, even though the left front wheel of the bus was thereby brought onto the north half of the pavement.

3. In not stopping his bus in a distance of 15 feet which by his own statement he said he could do. We have already discussed this question to some extent with reference to the duty of the bus driver, and have shown that, traveling at a reasonable rate of speed on a public highway and having the right of way over vehicles entering from a private driveway, he was not called upon to slow down or stop his bus until he should have become aware that the other vehicle was not going to comply with the law, and the evidence clearly establishes that he had no notice of such intent until the driver of the Chevrolet speeded up, at which time it clearly appears he did everything that he could to avoid the accident.

4. "In not seeing Wrightsman's car as it started onto the highway when he was a distance of 40 feet away, as the passenger did who was sitting on the same seat with him." As has been hereinbefore observed, the driver of the bus

had a right to assume that the driver of the other car would comply with the law, look for approaching cars, and yield the right of way. Even though he observed him at a distance of 40 or 50 feet, he cannot be charged with negligence, under the conditions shown, in failing to anticipate negligence upon the part of the other driver, but could rely upon the assumption stated until the contrary should have appeared. At the time he observed it, the car was just entering upon the pavement at a very slow rate of speed, and we are convinced that his failure to observe it a second or two earlier when it was six feet to the south of the pavement was not such actionable negligence as to constitute the proximate cause of the accident. The real cause of the collision was the negligence of Wrightsman in entering upon the highway without looking for approaching cars, in front of the bus when it was in plain sight and practically upon him, and which had the right of way. And while it may be that Wrightsman's negligence was not imputable to plaintiff, that fact is not material, when the act of the driver was the proximate cause of the accident, usually a question for the jury, but which, in this case, we hold was a question of law, there being no sufficient evidence upon which to base a finding of negligence on part of the defendant. Appellee relies upon the well-established rule that where the evidence is conflicting upon the material facts the verdict of the jury will not be disturbed unless clearly wrong. As we have intimated, the only material matters upon which there may be said a conflict exists are: (1) The location of the bus at the time or 6 feet before the car reached the pavement, two of plaintiff's witnesses placing it at or about the railway tracks 193 feet away and two 50 feet away, while Wrightsman did not see the bus until it was right upon him, at which time his car was entirely upon the pavement. Defendant's witness Vaupel said the car was 6 feet from the pavement when he saw it, the bus being 40 feet west, and Hodges that the front wheels of the car were just on the pavement when he was 15 or 20 feet away. The most favorable view for plaintiff would place the distance at 40

or 50 feet. It is argued that, as the driver of the bus said he could stop it in 15 feet by the use of both brakes, he was negligent in not doing so. But the driver did not say he could have stopped in 15 feet under the circumstances confronting him. He had about two seconds in which to make up his mind and act; he did three things—sounded his horn, turned to the left and applied his foot brake, which undoubtedly would have prevented the accident had not the driver of the other car speeded up instead of stopping as was his duty. We are clearly of opinion that all reasonable men would conclude that the driver of the bus did everything he possibly could under the conditions to avoid the collision, the situation not being one brought about by any negligence on his part. (2) That defendant was driving on the wrong side of the street. We have shown that the failure of Wrightsman to yield the right of way was the occasion of the left front wheel of the bus being over the center line, and the physical facts show conclusively that the impact took place while the Chevrolet was about half way across that line. The evidence is clearly insufficient to show negligence on the part of defendant on this point.

It is further urged that defendant could have turned to the right and passed to the rear, but this is pure conjecture. The natural thing to do was to turn to the left when the driver of the bus observed the car just entering upon the pavement, and had the latter not speeded up there would have been no accident. Having taken a reasonable course in turning to the left, there was not time to change to the right. To have turned to the right or kept straight on, the driver of the bus would be required to assume that Wrightsman would not comply with the law, whereas the presumption is to the contrary.

Plaintiff on this point cites *Cupples Mercantile Co. v. Bow,* 32 Idaho, 774, 189 Pac. 48, but in that case defendant violated the law of the road in attempting to pass plaintiff on the left as they approached each other; there seems to have been no question of emergency, and in acting as he did plaintiff assumed the defendant would continue upon

the wrong side of the road. In the present case defendant breached no law of the road in turning to the left, as that side was clear and defendant had a right to assume the other driver would obey the law and yield the right of way. At the time defendant's driver saw or should have seen the other car, just entering upon, or 6 feet south of the pavement, at such a slow rate of speed that it could be stopped instantly, the evidence discloses no fact which would indicate to the bus driver that Wrightsman would attempt to cross in front of the bus until it was too late to change his course to the right. In the Idaho case judgment for plaintiff was reversed on the ground that he violated the law of the road in turning to the left while passing a car coming in the opposite direction. The case makes rather for the defendant than plaintiff. Also, *Griffen v. Lincoln Traction Co.*, 118 Neb. 459, 225 N. W. 232. In that case defendant was a common carrier and plaintiff a passenger. As the driver approached within about 30 or 40 feet of the intersection of Twenty-fourth street, driving on the south side of R street, an automobile on his right reached the intersection and cut the corner to the left. The driver of the bus first turned to the right and then immediately to the left causing the bus to swerve violently and throw plaintiff to the floor. The bus passed in front of the car to near the northwest corner of the intersection, the car passing to its rear. There was no collision. The car on the right of the bus had the right of way. It was conclusively shown that there was a "zone of perfect safety" on the south side of "R" street which the bus could have occupied, and it was held that the driver was unjustified in turning to the left, contrary to the law of the road, and that the evidence was sufficient to sustain the verdict for plaintiff. The case is not controlling here for the reason that in the instant case the bus had the right of way, and because of the different rule of care required of defendant as a common carrier. And it appeared in that case that at all times there was a clear space for the bus to pass to the right. If there had been a collision in that case, an entirely different question

would have been presented as between the bus and the car in an action for damages by either party. While the rule requiring a driver to keep to the right is referred to in the opinion, that rule is not mentioned in the syllabus prepared by the court, and the real basis upon which the decision rests is the special care required of a common carrier in protecting its passengers while being transported, and the existence of a clear zone of safety where the bus could have been driven.

We think the verdict is not supported by sufficient evidence and is clearly wrong, and that the learned district court erred in overruling defendant's motion for a directed verdict. In view of our conclusion, the other errors alleged need not be discussed; and it appearing satisfactorily to us that another trial would be of no benefit to the plaintiff, the judgment of the district court is reversed and case dismissed as to defendant Soloman Valley Stage Lines Company.

REVERSED AND DISMISSED.

MARY DVORAK, APPELLEE, V. FRANK O. KUCERA: VICTOR A. DVORAK ET AL., INTERVENERS, APPELLANTS.

FILED JANUARY 31, 1936. No. 29447.

1. **Insurance**: POLICY: PLEDGE. An oral assignment or pledge of a life insurance policy as security for a debt of the assured is valid between the parties, notwithstanding a provision in the policy that no assignment shall be valid unless in writing and filed with the insurer.
2. ———: ———: ———. The delivery of a life insurance policy to secure a debt of the assured, whether assigned or not, constitutes a pledge entitling the pledgee to an equitable lien upon the proceeds.
3. **Evidence**: ADMISSIONS. An extrajudicial admission is ordinarily received only when it is against the interest of the party making it, but is incompetent as evidence in his favor.
4. **Witnesses**: COMPETENCY. A statute making a witness having a direct legal interest in the controversy incompetent to testify against the representative of a deceased person as to any con-

versation or transaction between such witness and deceased person does not render incompetent as a witness a third party who relates a conversation between the deceased and another, in which the witness took no part.

5. **Evidence** examined and *held* to establish the delivery of a policy of life insurance as security for a debt, entitling the plaintiff to an equitable lien upon the proceeds.

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

Bartos, Bartos & Placek, for appellants.

G. E. Hager, contra.

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

REDICK, District Judge.

This action was brought by Mary Dvorak, plaintiff and widow of Edward A. Dvorak, deceased, against Frank O. Kucera as an individual, praying for a judgment for the amount of the proceeds of a $10,000 life insurance policy issued upon the life of the said Edward A. Dvorak, deceased, and that said judgment be declared an equitable lien upon said proceeds. Certain creditors and heirs at law of said deceased obtained the permission of the court and intervened as parties defendant, as did also Frank O. Kucera as administrator of the estate of Edward A. Dvorak. The court, upon final hearing, dismissed the action against Kucera as an individual, and found for the plaintiff in the sum of $7,296.52 and interest, and the further sum of $800 and interest claimed to be due plaintiff's son Leonard Broz under a contract for his benefit with the plaintiff. The remaining interveners, the heirs of said deceased, and his creditors appeal.

The petition alleges that the plaintiff loaned her husband during his lifetime large sums of money, and about the year 1928 her husband orally assigned to her as collateral security the policy for $10,000 which was originally a term policy for ten years and later converted into an ordinary

life insurance policy, and that plaintiff had kept one or other of those policies in her possession ever since the same had been delivered to her, and claims an equitable lien on the proceeds of the policy which have been collected and are now in the hands of Kucera as administrator. The petition further alleges that plaintiff holds said policy as collateral security for $800 claimed as indebtedness from deceased to Leonard Broz. The allegations of the petition were put in issue by the answer.

The errors assigned are: (1) Findings of the court and judgment based thereon are not sustained by sufficient evidence. (2) Findings of the court and judgment are contrary to law. (3) The court erred in finding that the plaintiff held the insurance policy as collateral security for the $800 indebtedness to Leonard Broz. (4) That the court erred in refusing to admit the evidence of Frank Kovar. (5) That the court erred in rejecting the evidence of Charles Javorsky. (6) The court erred in admitting the testimony of Leonard Broz. Of these in their order:

1, 2. The testimony of plaintiff was properly excluded as to the transaction with her husband by which she claims to have received the policy as collateral security for his debt to her, but plaintiff testified she had loaned her husband September 1, 1926, the sum of $5,000, and a note for that amount was received in evidence, also a mortgage upon the Dvorak farm securing said note; also on June 9, 1932, the further sum of $670 and a note for that amount signed by her husband was received in evidence. This indebtedness is well established. Plaintiff testified that she had the policy in her possession since about 1928 (the original term policy was converted into the life policy in question in 1931), that she kept the insurance policy in question, together with policies of her own and other valuable papers tied up in a separate bundle, in a safe located in a closet in the farm house where she lived with her husband until March 5, 1932, when the house was partially destroyed by fire, after which, except for a few days in the garage, she kept the policy in question and these other papers in a tin

box under the brooder house until the damaged house was roofed over, when she kept them in the basement; that she retained the possession of the policy in question until after her husband's death by suicide on November 1, 1933, when Kucera, administrator, asked her for the policy for the purpose of making the proofs of loss, and that at first she refused, but afterwards delivered the policy to the administrator for the sole purpose of making the proofs and on the understanding that her debt was to be paid from the proceeds collected; that she kept the policy in a tin box and took it to Kucera's office when she delivered the policy to him; that Lambert took her to the home place in his car to get the tin box and she got it, and some clothes, and took it back to Kucera's. I told him I had all my important papers in the box. The mortgage securing the $5,000 note was not recorded, and later the plaintiff and her husband executed a mortgage to one Hoffman for the sum of $10,000, which was recorded and became a first lien upon the farm, and plaintiff testified on rebuttal that the policy in question came into her hands immediately after the Hoffman note and mortgage were executed, the date of which does not appear. Leonard Broz, son of plaintiff by a former marriage, testified that his mother kept her papers in the safe until after the fire, and then in a tin box which she kept under the brooder house, and after the basement was roofed over she kept it in the basement; that he was present at a conversation between his father and mother concerning a policy of insurance, that they were looking over the papers that were taken out of the safe and that "he gave the policy to mother and he said that will take the place of what amount of money that he owes her," and told her to keep it anywhere she wants to so it would not get lost. Irene Broz, daughter of plaintiff, testified that soon after the fire she was present on an occasion when her father and mother were sorting papers out of a box where they had put the papers that came out of the safe, and that Dad gave her the policy and "told her to keep it for the money that he owes her;" that her mother kept it in a tin box which she first

placed under the brooder house and then in the basement after it had been roofed over. Frank O. Kucera, called for plaintiff, testified that the day Dvorak committed suicide he took Mary to his house and the next day he asked Mary where she had those papers (exhibit 1) and "she had a safety deposit box, one of these little boxes they use in the bank," and the box and papers were there at my house; also that August, 1933, when Edward A. Dvorak was making application for a loan from the Federal Land Bank and listing his indebtedness he said, "Well, I owe her (his wife) quite a bit of money, but she is holding security, my life insurance policy," he says, "I don't think we have to put that in there." The application was not sent in as the other debts were more than the loan would stand. The above were all the witnesses called for plaintiff to establish the delivery of the policy, but plaintiff introduced in evidence a document in the handwriting of and signed by Edward A. Dvorak a short time before he killed himself by shooting in the head while plaintiff was kneeling beside him, and plaintiff testified that her husband gave her the paper and told her to keep it, and the paper was afterwards found by the side of the husband's body. It was identified as exhibit 1, and was in the following terms: "Loving Mary keep this Lambert Administrator 10,000 Insurance Pay 6000.00 to Loving Mary my wife all this I borrowed from her 800.00 to Leonard for leaving out high school and my gun automatic Give Mary her radio and car she payed for it also give her the pistol and kodak and every thing she wish I am sure she will treat you rite if you do her make her free so she can go and get well Save our farm pay Hoffman interest for 1933 and March 1934 pay Fritz Mrs Vrba Kores Oil Station Shimerda last Novak Z C B J will pay 500 to Edward and Lambert each on the 800 that I owe them. Lambert stay on home place sell Bullis Victor Lambert Edward divide when Edward is 21 Shimerda make every thing cheap give me my blue suit Dear Mary I know you will miss me but I will save you all Yours Loving Ed A Dvorak."

Opposed to this evidence for the plaintiff the interveners called three sons of the deceased by a former marriage, who testified in substance as follows: Lambert Dvorak testified that in 1933 his father told him, in answer to a question when he, the witness, would get his money, that he had insurance that would cover all his debts; that he never saw the tin box referred to by his step-mother; that he had a policy of insurance of his own which was kept with his father's policy in a wooden box under the bed or in a clothes closet. Victor Dvorak testified that after the fire the papers were taken from the safe and put in a wooden box; that about two months before his father died he had a conversation with his father and his mother was present, over money matters, in which his father said: "'Everybody wants their money, and now your—and Mary wants her money and I can't give it to her—* * * even she wants me to sign over the policy that I have, she wants me to sign that policy over to her.' And he says, 'How can I do it?' He says, 'I have always been pretty proud around the people I have been living with, and these people loaned me the money with the intentions they are going to get it back some day.' And he says, 'I can't do it while—with these people around.'" That after his father's death, at a conversation in the office of Mr. Bartos about the appointment of an administrator, and also at the home of Frank O. Kucera, when the policy was discussed, his mother did not claim any interest in the policy. Edward Dvorak, Jr., testified that in the summer of 1933, when Mr. Ward was at the house, his father got the policy in question out of the lower drawer of a cupboard, together with policies of himself and brother Lambert, and put them back in the cupboard on the shelf, and that in June, 1933, he heard his father say that he had enough insurance to cover all debts. Defendants also offered in evidence deposition of H. M. Ward who testified that he was a life insurance salesman and was called to the house of Edward A. Dvorak the day before he died, October 31, 1933, by Edward, and that the policy was about to lapse for nonpayment of premiums,

and that he executed on behalf of the company an extension for 30 days; that Mary was present, and that her husband got the policy out of a drawer in a little bedroom; that at the time the term policy was converted to an ordinary life policy, in 1931, Mary was present and insisted that she be named as beneficiary in the new policy, but that her husband stated he wanted it made payable to his estate because it was to take care of indebtedness that he owed the estate, that he believed $10,000 would clean up the debts on the farm and leave the farm clear for the boys; that Mary said she should be beneficiary so she would be taken care of, but Edward said that the only reason he carried this policy was to take care of the indebtedness on the farm; that at that time Mary said nothing of any indebtedness to her; that at the time the policy was converted Edward A. Dvorak got the policy out of the safe.

On rebuttal Mary denied that her husband said to Victor in her presence that she wanted him to assign the policy, that she never asked him to assign it, and that what he did with reference to the policy was voluntary on his part. She also denied that the policy was produced and present at the time the extension agreement was made, but was in the basement. To recite all the evidence received would unnecessarily prolong this opinion, but the above is a résumé of the material parts.

Leonard Broz and Irene Broz were children of Mary Dvorak by a prior marriage, and Edward A. Dvorak, Jr., Lambert E. Dvorak and Victor A. Dvorak were children of the deceased. All of these people lived together on the Dvorak farm until the marriage of Victor in 1930. All the witnesses, therefore, except Kucera and Ward, were interested parties, and Ward was very intimate with Dvorak, Sr., described as a "crony," and they were in the habit of having drinking bouts together, Dvorak, Sr., especially, being a victim of excessive drinking, and was undoubtedly drunk at the time he committed suicide. It is extremely difficult for a reviewing court to arrive at a satisfactory conclusion when the testimony is in conflict and the princi-

pal fact to be determined rests upon the evidence of interested witnesses. In such case the judgment of the trial court who had the benefit of seeing the witnesses and observing their deportment while testifying is of considerable weight, notwithstanding the requirement of the statute that the reviewing court shall try the case *de novo*. This principle is well established in this jurisdiction by the case of *Johnson v. Erickson,* 110 Neb. 511, 194 N. W. 670, and many others that might be cited. In the instant case we have the positive testimony of plaintiff that the policy in question, or rather its predecessor, had been in her possession claiming it as collateral security since 1928, and the testimony of Leonard and Irene that after the fire the policy in question was, with other papers, taken out of the safe and delivered by Dvorak, Sr., to plaintiff, saying in substance that it would take the place of what he owed her, and the testimony of Kucera that upon the making of an application to the Federal Land Bank for a loan, Dvorak, Sr., stated that his wife was holding the policy as security for what he owed her. Opposing this, very naturally, there is no direct evidence, but the substance of what is offered is that on two or three occasions when the policy was under discussion Mary made no claim to any special interest in it, and Dvorak, Sr., stated that he carried this policy to take care of his debts; that on one or two occasions Dvorak had access to and produced the policy. The policy was payable "to the insured's executors or administrator, beneficiary." The testimony is in direct conflict as to where the policy was kept after the fire, plaintiff's witnesses stating it was kept in a tin box under the brooder house or in the basement of the farm house after it had been roofed over, while that of the interveners is in substance that it was kept in the drawer of a cupboard or clothes closet in a garage which had been converted into a dwelling after the fire and where the family thereafter lived. The testimony for interveners does not directly dispute that for plaintiff, but affords some inferences to cast doubt upon the evidence of the plaintiff, especially from the fact, if established, that Dvorak, Sr.,

produced the policy from a drawer or cupboard in a bedroom of the garage. But even this fact is far from conclusive as against plaintiff when the circumstances surrounding the parties are taken into consideration, that the question arises between husband and wife living together in a garage converted into a dwelling place, and where, in the nature of things, both of the parties would have access to the policy. The fact, under the circumstances, that Dvorak, Sr., produced the policy is not conclusive upon the question of possession. The right of possession is in the party having lawful claim upon the instrument and will not be defeated by the mere fact that another party might have such opportunity of access to it as to temporarily bring it within his custody. If, as we find, the weight of the evidence establishes that at some time, whether in 1928 or after the fire, the policy was delivered to plaintiff as collateral security, it constituted a pledge upon which to found an equitable lien upon the proceeds. See 37 C. J. 428, where it is said: "A policy may be pledged by delivery to secure a debt, although a formal assignment is not made, and either with or without a written transfer; or it may be assigned as collateral security." The provision of the policy that no assignment of the policy shall be binding upon the company unless in writing and filed with the company is for its benefit, and is not available to the administrator and interveners to defeat the lien of plaintiff upon the proceeds paid by the insurer. *Opitz v. Karel*, 118 Wis. 527, 95 N. W. 948; *Hogue v. Minnesota Packing & Provision Co.*, 59 Minn. 39, 60 N. W. 812. Upon a critical examination of all the evidence we are of opinion that the positive testimony of plaintiff's witnesses outweighs the inferences to be drawn from the evidence offered by interveners, and, giving due consideration to the fact that the trial court observed the witnesses and their manner of testifying, that the decree of the district court finding that the plaintiff has an equitable lien upon the proceeds of the insurance policy in question in the sum of $7,296.52, is correct.

3. There is, however, no evidence to sustain the finding

of the district court that Leonard Broz has any equitable lien upon the proceeds of the policy. No testimony was offered to that effect and the decree in this respect seems to be based wholly upon the statement in exhibit 1, reading "800.00 to Leonard for leaving out high school." True, the preceding sentence in exhibit 1 reads "10,000 Insurance Pay 6000.00 to Loving Mary my wife all this I borrowed from her." The sentences quoted indicate at most a desire on the part of Dvorak, Sr., that payments from the insurance money be paid as indicated, but afford no just inferences that the policy had been theretofore held as security for such amounts. Of course, exhibit 1 is not enforceable as a will, and in the absence of any evidence that the policy was to be held as security for the amount admitted to be due Leonard, it can only be given effect as an admission of a debt payable out of the estate.

4, 5. Interveners claim that the court erred in refusing to receive the testimony of Frank Kovar to the effect that Dvorak stated that he had the policy changed to his estate so he could pay all his debts, and the testimony of Javorsky that Dvorak, Sr., stated that he had insurance to cover all his debts. Mary was not present when either of these statements was made and we think they were properly excluded as incompetent and hearsay. The evidence offered was in the nature of admissions, but such are ordinarily received only when against the interest of the party making them, not as evidence in his favor. The interest of the administrator, heirs and creditors of the estate is adverse to that of plaintiff and the evidence was not competent as against the plaintiff. But beyond this, in our judgment, they had no tendency to refute the claim of the plaintiff that the policy had been delivered to her as security.

6. That the court erred in admitting the testimony of Leonard Broz because witness was interested at least to the extent of his claim of $800. It is claimed that the witness was incompetent under section 20-1202, Comp. St. 1929, providing: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse

party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." The point is not well taken, as the evidence was not of any transaction between the witness and the deceased, but of a conversation between the deceased and his wife, which the witness overheard and in which the evidence does not show he took any part. Under such circumstances the witness was not incompetent under the statute. *Hajek v. Hajek,* 108 Neb. 503, 188 N. W. 181; *McNea v. Moran,* 101 Neb. 476, 163 N. W. 766; *In re Estate of Powers,* 79 Neb. 680, 113 N. W. 198; *Kroh v. Heins,* 48 Neb. 691, 67 N. W. 771; *DeWulf v. DeWulf,* 104 Neb. 105, 175 N. W. 884.

We conclude that the judgment in favor of plaintiff for $7,296.52 with interest is correct and should be affirmed; that the district court erred in its finding and judgment in favor of Leonard Broz, and to that extent the judgment should be reversed and action dismissed; and it is so ordered accordingly.

AFFIRMED IN PART AND REVERSED IN PART.

FIRST TRUST COMPANY OF LINCOLN, APPELLANT, V. RALPH E. HICKEY, ADMINISTRATOR, ET AL., APPELLEES.

FILED FEBRUARY 1, 1936. No. 29741.

1. **Mortgages:** FORECLOSURE: MORATORIUM. Mortgagors applying for a moratorium after a decree of foreclosure are not entitled to that relief, where the uncontradicted evidence shows that mortgagee's lien on the land far exceeds its value and consequently that mortgagors have no equity or other interest which the moratory law was intended to protect.
2. ———: ———: ———: EVIDENCE. On the hearing of an application for a moratory stay, after a decree of foreclosure in a suit on a mortgage, affidavits may be admitted in evidence on the issue as to the value of the mortgaged land. Comp. St. 1929, sec. 20-1244.

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

G. Porter Putnam, Jr., for appellant.

Patrick & Smith, contra.

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

ROSE, J.

This is a suit in equity to foreclose five mortgages, each for $20,000 on a quarter section of land in Sarpy county—all an 800-acre farm. Edward Hickey and Bertha L. Hickey, husband and wife, were mortgagors. They died while the unpaid mortgages were liens on the land and Ralph E. Hickey was appointed administrator of the estate of each decedent. Plaintiff is the First Trust Company of Lincoln, as successor-trustee to the Lincoln Safe Deposit Company and the Lincoln Trust Company, bankrupts. The defendants are the administrator of the estates of the deceased Hickeys, the latter's heirs and L. A. Ricketts, trustee in bankruptcy of the two bankrupts named.

A chronology of events follows: October 3, 1934, decree for the foreclosure of each of the five mortgages for an unpaid debt of $24,696.52 or $123,482.60 in all and stay of sale for nine months, or until July 3, 1935; August 13, 1935, request by administrator for moratory stay until March 1, 1937, under the act of 1935; August 14, 1935, each quarter section of land sold at judicial sale to plaintiff for $20,000, or all for $100,000; September 11, 1935, motion to confirm sale overruled and moratorium granted until March 1, 1937. Plaintiff appealed.

Were the heirs of the deceased mortgagors or the administrator entitled to a moratory stay under the act of 1935? Comp. St. Supp. 1935, sec. 20-21,159. The moratory rights of mortgagors and of others claiming an equitable interest in mortgaged land were considered in former cases. A recent opinion contains the following observations on the moratory law:

"It was clearly not the intent of the legislature that every person should be entitled to a moratory stay as a matter of

right, otherwise there would have been no occasion for the words, 'unless upon hearing on said application, good cause is shown to the contrary,' contained in the act. We therefore conclude that it must have been the intent of the legislature to relieve only such mortgagors as have an interest in their lands over and above the liens against them.

"It was the intent of the legislature undoubtedly to afford relief to mortgage debtors who would lose valuable property because of the existing economic emergency. It was not its intention to keep mortgagors in possession of their lands irrespective of the fact that they had no valuable interest therein." *Clark v. Hass,* 129 Neb. 112, 260 N. W. 792.

This was approved in a later case. *Erickson v. Hansen,* 129 Neb. 806, 263 N. W. 132.

In view of former rulings, the uncontradicted evidence in the present case shows that the moratorium was erroneously granted. For five years prior to the judicial sale defendants failed to pay taxes amounting to more than $3,000 and interest exceeding $30,000. The lien on each quarter section of land increased by interest and taxes from $20,000 to $24,696.52 or to $123,482.60 in all. The highest bid at the foreclosure sale was $20,000 for each quarter section of land or $100,000 for all. It is the proper deduction from the uncontradicted evidence that the indebtedness exceeded the value of the land to the extent of more than $30,000. Under the cases cited, therefore, neither the administrator nor any other defendant had an equity or other interest which the moratory act was intended to protect.

It is insisted, however, that values were estimated only in affidavits which were inadmissible for that purpose. This point is not well taken for the reason that method of proof on application for a stay of proceedings is authorized by statute. Comp. St. 1929, sec. 20-1244.

For the reasons stated the judgment overruling the motion to confirm the judicial sale and granting the moratorium is reversed with instructions to the district court to confirm the judicial sale on the record as it stands.

REVERSED.

LOUIS SMITHBERGER ET AL., PLAINTIFFS, V. WILLIAM B. BANNING ET AL., DEFENDANTS: NEBRASKA PETROLEUM MARKETERS, INC., ET AL., INTERVENERS.

FILED FEBRUARY 1, 1936. No. 29603.

Declaratory Judgments. "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." Comp. St. 1929, sec. 20-21,145.

Original action to determine the validity of emergency relief measures. Defendants demurred to petition of plaintiffs and petitions of interveners, and the demurrers were overruled. 129 Neb. 651. Defendants now move to dismiss petitions of intervention. *Motions sustained.*

Fay H. Pollock et al., for plaintiffs.

William H. Wright, Attorney General, Milton C. Murphy, Sterling F. Mutz and *Lester A. Danielson,* for defendants.

Lee Basye, for interveners.

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

EBERLY, J.

The issues presented by this proceeding were first presented for consideration by the general demurrers of the defendants to the amended petition of plaintiffs and to the petitions of intervention of the Nebraska Petroleum Marketers, Inc., and of Calvin J. Stover. The decision of this court thereon was announced in 129 Neb. 651, 262 N. W. 492. A motion for a new trial and for a rehearing was then presented by the defendants, which was overruled. The defendants electing to plead no further as to the petition of plaintiffs for a declaratory judgment only, a judgment so restricted was thereupon entered upon plaintiffs' pleading in favor of plaintiffs and against the defendants, determining that Senate File No. 363 (Laws 1935, ch. 155) as amended by House Roll No. 432 (Laws 1935, ch. 161) and House Roll No. 675 (Laws 1935, ch. 139) as amended

by Senate File No. 367 (Laws 1935, ch. 136) were in all respects unconstitutional and void. Motions of defendants to dismiss the petition of intervention of the Nebraska Petroleum Marketers, Inc., and the petition and amended petition of intervention of Calvin J. Stover are now presented for our consideration.

This action was originally brought by plaintiffs under section 20-21,141, Comp. St. 1929 (section 2 of our uniform declaratory judgments act), which provides, in part: "Any person * * * whose rights, status or other legal relations are affected by a statute * * * may have determined any question of construction or validity arising under the * * * statute * * * and obtain a declaration of rights, status or other legal relations thereunder."

This court has now determined that the statutory provisions, the validity and construction of which formed the entire basis of plaintiffs' application and to which it was limited, are unconstitutional and void. This relief has been granted upon the pleadings of plaintiffs, and covers fully all matters as to which a declaratory judgment was prayed.

Plaintiffs' petition, though in form an action brought by private persons as taxpayers, was especially in behalf of 23 counties of the state and their inhabitants. These counties and their inhabitants were represented in this litigation by their several county attorneys. Public rights were necessarily involved and sought to be maintained by these officers as the substance of the proceeding. Concurring opinion by Paine, J., 129 Neb. 666, 262 N. W. 500. The efficiency of their pleadings and procedure to maintain public interest, in light of results secured, could hardly be questioned.

The rule to which this jurisdiction is committed is: "When public officers are engaged in litigation to protect public rights, and their pleadings and procedure maintain the public interest, no private person is entitled to intervene." 1 Bancroft, Code Pleading, 861, sec. 592. See, also, *State v. Farmers State Bank,* 103 Neb. 194, 170 N. W. 901; *Buffalo County v. Kearney County,* 83 Neb. 550, 120 N. W. 171; *State v. Hall,* 125 Neb. 236, 249 N. W. 756.

However, passing this point for the moment, a known authority on the subject of declaratory judgments has well stated:

"At the outset, it may be remarked that in form it (an action seeking a declaratory judgment) differs in no essential respect from any other action, except that the prayer for relief does not seek execution or performance from the defendant or opposing party. It seeks only a final determination, adjudication, ruling, or judgment from the court, but the conditions of the usual action, procedural and substantive, must always be present, namely, the competence or jurisdiction of the court over parties and subject-matter, the capacity of the parties to sue and be sued, the adoption of the usual forms for conducting judicial proceedings (including process, pleadings, and evidence), the existence of operative facts justifying the judicial declaration of the legal consequences, the assertion against an interested party of rights capable of judicial protection, and a sufficient legal interest in the moving party to entitle him to invoke a judgment in his behalf." Borchard, Declaratory Judgments, 23-24.

With these principles in view, it is to be noted that the Nebraska Petroleum Marketers, Inc., for its petition of intervention, alleges in part: "That this intervener is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska, and that such association is composed wholly of persons duly licensed by the department of agriculture and inspection in the state of Nebraska to carry on the business of dealing and otherwise selling and merchandising motor vehicle fuels, including gasoline and kerosene within Lancaster county, and elsewhere within the state of Nebraska; that said association has a membership of more than two hundred of such dealers and that each of said dealers is a taxpayer and makes reports and pays the gasoline tax assessed by the department of agriculture and inspection of the state of Nebraska; that the intervener therefore intervenes in said cause in behalf of * * * any and all other persons engaged in the sale

and marketing of motor vehicle fuels within the state of Nebraska who are similarly situated and who desire to pay their proportionate share of this action and become a party hereto."

It does not allege in this pleading that as a corporate entity it is a dealer in gasoline, oils, etc., and thus subject to the terms of the statute, the validity of which it questions. Its complaint is wholly based on the fact that it is made up of constituent members who are, in their respective private capacities, dealers in gasoline, oils, etc., which the terms of the legislation in suit purport to tax. However, in addition to the fact of the identity of its membership, its representative capacity and its authority to appear for or in behalf of its membership in the present litigation is nowhere alleged, and cannot be presumed. In this class of cases corporate identity is wholly distinct from the persons who compose it. It is obvious that this corporation has no sufficient legal interest in the matters in controversy to invoke a judgment in its own behalf or in behalf of those it assumes to represent.

Calvin J. Stover, appearing in behalf of himself and all other persons similarly situated, in his original petition of intervention, sets forth that he is "a person duly licensed by the department of agriculture and inspection of the state of Nebraska to carry on and conduct the business of dealing in and otherwise selling and merchandising motor vehicle fuels, including gasoline and kerosene at Hickman, in Lancaster county, Nebraska, and elsewhere throughout the state; that as such dealer he makes reports to and pays the gasoline and motor vehicle fuel tax assessed by the department of agriculture and inspection of the state of Nebraska; that he has made reports to and paid the regular gasoline tax assessed for the months of March and April, 1935, and in addition to the regular tax of four cents per gallon upon the number of gallons received, imported and/or sold by said dealer during said time has been required to pay an additional tax of one cent per gallon upon each gallon of gasoline imported or caused to be imported, received and

sold for said period." He does not allege the quantities of taxable products sold by himself or the amount of alleged unlawful tax by him paid. His petition of intervention attacks the validity of the same legislation as is challenged by the petition of plaintiffs. But, in addition, he prays for an injunction in substance restraining the defendants from levying further taxes pursuant to the challenged legislation, and also restraining such officers from paying over any of such levies heretofore made and collected; asks that the legislation challenged in plaintiffs' petition be decreed unconstitutional, and that the taxes collected thereunder be repaid "to the contributors thereof in the proportionate amounts that the same was collected from such taxpayers." By an amended petition of intervention filed after the disposition of these proceedings made by order of this court on September 20, 1935, declaring the legislation attacked unconstitutional and void, this intervener, in addition to the statements contained in his original petition of intervention, makes further demand on defendants for return of the taxes so unlawfully assessed, and also alleges refusal of defendants to accede thereto. But neither the original nor the amended petition furnishes any basis for the determination of the amount of refunds demanded on behalf of this petitioner.

The tenth paragraph of the amended petition is as follows: "A part of the motor vehicle fuels on which said one cent tax was paid, as aforesaid, was thereafter sold by this intervener, and others similarly situated, but said tax was not collected from such purchasers thereof, although the sale price thereof was sufficient to cover the cost to this intervener, and others similarly situated, of said motor vehicle fuels, including the amount of said tax. This intervener, and others similarly situated, allege they are entitled to a return of said one cent tax paid by them as aforesaid and to retain the same, but this intervener, and others similarly situated, hereby offer to do equity in connection with the disposition of the amount recovered in this suit and, in the event the court determines that as a matter of

equity any part of said amount should be paid to the aforesaid purchasers, then said payments will be made by this intervener, and others similarly situated."

It must be conceded that the intervener Stover, so far as disclosed by his amended petition of intervention, represents in his offer "to do equity" no one but himself. His allegations above quoted disclose an admission of a fact which due consideration of the circumstances of this litigation confirms, viz., that, on the assumption that some one is entitled to a refund of these taxes collected without authority of law, it becomes a litigable controversy as to whether such beneficiary shall be the dealer represented by Mr. Stover, who actually transferred the tax to the officers named in the void acts to receive it, or the ultimate consumer who was the actual source of the payment. The ultimate consumer as against the dealer is not a party to this proceeding. He is a necessary party, and a final binding adjudication cannot be made without his presence.

In this connection, it is stated in Borchard on Declaratory Judgments, 104-106: "More often, however, the court dismisses the proceeding, on the ground that some designated necessary party or parties should have been heard, not only for the information of the court but because such a party might be affected by, even though not bound by, the decision; and in so conclusive a proceeding it would be neither just nor proper to render a judgment without hearing and binding such interested person. Any suggestion, of course, that interested parties could be bound by a judgment in a proceeding to which they were not parties served, with opportunity to be heard, would encounter constitutional objections."

So, too, we must take judicial notice of the fact that subsequent remedial legislation has been enacted and approved by the coordinate departments of our state government, viz., House Roll No. 37 (ch. 19) and House Roll No. 11 (ch. 18) enacted at special session of legislature of 1935, which in terms applies to the controversy before us. The validity of these enactments is not within the issues made by the

pleadings of the present case. While the rule is possibly invoked by the controversy here presented, viz., that, when an applicant is not an indispensable party, intervention will not be allowed when it will change the form of the action or the issues (2 Bancroft, Code Practice and Remedies, 1139, sec. 775), this court is of the opinion that it should refuse to enter any further declaratory judgment for the reason that, in view of the existing circumstances, if such judgment was rendered or entered, confined to the issues as limited by the pleadings, it would not finally terminate the uncertainty or controversy giving rise to this proceeding. Comp. St. 1929, sec. 20-21,145.

Then, too, this court has announced the doctrine that a taxpayer cannot maintain suit to recover void taxes for himself and others similarly situated, but each taxpayer must bring action in his own behalf. *Monteith v. Alpha High School District,* 125 Neb. 665, 251 N. W. 661.

It appears that in this proceeding, considered as an action in intervention, the principles of interpretation as applicable to our controlling statute and the equitable principles involved, as heretofore announced and applied, must be observed; that, considered as strictly an application for a declaratory judgment as to the validity of certain legislation referred to and identified therein, the limitations of interveners' pleadings necessarily set the limits of the possible relief; and that, considered as a proceeding in equity to coerce official action and secure a personal recovery by entry of a judgment in favor of plaintiffs for an amount certain, there can be no recovery by interveners for themselves and others similarly situated, under the doctrine of the *Monteith* case, *supra,* and also the additional reason that the amount of interveners' individual claims are not pleaded.

It is therefore ordered that defendants' motions to dismiss further proceedings on interveners' petitions and amended petition of intervention be and the same hereby are sustained, without prejudice to future actions.

MOTIONS TO DISMISS SUSTAINED.

E. H. LUIKART, RECEIVER, APPELLANT, V. HENRY BRAASCH, APPELLEE.

FILED FEBRUARY 7, 1936. No. 29500.

1. **Bills and Notes:** SIGNING ON CONDITION. As between the parties to a promissory note, it is not binding on one who signed it and entrusted it to payee on the express condition, known to the latter, that another person named also sign it, where there is no compliance with that condition.
2. ———: PAROL EVIDENCE. Conditional delivery of a promissory note may be shown by parol evidence.
3. **Witnesses:** COMPETENCY. In an action on a promissory note by the receiver of a bank named as payee, defendant is not incompetent as a witness to testify to transactions, between himself and the deceased president of the bank, to the effect that defendant signed the note and entrusted it to the bank on the express condition that another person named also sign it.

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

F. C. Radke, Radcliffe & Wehmiller and *W. A. Crossland,* for appellant.

Heaton & Heaton, contra.

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

ROSE, J.

This is an action on a promissory note for $1,345.82 with interest at the rate of 10 per cent. per annum, dated August 8, 1931, and payable on demand. Henry Braasch, defendant, signed the note. The Liberty State Bank of Sidney was payee, but became insolvent and E. H. Luikart was appointed receiver February 2, 1932. As such he is plaintiff. It is alleged in the petition that no part of the debt has been paid except $282.48 and $52.14 on May 26, 1932.

The answer of defendant contained a general denial and affirmative defenses that the president of the bank requested him to indorse the note as surety for Ray Spiker, the debtor, and that defendant signed it and entrusted it to

the bank on the express condition that Spiker also sign it; that the bank, knowing the condition, failed to procure the signature of Spiker; that there was never any compliance by the bank with the condition on which defendant signed the note; that defendant did not receive any consideration for it.

In a reply to the answer the facts pleaded in defense were denied. It was also stated in the reply that the note in suit was the last of a series of former renewal notes owing by defendant to the bank; that on March 17, 1932, defendant applied for offsets of $282.48 and $52.14 in bank deposits against the note in controversy and that these offsets were duly allowed by the district court.

Upon a trial of the issues the jury rendered a verdict in favor of defendant. From a judgment dismissing the action plaintiff appealed.

It is urged on appeal that the evidence is insufficient to prove any defense to the case made by plaintiff, the receiver, and that the district court erred in overruling a motion to direct a verdict in his favor. The defense upon which defendant relies is that, without any consideration, he signed the note as surety and entrusted it to the bank on the express, unperformed condition that Ray Spiker, the debtor, also sign it. This is a valid defense, if proved, and the conditional delivery may be shown by oral testimony. Comp. St. 1929, sec. 62-116; *Farmers State Bank v. Baker,* 117 Neb. 29, 219 N. W. 580; *Witte v. Broz,* 111 Neb. 76, 197 N. W. 121; *Monroe v. Parker,* 122 Neb. 499, 240 N. W. 548.

Henry Braasch, defendant, was a witness in his own behalf and his testimony tends to prove the following facts: Ray Spiker was indebted to the bank in 1923 and a note for his debt was signed by him and by defendant as surety. Renewal notes thus signed were executed from time to time until the note in suit, as a renewal of the previous notes, was presented to defendant for his signature August 8, 1931. On that date Fred Slawson, president of the bank, met defendant on the street and said he had a note ready

for the signature of defendant and Ray Spiker. Slawson and defendant went into the bank and were alone there. Slawson got the note and said, when defendant signed it, "I will get Ray Spiker to write his name down there, too, and then the note will be O. K." Defendant did not then or previously receive any consideration and never made any payment on principal or interest. Previous notes bearing the signatures of both Spiker and defendant were identified as notes of which the note in suit was a renewal and were inserted in the record. Spiker did not sign it and the fact that his signature was never procured by Slawson or the bank was unknown to defendant until 1934. In substance defendant testified to the facts thus narrated.

Unless testimony of the nature outlined was improperly admitted over the objection that defendant was an incompetent witness, it presented a question for the jury on the issue of a conditional delivery of the note. Plaintiff argues, however, that defendant was not a competent witness to testify to the transaction or the conversation with Fred Slawson, a deceased person. In this connection the following provision of statute is invoked:

"No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." Comp. St. 1929, sec. 20-1202.

While defendant, the witness in the present instance, had a direct legal interest in the result of the action, the plaintiff bank, acting by the receiver, was the adverse party but not the representative of the deceased Slawson. The bank and Slawson were two separate entities. The insolvency and the appointment of the receiver did not extinguish the bank as a corporation. Its existence continues for the settlement of its affairs. Its records are evidence of its transactions. Bank officers other than the president are competent witnesses in its behalf.

"Every human being of sufficient capacity to understand

the obligation of an oath," says the statute, "is a competent witness in all cases, civil and criminal," with enumerated exceptions not applicable to the present inquiry. Comp. St. 1929, sec. 20-1201. Restrictions on competency are statutory and are ordinarily limited to statutory exceptions. When the restrictions are in plain language they are not open to extension by judicial interpretation. *Clark v. Fleischmann,* 87 Neb. 609, 127 N. W. 914. The statute uses the term "adverse party," which does not include agents or officers of the "adverse party." An analogous principle was stated in this form:

"A party to an action is not an incompetent witness by whom to prove a transaction with an agent of the other party since deceased." *German Ins. Co. v. Frederick,* 57 Neb. 538, 77 N. W. 1106. Followed in *Walker v. Hale,* 92 Neb. 829, 139 N. W. 658.

In support of the contention that defendant was not a competent witness, plaintiff cites *Sheldon v. Michigan Millers Mutual Fire Ins. Co.,* 124 Mich. 303, 82 N. W. 1068, and *Charles C. Kawin Co. v. Goodale Co.,* 214 Mich. 513, 183 N. W. 15. These cases are inapplicable to the present controversy owing to differences between statutes of Michigan and statutes of Nebraska. Other cases cited by plaintiff are not controlling here. Defendant was not an incompetent witness and his testimony is sufficient to sustain the verdict and judgment. There was therefore no error in the overruling of the motion for a directed verdict in favor of plaintiff.

It is further insisted that defendant received consideration in the form of two 100-dollar notes, evidencing his individual indebtedness to the bank—sums included in the renewal note in suit; that he was liable on the former notes signed also by Spiker; that the antecedent obligations were sufficient as consideration for the new note. The answer to these propositions is the defense of conditional delivery already explained and testimony by defendant to the effect that, when signing the note in controversy, he did not know the amount due on his individual notes was included; that

he paid his own debts by offsetting against them his personal deposits.

All assignments of error discussed by plaintiff have been considered without finding a substantial ground for reversing the judgment below.

AFFIRMED.

OMAR BAKING COMPANY, APPELLANT, V. EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD., APPELLEE.

FILED FEBRUARY 7, 1936. No. 29519.

1. Insurance: POLICY: CONSTRUCTION. An insurance policy is a contract and, if couched in unambiguous and clear language, should be construed as other contracts.
2. ———: ———: ENFORCEMENT. "Where there is no uncertainty as to the meaning of an insurance contract, and the same is legal and not against public policy, it will be enforced as made." *Rye v. New York Life Ins. Co.*, 88 Neb. 707, 130 N. W. 434.
3. ———: ———: CONSTRUCTION. Loss sustained by assured in being compelled to pay damages for breach of a warranty in the sale of a horse is not covered by this provision: "This policy covers bodily injuries, accidentally sustained by any person or persons other than employees of the assured, caused by, and/or owing to the ownership, the maintenance, the use, and/or the operation of, all horses used in connection with the business operations of the assured."

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

George B. Boland and *Edward F. Leary*, for appellant.

Hall, Cline & Williams, contra.

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

GOOD, J.

This is an action upon a policy of liability insurance. A general demurrer to the petition was sustained. Plaintiff

elected to stand upon its petition, and the action was dismissed. Plaintiff has appealed.

Plaintiff owns and operates a bakery in the city of Omaha and, in the prosecution of its business, owns and uses a large number of horses and horse-drawn vehicles for delivery of its products. One of its horses so owned, having become unsuited for plaintiff's use, was sold to one Lentz. When Lentz attempted to use the horse a few days later it ran away and seriously injured him. Lentz sued plaintiff for damages, alleging that the horse had been warranted to be gentle and suited to his needs. Lentz recovered a judgment against plaintiff which was affirmed by this court. *Lentz v. Omar Baking Co.*, 125 Neb. 861, 252 N. W. 410. Plaintiff satisfied the judgment obtained against it by Lentz and makes its loss to Lentz the basis for recovery in this action.

The policy in question is denominated "Teams Public Liability Policy" and contains this stipulation: "This policy covers * * * bodily injuries, * * * accidentally sustained by any person or persons other than employees of the assured, (1) caused by, and/or owing to the ownership, the maintenance, the use, and/or the operation of, all horses * * * used in connection with the business operations of the assured."

Plaintiff contends that the loss sustained by it in the suit by Lentz was one covered by the above provision of the policy. On the other hand, defendant contends that the loss sustained by plaintiff in satisfying the Lentz judgment was not covered by the policy.

Plaintiff argues that the loss which it incurred by reason of paying the judgment to Lentz was one arising out of its ownership of the horse; that the ownership of the horse implied the right to sell the horse, and that the damage sustained by Lentz arose by reason of the sale of the horse to him by plaintiff. Plaintiff in its excellent brief cites many sound propositions of law, buttressed by ample authority, but the view that we take is that they are not applicable to the facts disclosed by the record. We think the

decision in this case must be ruled by well-settled principles of law, and that it would be a work of supererogation to review the authorities which are not applicable.

An insurance policy is a contract, and, if it is couched in unambiguous and clear language, it should be construed as other contracts. The interest and the intent of the parties must be gathered from the language of the policy; each part of the contract should be considered in arriving at its true meaning, and a reasonable construction should be given to it.

"Where there is no uncertainty as to the meaning of an insurance contract, and the same is legal and not against public policy, it will be enforced as made." *Rye v. New York Life Ins. Co.*, 88 Neb. 707, 130 N. W. 434. See *Dressler v. Commonwealth Life Ins. Co.*, 105 Neb. 669, 181 N. W. 543; *Cilek v. New York Life Ins. Co.*, 95 Neb. 274, 145 N. W. 693.

We think that the language of the policy is not ambiguous; that it is clear, and that it should be given effect as made. The injury sustained by Lentz was not caused by, nor was it owing to, the ownership of the horse by plaintiff. At the time of the injury to Lentz plaintiff had parted with its ownership of the horse. The injury was not caused by, nor was it owing to, the maintenance of the horse by the plaintiff; nor was it caused by, or owing to, the use or operation of the horse in the plaintiff's business. The injury to Lentz, for which plaintiff became liable, was due to a contract of warranty made by it. Nowhere in the policy can we find coverage for such a transaction. We are satisfied that the loss sustained by plaintiff in paying damages for breach of its warranty was not one covered by the policy.

The trial court rightly sustained the demurrer to plaintiff's petition.

AFFIRMED.

EMIL G. EHLERS, APPELLEE, V. FARMERS MUTUAL INSURANCE COMPANY, APPELLANT.

FILED FEBRUARY 7, 1936. No. 29525.

1. **Statutes:** CONSTRUCTION. When the court of last resort has judicially construed a statute, the rule permitting recourse to contemporaneous construction of the statute by administrative or executive officials, charged with the enforcement of such statute, is inapplicable.
2. ———: ———. Construction of insurance statute, as made in *Hobza v. State Farmers Ins. Co.*, 125 Neb. 776, 252 N. W. 214, is adhered to.
3. **Insurance:** CONTRACT. The application for a policy of mutual assessment insurance, the policy itself, the articles of incorporation and by-laws of the insurer, and the applicable statutes all enter into and form a part of the insurance contract.
4. ———: ———: ASSESSMENTS. The provisions of the policy, application therefor and by-laws, set out in opinion, *held* to authorize defendant to levy assessments only for losses which have occurred, together with necessary expenses.
5. ———: FORFEITURE. Failure of a policyholder to pay an invalid assessment will not operate as a forfeiture of his policy.

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

Harvey W. Hess and *Harold J. Requartte,* for appellant.

J. P. Baldwin and *W. O. Baldwin, contra.*

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

GOOD, J.

In this action plaintiff seeks recovery on a policy of fire insurance, issued to him by defendant. Defendant admitted the issuance of the policy, denied liability on the ground that the policy had lapsed for nonpayment of an assessment duly made, and alleged that the policy was not in force at the time plaintiff sustained his fire loss.

The parties stipulated the value of the property covered by the policy and destroyed by fire. At the close of all the evidence each of the parties moved for a directed verdict.

The court overruled defendant's motion and sustained that of plaintiff, and judgment was entered upon the directed verdict for the stipulated value of the property destroyed, plus interest. Defendant has appealed.

The only assignments of error requiring consideration are those relating to the question of whether the policy had lapsed for nonpayment of the assessment.

Defendant was a mutual assessment insurance company. The loss sustained by plaintiff occurred March 16, 1934. In July, 1933, defendant authorized an assessment to be made as of the 1st day of October, 1933, and the assessment was made as of that date. It is conceded that plaintiff has not paid the assessment. Plaintiff claimed that he had received no notice of such assessment, and further that the assessment was void because it was made, in part, for anticipated future losses; and plaintiff contends that defendant had power to levy assessments only for losses that had actually occurred, together with necessary expenses of the company.

In *Hobza v. State Farmers Ins. Co.*, 125 Neb. 776, 252 N. W. 214, this court construed the applicable statute, to the effect that such a company as plaintiff may make an assessment upon its members only for losses which have actually occurred, plus operating expenses incurred by the company, and it is admitted in this regard that the assessment made by this company, effective October 1, 1933, was, in part, for future anticipated losses. Defendant now contends that this court did not properly construe the statute, and that the administrative department of the state, having to do with enforcement of the insurance laws, had for a long time previously construed this statute as authorizing such companies to make assessments for future anticipated losses, and that such construction, having been acquiesced in by the administrative department for a long time, should control the action of this court.

In 59 C. J. 1022, it is said: "Where the language of a statute is ambiguous or uncertain, the construction placed on it by contemporaries, although not controlling, may be

resorted to as an aid in ascertaining the legislative intent, and should not be overturned except for cogent reasons. * * * But since it is primarily the function and duty of the courts to interpret the meaning of a statute, a resort to contemporaneous construction is both unnecessary and improper where the language used is clear, or its meaning can be ascertained by the use of intrinsic aids alone."

In 25 R. C. L. 1043, sec. 274, it is said: "It is a well-settled rule that the contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, while not controlling, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

Evidently, construction of a statute by an administrative or executive department of the state may be resorted to as an aid to the court in determining its meaning, but only where the court of last resort of the state has not previously interpreted the statute. After the court of last resort has placed an interpretation thereon, it is unthinkable that its ruling should be overturned by a construction placed thereon by an administrative or executive body. If such were the rule, then the decision of a court of last resort might, in effect, be overruled and overturned by showing that an administrative or executive department, charged with the administration of a statute, had previously given it a different construction. The rule that consideration will be given to contemporaneous construction by administrative or executive departments of the state is applicable only where the court has not previously determined the meaning of the statute. In *Hobza v. State Farmers Ins. Co., supra,* this court has previously placed a construction upon the applicable statute. We are content to abide by our former decision.

It may be observed that the statute which controls in the instant case, and which was construed in *Hobza v. State Farmers Ins. Co., supra,* was amended by the legislature in 1935, so as to provide for assessments for future losses.

Comp. St. Supp. 1935, sec. 44-902. The new statute, however, has no application to the instant case.

For another reason the judgment of the district court must be affirmed. It is a rule that the application for a policy of insurance, the policy itself, the articles of incorporation and by-laws of the company, and the applicable statutes all enter into and form a part of a contract of insurance. In the instant case, the application contains this language: "In consideration of the above guaranteed indemnity during the time specified in the above application for insurance I agree to pay to the treasurer of the Farmers Mutual Insurance Company of Thayer county, Nebraska, a membership fee of.....Dollars, and also bind myself, * * * to pay my pro rata share of all losses and necessary expenses." The policy contains this provision: "In consideration of the payment of Four and 25/100 Dollars, the renewal of Policy No. Part 17608 and an agreement to pay his pro rata share of all losses and necessary expenses that may be incurred, the above named company hereby insures," etc. The by-laws provide among other things: "Any member may withdraw from this company by surrendering his policy to the secretary and paying his pro rata share of all losses up to date of such action." Another provision reads: "When an assessment has been ordered the secretary shall send notice of same to each member. Which notice shall * * * give a complete list of all losses since date of last assessment."

We think a fair interpretation of the various provisions of the application, the policy and the by-laws indicates quite clearly that the company was not authorized to make an assessment for future anticipated losses; that it was limited to losses that had occurred and necessary operating expenses of the company.

The conclusion already reached renders it unnecessary to consider other assignments of error. The judgment is right and is

AFFIRMED.

JOHN AHLSTEDT, APPELLEE, V. DAVID SMITH ET AL.: EDWARD FRANCIS STRAKA, APPELLANT.

FILED FEBRUARY 7, 1936. No. 29405.

1. **Automobiles:** JOINT ENTERPRISE: IMPUTED NEGLIGENCE. Where two persons unite in the joint prosecution of a common purpose so that each has authority, express or implied, to act for the other in respect to the control of the means to accomplish the common purpose, the negligence of one will be imputed to the other.
2. ———: ———: ———. Where two or more are riding in a car and are operating it as a joint enterprise, one who has joint control over the automobile may be liable for the negligence of the other in operating it.
3. ———: ———: QUESTION FOR JURY. Whether a person riding in an automobile driven by another is engaged in a joint enterprise with the driver is a question of fact for the jury.
4. ———: ———: IMPUTED NEGLIGENCE. A minor, who occupies an automobile and engages in the prosecution of a joint enterprise with another who drives, may be liable for the negligence of the driver.

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

Beghtol, Foe & Rankin, for appellant.

George I. Craven and *J. Jay Marx, contra.*

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

DAY, J.

This is an action for damages for personal injuries resulting from an automobile accident. Edward Francis Straka appeals from a judgment entered on a verdict in the district court.

It seems necessary to state the circumstances which preceded the accident. The appellant was a minor 15 years of age at the time, living with his minor brother and sister at the family home. His mother and father were dead, and an aunt and her husband lived at the Straka home. A group of men and young men gathered on the premises at

the rear of the Straka home on the evening in question. After visiting and drinking some elderberry wine, it was decided by several, including the appellant, that an automobile ride would be a good idea. Edward Francis Straka, at least one of his brothers, and two older men, Smith and Jones, went for a ride in an automobile belonging to appellant's brother, Charles. There is some dispute as to whether Edward borrowed the automobile or merely took it without his brother's knowledge and consent. Smith, a man 60 years of age, drove the car because Edward did not have a driver's license. There is abundant evidence to establish that at the time in question he was an incompetent driver. They drove for a short distance, and then the accident occurred in which the plaintiff was injured.

The issues presented are comparatively simple. It is necessary to determine if the evidence is sufficient to connect Edward Francis Straka with the accident in such a way that he is legally liable for damages to the plaintiff. He did not own the car and was not driving it at the time. He was fifteen years of age. The petition alleges that Edward Francis Straka and Smith were engaged in a joint enterprise, and that he is, therefore, legally liable for the damage caused by the accident.

Although somewhat disputed, there is evidence that Edward Francis Straka, Smith, and others took the car for the purpose of a ride. Their destination was a store to purchase some cigarettes. Edward Francis Straka provided the car, whether by permission of his brother or by unauthorized appropriation. He suggested that Smith drive. This was for his convenience and pleasure. He assisted Smith to shift the gears at first and continued to direct the movements of the car throughout the drive. The drive was not for the benefit of one, but all shared in the pleasure alike. There is evidence that indicates that the operation of this car was directed by both with much discussion and argument. Where two persons unite in the joint prosecution of a common purpose, so that each has authority, express or implied, to act for the other in respect

to the control of the means to accomplish the common purpose, the negligence of one will be imputed to the other. *Koplitz v. City of St. Paul,* 86 Minn. 373, 90 N. W. 794; *Judge v. Wallen,* 98 Neb. 154, 152 N. W. 318.

Where two or more are riding in a car and are operating it as a joint enterprise, one who has joint control over the automobile may be liable for the negligence of the other in operating it. In such a case, the driver's negligence is imputable to the occupant.

The evidence amply supports the verdict of the jury that Edward Francis Straka and Smith were engaged in a common enterprise and that Edward exercised joint control of the automobile at the time. Whether a person riding in an automobile driven by another is engaged in a joint enterprise with the driver is a question of fact for the jury. *Judge v. Wallen, supra.*

The appellant was a minor fifteen years of age at the time. A joint enterprise is in the nature of a contractual relation. The appellant asserts that the contract which created the joint enterprise was voidable and that he can disaffirm. It is undoubtedly true that a minor may disaffirm his contracts, including one that creates a joint enterprise or venture. But a minor is responsible for his torts. This action is founded upon tort. The basis of this action is that Edward Francis Straka was operating this car under his control through the agency of Smith. He could repudiate the relation and disaffirm at any time. But he is responsible for torts which he committed through the operation of the automobile as much as though he had personally operated the automobile. If Edward Francis Straka as a minor had purchased an automobile, he could have repudiated the contract of purchase; but he could not thereby avoid liability for a tort committed while operating the automobile.

A minor, who occupies an automobile, and engages in the prosecution of a joint enterprise with another who drives, may be liable for the negligence of the driver.

An examination of the instructions as a whole reveals

that the issues were fairly submitted to the jury. Possibly an instruction that the same degree of care is not expected from a minor as from an adult should have been given. However, the negligence in this case and the circumstances surrounding the accident were such that the failure to give such an instruction was not prejudicial to the appellant.

The admission of immaterial evidence relating to another defendant who secured a directed verdict was not prejudicial to the appellant.

AFFIRMED.

IN RE ESTATE OF ERNST ZEHNER.
AGATHA KATHERINA LANG, APPELLANT, V. FRED ZEHNER, APPELLEE.

FILED FEBRUARY 7, 1936. No. 29435.

1. **Adoption:** NOTICE. A failure to give the required statutory notice to the natural parents renders the adoption proceedings irregular and void, so far as regards the person not notified.
2. ———: ESTOPPEL. A parent who appears, participates in, and consents to adoption proceeding and thereafter treats it as valid is estopped to deny the validity thereof.
3. ———: NOTICE. Where a parent is entitled to notice of adoption proceeding, he alone can complain of failure of notice.
4. ———: DECREE. The probate court acts judicially in an adoption proceeding. If there is a substantial compliance with the statutes, the decree is conclusive.
5. ———: ———. Such a decree of adoption could be reversed, vacated or modified by the district court upon appeal by one having an appealable interest in the decree.
6. ———: ———: COLLATERAL ATTACK. Where adoptive parents seek and obtain a decree of adoption, and take the child into their home as their own, they and their heirs are estopped from attacking said decree collaterally.
7. ———: ESTOPPEL. The collateral heirs of the deceased adopting parents are estopped to deny the validity of the adoption proceeding and the right of the child to inherit.

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

Frank P. Johnson and *Morrow & Morrow,* for appellant.

Wright & Wright, Max G. Towle and *Farley Young, contra.*

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

DAY, J.

On September 4, 1913, Ernst Zehner, who died intestate November 22, 1930, adopted Fred Zehner who at the time of his birth was named Horace Clark. Fred Zehner filed a petition of intervention in the probate proceeding, the prayer of which is that he be decreed the sole and only heir of Ernst Zehner, deceased. Agatha Katherina Lang, a sister of the deceased, contested the claim of Fred Zehner that he is the sole heir at law, and the prayer of her answer to intervener's petition was that she be decreed the sole and only heir of deceased. The county court entered a decree of distribution after a hearing upon the issues raised between Fred Zehner and Agatha Katherina Lang, finding that the former was the legally adopted son of the deceased at the time of his death and is the sole and only heir at law. Agatha Katherina Lang appealed to the district court from the order allowing said final account and from the decree of heirship and distribution of said estate. After a trial the district court found "That the adoption proceedings in Scotts Bluff county, Nebraska, wherein Fred Zehner was adopted by Ernst Zehner and Irene Zehner, are voidable as to the natural parents of said Fred Zehner. * * * That the adoptive parents, and all those claiming through and under said adoptive parents of said Fred Zehner, are estopped to deny the validity of said adoption proceedings, and that Fred Zehner is the legally adopted son of Ernst Zehner, deceased, and is the sole and only heir at law of the said Ernst Zehner, and is entitled to inherit his estate."

Upon appeal to this court, it is contended by the appellant, Agatha Katherina Lang, that the decree is erroneous for the reason that the adoption proceedings were void

because there was no notice to or consent of the natural parents to the adoption. There is no dispute as to the facts in this case. Agatha Katherina Lang is the sister of the deceased, and there are no other heirs, unless it be Fred Zehner as an adopted son. If Fred Zehner is the legally adopted son, then he is the sole heir, but if he is not, then Agatha Katherina Lang is the sole heir of the deceased. Therefore, the adoption proceeding is our only concern here.

On March 27, 1912, a petition was filed in the district court for Lancaster county as a juvenile court, alleging that Horace Clark, who was born March 14, 1912, was a neglected and dependent child and that his mother was Stella Clark of Roca, Nebraska. A summons was issued to Stella Clark, the mother, and upon service, she appeared in court with the child, and the court found that Horace Clark was a dependent child and a ward of the court; that his mother was unable to support him, and the whereabouts of his father was unknown, and that it was to the best interest of said child that a guardian be appointed for him. The court then appointed the board of control as guardian of the person of Horace Clark, and no further order was ever made by said court in this case.

Thereafter, on July 15, 1913, the deceased, Ernst Zehner, and his wife, Irene Zehner, filed a petition in the county court of Scotts Bluff county praying for a decree of adoption of said Horace Clark. Attached to this petition was a relinquishment and consent to adoption signed by the board of control, by Etta Caton, agent. A notice was given by the court that said petition would be heard on September 4, 1913, and was published in the "Gering Wasp," a newspaper, for four consecutive weeks, but the last publication was only five days before the date of hearing, instead of the ten days required by statute. On September 4 the court entered a decree finding that the board of control had consented to the adoption by Ernst Zehner and Irene Zehner and entered a judgment that Horace Clark was the adopted son of the parties.

About a year thereafter, the Zehners were divorced, and the court found that neither of them was a proper person to have the care and custody of the adopted child and committed Fred Zehner to the custody and control of the board of control. Thereafter, Fred Zehner was placed in the home of some blood relatives.

Agatha Katherina Lang contends that the consent of the board of control adds nothing to the validity of the proceedings because the statute authorizing the juvenile court to appoint the board of control as guardian of the person of the minor is unconstitutional and void for the reason that the county court is given exclusive jurisdiction over guardianship matters by the Constitution. It is unnecessary to pass upon the validity and effect of these statutes, for this court is determined that the adoption proceedings cannot be collaterally attacked by Agatha Katherina Lang to prevent the adopted child from inheriting from the adoptive father.

The answer of Agatha Katherina Lang to the petition of intervention of Fred Zehner alleges that the decree of adoption is void and a nullity. This is a collateral attack upon the judgment of the county court. Our statutes, in common with those of most states, provide that notice shall be given the natural parents of a child. A failure to give the required statutory notice to the natural parents renders the adoption proceedings irregular and void, so far as regards the person not notified. Natural justice requires that natural parents should be notified of the proceedings before the custody of their child is taken from them and given to another. However, a parent, who appears, participates in, and consents to adoption proceeding and thereafter treats it as valid, is estopped to deny the validity thereof. *Stone v. Stone,* 119 Neb. 45, 226 N. W. 807. Where a parent is entitled to notice of adoption proceedings, he alone can complain of failure of notice. *Slattery v. Hartford-Connecticut Trust Co.,* 254 Mich. 671, 236 N. W. 902.

The probate court acts judicially in an adoption proceeding. If there is a substantial compliance with the

statutes, the decree is conclusive unless an appeal is taken. *Ferguson v. Herr,* 64 Neb. 649, 659, 90 N. W. 625, 94 N. W. 542. Such a decree of adoption could be reversed, vacated or modified by the district court upon appeal by one having an appealable interest in the decree. The heir of the adoptive father does not have such an appealable interest in the decree of adoption that she could prosecute an appeal, attacking the decree in a direct proceeding. Can the heir of the adoptive father attack the decree in a collateral proceeding? We think not. In *Milligan v. McLaughlin,* 94 Neb. 171, 142 N. W. 675, the petition was filed in the wrong county, clearly without jurisdiction, and the court held that the collateral heirs of the deceased adopting parents are estopped to deny the validity of the adoption proceedings, and that the child is entitled to inherit. The effect of this rule is that third persons cannot take advantage of the failure to give notice to the child's parents in an adoption proceeding so as to prevent the child from inheriting from his adoptive parents.

The appellant raises many questions, which are not applicable to the issues or are unnecessary to a decision of this case. One of them is that the child did not continue to live with the adoptive father until his death, but only lived with him approximately ten months. It was no fault of the child, then under two years of age, that he did not continue to live with his adoptive father. The adoptive father was adjudged in a divorce action not to be a proper person to have the custody of his child. He made no complaint as to the regularity of the adoption proceeding. He always recognized it as valid. He put into operation the judicial machinery which entered the decree of adoption. Where an adoptive parent institutes such proceedings and procures an order of adoption and takes the child into his family, where it assumes the place and duties of his child, he will not be permitted to urge thereafter that the proceedings were void. Paraphrasing the language of another court, the rule is stated as follows: Where adoptive parents seek and obtain a decree of adoption, and take the child into

their home as their own, they and their heirs are estopped from attacking said decree collaterally. The presumptive heirs of the adoptive parents are estopped to attack collaterally the decree of adoption. Their claim arises through their ancestors, and they are in no better position to question its validity. *Kenning v. Reichel,* 148 Minn. 433, 182 N. W. 517; *Pugh v. Cox,* 185 Wis. 33, 200 N. W. 686; *Milligan v. McLaughlin,* 94 Neb. 171, 142 N. W. 675. But in this case, the adoptive parent never questioned the validity of the decree. It is usually the heirs of adoptive parents who question the proceedings. Since the rights of the appellant here are derived solely as an heir of deceased, she can have no greater right to question the validity of the adoption proceedings than the decedent. The decedent created his relationships of life, and upon his death such relationships are fixed. One of the relationships which he created was that of a son by adoption. His sister, Agatha Katherina Lang, cannot change the legal effects which naturally flow from the relationship which the decedent established, not by the operation of the laws of nature, but by the deliberate overt act of the decedent in the institution of the adoption proceedings.

The judgment of the district court is

AFFIRMED.

ANNIE NYEGOMIR, ADMINISTRATRIX, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLEES.

FILED FEBRUARY 7, 1936. No. 29523.

1. **Railroads:** CONTRIBUTORY NEGLIGENCE. A railroad track is inherently dangerous, and a pedestrian who walks along or on a railroad track and fails without reasonable excuse to take ordinary precautions for his own safety is as a matter of law guilty of such contributory negligence as to bar a recovery.
2. **Negligence:** LAST CLEAR CHANCE. To recover under the doctrine of the last clear chance, a plaintiff must have been in a position of peril which was known or, by the exercise of ordinary

care, ought to have been known to defendant in time to avoid injury by the exercise of ordinary care.

3. ———: ———: BURDEN OF PROOF. The fact that the person injured was in a place of danger and so situated that he could have been observed by the railroad engineer in time to have avoided the accident must be proved by a preponderance of the evidence. It is facts and not probabilities that must be thus established.

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

B. J. Boyle, J. J. Krajicek and *Johnsen, Gross & Crawford,* for appellant.

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

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

CARTER, J.

This is an action brought by the plaintiff as administratrix of the estate of Michael Nyegomir, deceased, against the Union Pacific Railroad Company, Lorenzo W. Litton and Frank Foley to recover damages for the alleged wrongful death of her husband, Michael Nyegomir. The trial court sustained the motion of the defendants for a directed verdict and dismissed plaintiff's action. From the overruling of her motion for a new trial, plaintiff brings the case to this court on appeal.

The record shows that the railroad of the Union Pacific Railroad Company, in the vicinity where the accident occurred, ran north and south parallel to Twenty-fourth street in the city of Omaha. Its tracks cross Washington street, a public thoroughfare, at which intersection the railroad company provides a watchman who, at the time of the accident, was the defendant Foley. It is also shown by the record that it had been the custom of packing-house employees and others to walk upon the railroad tracks and the pathways between the tracks in going to and from work. The watchman, Foley, had knowledge of the fact

that the right of way of the railroad company was so used and that the deceased, Michael Nyegomir, had used the right of way of the railroad company for such purpose.

On the evening of October 18, 1933, the deceased, Michael Nyegomir, came down the tracks from the north, crossed Washington street and proceeded south on the right of way of the railroad company, following a path immediately west of the main track for southbound trains. The evidence is undisputed that Nyegomir was intoxicated to such a degree that he staggered noticeably, which state of intoxication was observed by the watchman Foley and one Wilford Segrade, a 16-year-old high school boy who was with Foley at the time. The evidence of young Segrade is to the effect that he and Foley watched Nyegomir stagger south on the path west of the main track, saw him fall once and, apparently with considerable effort, rise to his feet and proceed into the shadow of some coalbins that parallel the tracks for some distance at that point. The evidence of Segrade also shows that Foley stated that a freight train was expected at any time, as it was then past due. Segrade testifies that he told Foley that he had not seen Nyegomir come out of the shadow of the coalbins and that Foley stated that he was probably lying down in the weeds. Segrade says that he walked down toward the coalbins to a place where he could see along the tracks and that Nyegomir was not on the tracks at that time. This fact he reported to Foley and suggested that they both go down and look for Nyegomir. Foley stated that his duties required his presence at the crossing and that he could not leave. The record shows that the train came along within a few minutes, whistled at the crossings north of Washington street and also on its approach to Washington street. When the engine of the train was within 15 or 20 feet of the Washington street crossing, Nyegomir was first seen by Segrade about 150 feet south of the crossing with both legs over the west rail of the track. At the same time that Segrade noticed Nyegomir on the tracks, the engineer Litton, one of the defendants, applied his brakes and attempted to stop the

train but was unable to do so, with the result that Nyegomir was run over and injured to such an extent that he died the next day. The evidence was that the train was composed of about 60 cars and was traveling approximately 40 miles an hour. The plaintiff contends that this evidence is sufficient to show such negligence on the part of the defendants as to require a submission of the case to a jury.

It is clear from an examination of this evidence that there is no negligence shown in the operation of the train unless its speed could be so considered. There is no evidence, however, that the speed of the train was a material factor in causing the injury complained of. We fail to find sufficient evidence of negligence on the part of the watchman, Foley, to sustain a judgment. All of the information that he had prior to the accident was that the tracks were clear. He remained at his post to guard against injury to persons crossing the railroad tracks on Washington street. The watchman could hardly be expected to abandon his station at the railroad crossing at a time when a train was expected in order to investigate the mere possibility that a person might be in a place of danger elsewhere. It would appear therefore that, unless the last clear chance doctrine applies, there can be no liability on the appellees.

In order for the plaintiff to prove liability under this doctrine, it is incumbent upon her to prove by competent evidence that just before the accident the deceased was in a position of peril; that the railroad company or its agents knew or by the exercise of ordinary care ought to have known of his peril; that defendant, after receiving such knowledge, had the present ability, with the means at hand, to have averted the impending injury without injury to himself or others; that defendant failed to exercise ordinary care to avert the impending injury, and that deceased was injured as a result thereof. *Banks v. Morris & Co.*, 302 Mo. 254, 257 S. W. 482. It will be noted in the case at bar that there is no evidence in the record showing when the deceased became imperiled. He was first seen on the track 150 feet south of the Washington street crossing when the

engine was within 15 or 20 feet north of the crossing. The engineer applied his brakes and attempted to stop at that time. There is no evidence that the train could have been stopped in time to have avoided the injury. There is no evidence that the deceased was on the track and in a position of peril at a time when the engineer in the exercise of ordinary care could have stopped his train and avoided the injury. A recovery cannot be had on probabilities arising from a given situation. In *Zitnik v. Union P. R. Co.*, 91 Neb. 679, 136 N. W. 995, the court said: "These are only conjectures, and the evidence fails to prove that the deceased was on the tracks in a dangerous situation for such a length of time that he could have been seen by the fireman looking from the cab window. It is not the 'probabilities' that are to be established by a preponderance of the evidence; the fact itself must be so established." See, also, *Lucas v. Omaha & C. B. Street R. Co.*, 104 Neb. 432, 177 N. W. 786; *Wilson v. Union P. R. Co.*, 107 Neb. 111, 185 N. W. 406; *Patterson v. Kerr*, 127 Neb. 73, 254 N. W. 704. We conclude that plaintiff failed to prove facts sufficient for the application of the last clear chance doctrine. We are obliged to hold that the deceased elected to walk along or on the railroad company's tracks and met his untimely death because of his own carelessness and negligence. As was stated by this court in *Eggeling v. Chicago, R. I. & P. R. Co.*, 119 Neb. 229, 228 N. W. 361: "He may not, in reckless disregard of any possible negligence of the railroad, rely solely upon its statutory duty, proceed to a place of danger, and expect the train, which cannot turn out or stop instantly, to be an insurer of his safety. If he does nothing for his own security he is negligent, and if the physical facts leave no doubt so that reasonable minds would not differ in that he either proceeded recklessly or failed without reasonable excuse to take the precautions which the conditions indicate were available to him, he is as a matter of law guilty of negligence more than slight, which under our rule of comparative negligence bars a recovery." This has particular application to the case at bar. The contributory negligence

of the deceased was more than slight as a matter of law and, under our comparative negligence rule, a recovery cannot be had. The trial court was right in directing a verdict for the defendants.

AFFIRMED.

HENRY P. BRANZ, APPELLANT, V. HARRY I. HYLTON, EXECUTOR, ET AL., APPELLEES.

FILED FEBRUARY 14, 1936. No. 29520.

1. **Pleading.** The prayer for equitable relief is of no avail, unless the petition states facts authorizing the court to grant such relief.
2. **Judgment:** REVIVOR: COLLATERAL ATTACK. A deficiency judgment, entered in a foreclosure case where the petition did not allege a cause of action warranting a personal judgment against defendant, is a nullity and is subject to collateral attack when the judgment, which has become dormant, is sought to be revived.

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

C. E. Sandall, C. F. Stroman and *Calvin Webster,* for appellant.

Kirkpatrick, Good & Dougherty and *J. C. Quigley, contra.*

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

GOSS, C. J.

Plaintiff appeals from a denial by the district court of a revivor of a judgment originally entered against Robert Brown and others.

March 1, 1920, Alfred E. Green and wife made their principal note for $6,000 with 10 interest coupon notes attached, all in favor of Robert Brown. They gave to Brown their five-year mortgage on 160 acres of land in Cherry county to secure the loan. April 22, 1921, Brown sold and

assigned the notes and mortgage to Henry Branz, through whom, by mesne assignments of the notes and mortgage, and of the judgment, the deficiency judgment based upon a foreclosure of the mortgage has come to be owned by the present plaintiff.

In 1926 Ernest Branz began a suit to foreclose the mortgage for nonpayment of interest and taxes. Brown was made a party. After a decree of foreclosure and a sale of the land, a deficiency judgment was entered September 27, 1927, against Robert Brown (and others) for $4,480.48, with interest at 10 per cent. from that day. It is stipulated that Robert Brown died intestate in York county, that his will was there probated on September 26, 1932, that defendant Hylton is his executor, and the other defendants are the only persons interested in his estate.

This particular proceeding was begun by filing an affidavit for a conditional order of revivor on August 31, 1933. When a conditional order of revivor was served, defendants answered that the pretended judgment is utterly null and void, for that it was not sustained by the pleading, is outside the pleadings or issues in the foreclosure case in which it was rendered, and is contrary to the averments of the pleadings in that action.

The suit for foreclosure upon which the deficiency judgment was based was brought by Ernest Branz who had, by assignment, become the owner of the Brown note and mortgage. To show his title to the notes and mortgage he pleaded that on the 22d day of April, 1921, defendant Robert Brown, for full consideration, assigned in writing and delivered the promissory note and mortgage to Henry Branz. Then followed, in the petition for foreclosure, a full copy of the assignment of the mortgage (describing it). This assignment pleaded contained the following words: "Together with the notes or mortgages therein described, without recourse or in any event or for any cause." While the petition set out the notes and coupons in full, it pleaded no indorsement or assignment by Brown other than the above quoted assignment.

In this foreclosure Brown was duly summoned as a nonresident of the county but made no appearance. Somehow, notwithstanding plaintiff's plea that Brown had transferred the notes and mortgage to plaintiff's assignor without recourse, the decree of foreclosure found that Brown was personally liable on the principal note and coupons and that plaintiff should have a deficiency judgment if there should be a deficiency after application of the proceeds of the sale. The judgment sought to be revived resulted. It was entered by a visiting judge. The proceedings to revive were heard by the resident judge who had also entered the original decree of foreclosure. After a full hearing upon the pleadings and evidence he held "that the purported judgment sought to be revived herein is *coram non judice* and null and void and that an order for the revivor thereof should be denied."

Plaintiff assigns error because the judgment was allowed to be attacked collaterally.

When duly served with summons in the foreclosure case, it was the duty of Robert Brown to inspect the petition or abide the consequences of his failure to plead and give evidence to defeat the proof of any facts alleged against him. But if the petition alleged no facts upon which the court could render a judgment against him, it would make no difference whether he knew the contents of the petition or whether he pleaded or offered proof of any fact whatever. It is true that the petition prayed a deficiency judgment against Brown, but the failure of a plaintiff to allege facts sufficient to raise a liability against a defendant cannot be aided by a prayer for a deficiency judgment against such defendant. Especially is this true where the allegations of fact negatived the right to a judgment. "The prayer for relief does not constitute a part of the statement of the cause of action." 49 C. J. 173. "A prayer for equitable relief is of no avail, unless the petition states facts which will authorize the court to grant such relief." *Emanuel v. Barnard,* 71 Neb. 756, 99 N. W. 666.

"It is also a general principle of law that a court cannot

set itself in motion, nor has it power to decide questions except as presented by the parties in their pleadings. Anything that is decided beyond them is *coram non judice* and void. Therefore where a court enters a judgment or awards relief beyond the prayer of the complaint or the scope of its allegations the excessive relief is not merely irregular but is void for want of jurisdiction, and is open to collateral attack." 15 R. C. L. 854, sec. 328.

A well-reasoned and leading case on the subject is *Munday v. Vail* (1871) 34 N. J. Law, 418. The syllabus says: "A decree in equity, which is entirely aside of the issue raised in the record, is invalid, and will be treated as a nullity, even in a collateral proceeding." The opinion is clear and learned. It goes back into the English cases and brings their reasoning forward to the present.

In *Reynolds v. Stockton,* 140 U. S. 254, 35 L. Ed. 464, 11 Sup. Ct. Rep. 773, Mr. Justice Brewer wrote the opinion. It quotes nearly two pages from the reasoning in *Munday v. Vail, supra,* from which the syllabus we have quoted was deduced, and then says: "This case is very much in point. We regard the views suggested in the quotation from the opinion as correct, and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes.*" The syllabus in *Reynolds v. Stockton* says: "When a defendant appears in an action in a state court and responds to the complaint as filed, but takes no subsequent part in the litigation, and on those pleadings a judgment is rendered in no way responsive to them, he is not estopped by the judgment from setting up that fact in bar to a recovery upon it."

Another fine case holding that, where an issue is not raised but is sought to be concluded by a judgment, such a judgment is subject to collateral attack, is *Charles v. White,* 214 Mo. 187, 112 S. W. 545.

Lincoln Nat. Bank v. Virgin, 36 Neb. 735, 55 N. W. 218, a collateral attack case, held: "A judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claim of the parties,

and is foreign to the issues submitted for its determination, is a nullity."

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

AFFIRMED.

CHAUNCEY E. BEADLE, APPELLANT, V. GEORGE W. HARMON ET AL., APPELLEES.

FILED FEBRUARY 14, 1936. No. 29483.

1. **Counties and County Officers:** CLAIMS: ALLOWANCE: RECOVERY BY TAXPAYER. Section 26-118, Comp. St. 1929, prescribes two conditions precedent to a recovery by a taxpayer thereunder, viz., (1) that 85 per cent. of the amount levied for the year of the fund against which a warrant is drawn has been exhausted, and (2) that there are no funds in the treasury for the payment of such warrant.
2. ———: ———: ———. A county board has exclusive jurisdiction to examine and pass upon claims against the county properly cognizable for audit and allowance, and the action of the board in allowing or rejecting claims has the force and effect of a judgment, and is conclusive unless vacated or reversed by means of appropriate appellate proceedings.
3. ———: ———: VERIFICATION. The requirements of section 26-119, Comp. St. 1929, that the claimant or his agent shall verify his claim as therein prescribed, regulates the grant of power and mode of procedure in the allowance of claims against the county, and the failure to observe its provisions does not deprive the commissioners of the county of jurisdiction to act upon claims against the county.
4. ———: ———: APPEAL. The delivery of the warrant in suit prior to the lapse of the time for taking a taxpayer's appeal, in violation of section 26-115, Comp. St. 1929, in no manner affected the taxpayer's right of appeal provided for by sections 26-120 and 26-121, Comp. St. 1929.
5. ———: ———: ALLOWANCE. "Where judicial discretion is called for in the allowance of a claim presented, the board then acts as any other judicial body, and its findings can be questioned and set aside only by an appeal taken from the decision as provided by statute. Neither can the members of the board

be made liable for a mere mistake made in passing judgment on the claim, the commissioners, in such case, being entitled to the same immunity as other judicial officers." *Crouch v. Pyle*, 70 Neb. 60, 96 N. W. 1049.

6. **Evidence** examined, and *held* to support the judgment of the district court.

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

H. A. Bryant and *Charles H. Hood*, for appellant.

Clyde R. Worrall, contra.

Heard before GOOD, EBERLY and PAINE, JJ., and RAPER and PROUDFIT, District Judges.

EBERLY, J.

This is an action brought by Chauncey E. Beadle, as a taxpayer, for the benefit of Saunders county, of which he is a resident, against the defendants, George W. Harmon, Carl Keifer and Frank Houfek, county commissioners of Saunders county, for public moneys unlawfully expended by them. It is charged that the defendants, as such county commissioners, while in session in the county courthouse of that county, unlawfully and without authority, purchased one certain electric refrigerator from the Carl W. Weber Electric Company, and caused the same to be installed in the county jail; that on the same date the claim therefor, in the sum of $271.50, was without authority of law presented and allowed, and a warrant therefor unlawfully drawn, issued, and delivered to this electric company, and paid by the county treasurer of Saunders county; that at the time of the allowance and issuance of this warrant the petition alleges that "the amount levied for the general purposes of said county was the sum of $92,063.67; that on said date the amount of warrants issued and drawn against said fund totaled $110,155.02." But plaintiff nowhere alleges that "there were no funds in the treasury for the payment of the same." Comp. St. 1929, sec. 26-118. It is admitted that, derived from sources other than property tax, there was then in the county treasury in the general fund moneys

ample in amount to cover this warrant, and out of which it was in fact immediately paid. Plaintiff avers that, by reason of the immediate delivery of the warrant and the consequent violation of section 26-115, Comp. St. 1929, which provides that "the same shall not be delivered to the party (in whose favor drawn) until the time for taking an appeal has expired," etc., he was deprived of his appeal, and that the claim being for the unlawful and unauthorized purchase of personal property, and the transaction completed in contravention of the statutory requirement that warrants shall not be issued in an amount "exceeding the aggregate of eighty-five per cent. of the amount levied by tax for the current year" (Comp. St. 1929, sec. 26-116), the county officers involved are personally liable to the extent of the public funds paid out. Plaintiff seeks to recover under the provisions of section 26-118, Comp. St. 1929. It provides: "Any warrant drawn after eighty-five per cent. of the amount levied for the year is exhausted, *and where there are no funds in the treasury for the payment of the same,* shall not be chargeable as against the county, but may be collected by civil action from the county board making the same, or any member thereof." (Italics ours.) In the district court judgment was entered for defendants. Plaintiff appeals.

While plaintiff's proof may be conceded to establish that 85 per cent. of the amount levied for the year was exhausted, it wholly fails to establish that there were no funds in the treasury for payment of the same. Obviously, without the existence of the second condition prescribed by the statute quoted, no recovery under section 26-118 is justified. This conclusion is also supported by the fact that to the mandate of section 26-116 which renders the issuance of any warrant in any amount exceeding the aggregate of 85 per cent. of the levy unlawful is added the words, "except there be money in the treasury to the credit of the proper fund for the payment of the same." On argument at the bar of this court it was conceded that, from sources of taxation other than property tax, money had been received

by the county treasurer and was possessed by that official on the date of the allowance of the bill, which was properly to be credited to this fund, and from which the warrant in controversy was actually paid. It follows that under these circumstances no recovery may be sustained under the statutory provisions quoted and relied upon. *Lancaster County v. State*, 13 Neb. 523, 14 N. W. 517.

It also appears that the claim presented by the electric company had not been verified as required by section 26-119, and plaintiff challenges the correctness of the action taken by the county board because of this omission. This question has heretofore been determined by this court adversely to plaintiff's present contention. *State v. Board of County Commissioners of Cass County*, 60 Neb. 566, 83 N. W. 733; *State v. Farrington*, 80 Neb. 628, 114 N. W. 1100; *Gibson v. Sherman County*, 97 Neb. 79, 149 N. W. 107; *Bartlett v. Dahlsten*, 104 Neb. 738, 178 N. W. 636.

Plaintiff also avers that the purchase of the electric refrigerator, under the circumstances that attended the transaction, was wholly unauthorized and not within the powers conferred on the county board, and that the action taken by it was "unlawfully and corruptly ordered."

However, there is no evidence in this record from which it may be inferred that any of the defendants derived any private profit from the transaction, and it wholly fails to show any dishonest motive on the part of any of the defendants, or to disclose that they were not acting honestly in the allowance of this claim. The issuance of the warrant prior to the lapse of ten days in no manner affected plaintiff's right of appeal which the statute vested in him as a taxpayer. The question as to whether the transaction was properly within the powers of the county board is one which the issues in the instant case do not clearly present.

Our statute provides: "The powers of the county, as a body corporate or politic, shall be exercised by a county board, to wit, * * * in counties not under township organization by the board of county commissioners." Comp. St. 1929, sec. 26-103. Among the powers of counties so to

be exercised are: "First. To purchase and hold the real and personal estate necessary for the use of the county; * * * Second. To sell and convey, or lease, any real or personal estate owned by the county; Third. To make all contracts and to do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers." Comp. St. 1929, sec. 26-104. The county boards also have power "to take and have the care and custody of all the real and personal estate owned by the county," and also power "to manage the county funds and county business except as otherwise specifically provided," and "Fifth. To examine and settle all accounts against the county, and accounts concerning receipts and expenditures of the county." Comp. St. 1929, sec. 26-105. By section 26-108, Comp. St. 1929, it is expressly made the duty of county boards, "to erect or otherwise provide a suitable courthouse, jail and other necessary county buildings, * * * and to provide suitable rooms and offices for the accommodation of the * * * sheriff, * * * and suitable furniture therefor." Chapter 47, Comp. St. 1929, contains general provisions regulating and governing jails. In consideration of these powers thus specifically conferred, this court has repeatedly declared that boards of county commissioners in this state, in addition to the powers specifically conferred by statute, have such other powers as are incidentally necessary to enable such boards to carry into effect the powers granted. *Lancaster County v. Green,* 54 Neb. 98, 74 N. W. 430; *Berryman v. Schalander,* 85 Neb. 281, 122 N. W. 990; *Wherry v. Pawnee County,* 88 Neb. 503, 129 N. W. 1013; *Emberson v. Adams County,* 93 Neb. 823, 142 N. W. 294; *Hallowell v. Buffalo County,* 101 Neb. 250, 162 N. W. 650; *Buffalo County v. Bowker,* 111 Neb. 762, 197 N. W. 620; *Lindburg v. Bennett,* 117 Neb. 66, 219 N. W. 851; *Cheney v. County Board of Supervisors,* 123 Neb. 624, 243 N. W. 881.

It is obvious, therefore, that the transaction in suit was one which necessarily invoked the due and proper exercise of the statutory powers above enumerated.

However, in *Taylor v. Davey*, 55 Neb. 153, 75 N. W. 553, where injunctive relief was sought as a challenge to a similar exercise of power by a county board, Norval, J., employed the following language:

"Plaintiffs sought to enjoin the payment of the warrant in question for the following reasons: (1) That the contract made by said county with Fritzon, which is the basis for said warrant, was illegal; (2) that said contract was not executed; (3) that said claim was not included in the estimates of expenses made by the county board; (4) there was no money on hand, or levy of taxes made, against which said warrant could be drawn.

"A county board has exclusive original jurisdiction to examine and pass upon claims against the county properly cognizable for audit and allowance, and the action of such board in allowing and rejecting claims has the force and effect of a judgment, and is conclusive unless vacated or reversed by means of appropriate appellate proceeding. This is the settled doctrine of this court. *Heald v. Polk County*, 46 Neb. 28, 64 N. W. 376; *State v. Merrell*, 43 Neb. 575, 61 N. W. 754; *State v. Churchill*, 37 Neb. 702, 56 N. W. 484; *Ragoss v. Cuming County*, 46 Neb. 36, 64 N. W. 378; *id.* 36 Neb. 375, 54 N. W. 683; *Sioux County v. Jameson*, 43 Neb. 265, 61 N. W. 596. The grounds above stated upon which relief is demanded, or the most of them, would have afforded good and valid reasons for the rejection by the county board of the said claim of Fritzon, had the objections been seasonably presented. But the board had jurisdiction to audit and pass upon this claim, and it having acted in the premises, allowed the demand, and drawn a warrant for its payment, the decision is conclusive upon the county and the taxpayers thereof, since no appeal was prosecuted by any one from the action of the board."

In addition, this court is committed to the doctrine that, in view of the statutory provisions referred to, the allowance of the present claim by the county board necessarily involved the exercise of judicial discretion by the members of the board, and as to matters which involve the exercise

of judicial discretion the members of county boards incur no personal liability because of mere errors of judgment.

The controlling principle, in this view of the case, is:

"Where judicial discretion is called for in the allowance of a claim presented, the board then acts as any other judicial body, and its findings can be questioned and set aside only by an appeal taken from the decision as provided by statute. Neither can the members of the board be made liable for a mere mistake made in passing judgment on the claim, the commissioners, in such case, being entitled to the same immunity as other judicial officers." *Crouch v. Pyle*, 70 Neb. 60, 96 N. W. 1049.

While the form of the present action eliminates the necessity of defining the actual powers vested in the county board, we are satisfied that the judgment appealed from was the only judgment that could have been entered in this case, and it is, therefore,

AFFIRMED.

E. H. LUIKART, RECEIVER, APPELLANT, V. M. A. HIGGINS ET AL., APPELLEES.

FILED FEBRUARY 14, 1936. No. 29506.

1. **Opinion Approved.** The opinion in *Luikart v. Paine*, 126 Neb. 251, 253 N. W. 86, reexamined and approved.
2. **Banks and Banking:** LIABILITY OF STOCKHOLDERS: SUIT TO RECOVER. A suit to recover stockholders' constitutional double liability on corporate bank stock purchased prior to 1930 amendment, brought before the corporate assets are exhausted and before the exact amount justly due is judicially determined, is premature.
3. ———: ———. The constitutional double liability of a stockholder in a state bank is determined by the Constitution at the time of purchase of said stock.
4. **Constitutional Law:** AMENDMENT: CONSTRUCTION. A constitutional amendment becomes an integral part of the instrument and must be so construed. It must be harmonized, if possible, with all other provisions, and effect must be given to every section and clause as well as the whole instrument.

5. ———: ———. A constitutional amendment operates prospectively only, unless the words employed show a clear intention that it should have a retrospective effect.

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

F. C. Radke, Leon L. Hines and *George I. Craven,* for appellant.

Butler & James, R. D. Druliner and *Victor Westermark, contra.*

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

DAY, J.

This is a suit in equity instituted by the receiver of the Farmers & Merchants State Bank of Benkelman to recover stockholders' double liability under section 7, art. XII of the Constitution of the state of Nebraska, as amended in 1930. The constitutional provision is set out here with the words added by the amendment of 1930 in italics:

"Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing *or existing* while he remains such stockholder, and all banking corporations shall publish quarterly statements under oath of their assets and liabilities. *The stockholder shall become individually responsible for the liability hereby imposed, immediately after any such banking corporation, or banking institution shall be adjudged insolvent, and the receiver of said corporation or institution shall have full right and lawful authority, as such receiver, forthwith to proceed by action in court to collect such liabilities; and the provisions of section 4, article XII, of the Constitution of the state of Nebraska shall not be construed as applying to banking corporations or banking institutions.*"

Section 4, art. XII of the Constitution, provides:

"In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock."

In *Bodie v. Pollock,* 110 Neb. 844, 195 N. W. 457, this court construed these constitutional provisions before the 1930 amendment as follows: "Sections 4 and 7, art. XII of the Constitution, are self-executing when considered together, as they have been and should be; and, so considered, they form a complete constitutional rule to the effect that, while stockholders in banks are subject to the double liability set out in said sections, such liability cannot be enforced until the property of the bank has been exhausted, and the amount justly due judicially determined." In *Dempster v. Williams,* 118 Neb. 776, 226 N. W. 446, it was said: "Neither are complete standing alone; but, when considered as one, both the substantive law and the remedy are sufficiently declared to make them self-executing and need no legislative action to carry them into effect."

The defendants were stockholders in the bank at the time it was closed. When this suit was filed, the exact amount justly due creditors of the bank had not been judicially determined, and the assets had not been exhausted.

This court recently held in a similar case that the suit to recover the constitutional stockholders double liability was prematurely brought under such conditions. *Luikart v. Paine,* 126 Neb. 251, 253 N. W. 86. A reexamination of the legal principles announced in that case is requested here. A summary of the holding there is that stockholders' double liability in state banking corporations is a contractual liability and constitutional provisions at the time of purchase are material parts thereof; that the contractual obligation is determined under the Constitution extant at the time of purchase; and that a suit based on stock purchased prior to

the 1930 amendment, brought before the corporate assets are exhausted and the exact amount justly due is judicially determined, is premature.

The basis of that judgment was that the amendment changed the nature of the contractual obligation from a secondary or contingent liability to a primary or absolute one. The contractual obligation as it existed prior to the 1930 amendment was to pay an amount equal to the amount of his stock for the benefit of creditors, whose claims accrued while a stockholder, when the assets had been exhausted and the amount justly due had been judicially determined. It would be a claim contingent upon a failure of the assets to produce enough to satisfy the claims of the creditors. But the amendment, if applicable to stockholders who purchased bank stock prior to its adoption, would materially change the nature of the obligation to a primary or absolute liability. Absolute because it would be payable when the bank was adjudged insolvent without any relation to the necessity for the fund to pay creditors of the bank. The contractual obligation was fixed by the constitutional provision as it existed at the time of the purchase. To permit such a change of contractual obligations as suggested would violate section 10, art. I of the Constitution of the United States, which prohibits a state from impairing the obligation of a contract by law. Upon a reexamination, we adhere to the opinion in *Luikart v. Paine, supra.*

Again, the 1930 amendment changes the time for payment of the stockholders' double liability from the time when the assets of the bank are exhausted to immediate payment upon an adjudication of insolvency. It would seem that this court may take judicial notice of the public records of the state that the liquidation of insolvent state banks requires several years. This change in the time of payment accelerates the date the liability is due and thus changes the obligation. Since time and method of payment are material parts of contractual obligations, a change thereof is an impairment. U. S. Const. art. I, sec. 10.

The acceleration of the time of payment, which the 1930

amendment provides, deprives the stockholder of the use of the money for the period of time required for the liquidation of the bank. This increases the obligation materially, and increases the contractual liability. *O'Connor v. Hartford Accident & Indemnity Co.*, 97 Conn. 8, 115 Atl. 484; *Shouse v. Quinley*, 37 Pac. (2d) (Cal.) 89; *Edwards v. Kearzey*, 96 U. S. 595.

We have not been unmindful that the legislature may change the remedy and the methods of procedure under a past as well as a future contract. See *Luikart v. Bunz*, 125 Neb. 867, 252 N. W. 473, where these constitutional questions were discussed in so far as they changed the remedy. But this court is unanimously of the opinion that the 1930 amendment is much more than a change of remedy.

However, it is urged that the surplus over that required to pay the creditors of the bank could be returned to the stockholders. There is no provision for such repayment. The constitutional double liability of stockholders of a state bank is not an asset of the bank but is for the benefit of all the unpaid creditors of a bank. *State v. Citizens State Bank*, 118 Neb. 337, 224 N. W. 868. It creates a common trust fund for the protection of all the creditors of a bank. *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353, 68 N. W. 520. No method of redistribution of this fund to stockholders has been indicated to us. It is very questionable whether stockholders could recover payments in excess of that required to pay the creditors of the bank.

As to one of the defendants, the contractual obligation is changed in a vital manner. This stockholder did not own the stock when the liability accrued but acquired it afterwards. The amendment changed the contractual obligation materially by the addition of the words *or existing* because it made him liable to the creditors not only for liabilities accruing but also existing while he remains a stockholder.

Finally, section 16, art. I of the Constitution of Nebraska, provides that no law impairing the obligations of contracts shall be passed. This is a section of our Bill of Rights. "Upon the adoption of an amendment to a Constitution, the

amendment becomes a part thereof; as much so as if it had been originally incorporated in the Constitution; and it is to be construed accordingly. If possible, it must be harmonized with all the other provisions of the Constitution." Cooley, Constitutional Limitations (8th ed.) 129. The well-recognized rule applicable here is that effect is to be given, if possible, to the whole instrument and to every section and clause. The Constitution as amended must be construed as a whole. *Hooper Telephone Co. v. Nebraska Telephone Co.*, 96 Neb. 245, 147 N. W. 674. Now section 16, art. I, is not necessarily repugnant to section 7, art. XII. The adoption of this amendment does not repeal by implication the effect of the former. Applying the rule above stated and giving effect to every section and every clause of the whole instrument, the 1930 amendment cannot change the contractual obligation of a stockholder in state banks. Section 16, art. I, could be transposed and added as an integral part of section 7, art. XII, and it then clearly appears, even to a partisan observer, that the Constitution as amended does not change the obligation of existing contractual relations. No other conclusion would give effect to every part of the instrument. So that the decision in *Luikart v. Paine, supra,* conforms to a proper construction of the Nebraska Constitution. The bank stock upon which the superadded constitutional stockholders' liability is sought to be imposed in this case was purchased and the liabilities accrued thereon prior to the amendment of 1930, and the contractual obligation is determined under the Constitution as it then existed.

A constitutional amendment operates prospectively only, unless the words employed show a clear intention that it should have a retrospective effect. It is a rule, says Cooley, Constitutional Limitations (8th ed.) 136, of "such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively." And we are aware of no reasons applicable to ordinary

legislation which do not upon this point apply equally well to Constitutions. This rule is now supported by abundant authority. See *Shreveport v. Cole,* 129 U. S. 36; *State v. Houdersheldt,* 151 Minn. 167, 186 N. W. 234.

This action was, therefore, properly dismissed because it was brought prematurely.

AFFIRMED.

PUBLIX CARS, INC., ET AL., APPELLANTS, V. YELLOW CAB & BAGGAGE COMPANY ET AL., APPELLEES.

FILED FEBRUARY 14, 1936. No. 29356.

1. **Automobiles:** TAXICAB COMPANIES: REGULATION. A regulation adopted by the state railway commission that requires operators of taxicabs to obtain certificates of convenience and necessity is not unreasonable or arbitrary. *In re Yellow Cab & Baggage Co.,* 126 Neb. 138, 253 N. W. 80.
2. ———: ———: ———. The grant or denial of a certificate of convenience and necessity by the railway commission requires the exercise of administrative and legislative functions and not of judicial powers.
3. ———: ———: ORDERS OF COMMISSION: REVIEW. On an appeal to the supreme court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
4. ———: ———: REGULATION. In considering an application for a certificate of convenience and necessity for the operation of taxicabs, the public, and not individuals, is to be most considered.
5. ———: ———: ———. Where the railway commission has determined the number of taxicabs that are necessary to supply the taxicab needs of a city, and it appears that less than that number are actually operating, the action of the railway commission in refusing to grant additional certificates of convenience and necessity to applicants in the taxicab business in the city, they having shown willingness and ability to perform the service required, is unreasonable and arbitrary.
6. ———: ———: ———. Where a regulation adopted by the

railway commission provides that certificates of convenience and necessity shall be granted to all persons operating taxicabs on the date the commission assumed control thereof, the commission may not void the effect of the regulation by imposing arbitrary conditions precedent upon their issuance.

7. ———: ———: ———: REVIEW. An order of the railway commission, in form denying the application of taxicab owners for additional certificates of convenience and necessity, but the effect of which is to approve other certificates of convenience and necessity held by a competitor unlawfully, is reviewable by this court on appeal.

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

Johnsen, Gross & Crawford, Frost, Hammes & Nimtz and *F. L. Wolff,* for appellants.

William H. Wright, Attorney General, and *Edwin Vail,* for Nebraska State Railway Commission, appellee.

Brome & Thomas, for Peoples Cab, Inc., appellee.

Kennedy, Holland, De Lacy & Svoboda, for Yellow Cab & Baggage Co., appellee.

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

CARTER, J.

This is an appeal from an order of the state railway commission denying the applications of Publix Cars, Inc., Checker Cab Company, Inc., and Safeway Cabs, Inc., for certificates of convenience and necessity to operate taxicabs in the city of Omaha, which were placed in service May 4, 1932, or intended to be placed in operation since that time to take care of existing business needs; and from an order of the commission imposing conditions on the rights of appellants to certificates of convenience and necessity for taxicabs which were in operation on and prior to May 4, 1932.

As a matter of convenience Publix Cars, Inc., Checker Cab Company, Inc., Safeway Cabs, Inc., Yellow Cab & Baggage Company, Peoples Cab, Inc., and Omaha & Council

Bluffs Street Railway Company will be hereinafter referred to as the Publix, Checker, Safeway, Yellow, Peoples, and Street Railway Companies, respectively.

The statutes of this state provide for an appeal to this court from the decision of the railway commission with reference to any rate, classification, rule, charge, order, act, or regulation made or adopted by it upon which there has been a hearing before said commission. Comp. St. 1929, sec. 75-505. The railway commission is clothed with legislative, administrative and judicial powers, and, under our previous holdings, this court has jurisdiction to review the orders and regulations of the commission on appeal.

It appears from the record that on May 4, 1932, the state railway commission assumed jurisdiction to regulate the taxicab business in the city of Omaha. This court subsequently held that taxicab companies are common carriers and that the control and regulation of the operation of taxicabs were vested in the state railway commission. *In re Yellow Cab & Baggage Co.*, 126 Neb. 138, 253 N. W. 80.

The right of the railway commission to require certificates of convenience and necessity is not disputed, this court having held that a regulation adopted by the railway commission requiring taxicab companies to obtain them is not unreasonable or arbitrary. *In re Yellow Cab & Baggage Co., supra.* The grant or denial of a certificate of convenience and necessity by the railway commission is the exercise of an administrative or legislative power. An appeal to this court from such an order involves only the questions whether the railway commission acted within the scope of its authority and whether its order is supported by evidence showing that the order is not unreasonable or arbitrary. Where the action of the railway commission is not unreasonable or arbitrary and does not exceed its powers, this court will not interfere with its findings of fact, because they involve an administrative rather than a judicial question. In the case of *Niagara Falls Power Co. v. Water Power & Control Commission*, 267 N. Y. 265, 196 N. E. 51, this proposition was ably expressed in the follow-

ing language: "As there was evidence before the commission bearing upon the reasonable value or rental value for the use of this water, neither the appellate division nor this court has any power to reconsider the question. No doubt much administrative law has grown up in this state and in this country in response to the development of the public utility resources, but, unless these administrative agencies act arbitrarily and beyond their powers, the courts should not interfere." Also, in *In re Application of Consolidated Freight Co.*, 265 Mich. 340, 251 N. W. 431, the court said:

"Within its proper sphere such a commission often determines issues of fact, which determination renders operative or inoperative, as the case may be, legislative enactments. But, in so functioning, the commission is not exercising a legislative power. In such instances the determinations of fact issues pertain only to the functioning of the commission in its legislative capacity, as an adjunct to the legislature. The policy or wisdom of such action by the commission cannot be reviewed by the courts any more than can the policy or wisdom of a legislative enactment be reviewed by the courts. In short, in so far as the functioning of a commission pertains to the administration of executive or legislative matters, it is not reviewable in this court.

"In the instant case the exact question involved is whether there shall be granted a certificate of public convenience and necessity to appellant under which it may operate as a common carrier over a fixed route within the state of Michigan. Primarily this is clearly a legislative question, not a judicial one. The legislature has properly delegated to the public utilities commission the administrative power of determining whether under the facts disclosed to it the certificate should be granted. In so determining the public utilities commission is acting in its legislative capacity and the factual aspect of such determination is not reviewable in this court. Provisions in Acts Nos. 212 and 312, Pub. Acts 1931, to the contrary are unconstitutional and void.

"However, the commission must act within the law.

Whether it has so acted is subject to review by the courts and such review is strictly in the nature of certiorari where the legal aspect of the commission's determination may be inquired into, but not the factual phases of its determination."

In *United Fuel Gas Co. v. Public Service Commission,* 73 W. Va. 571, 80 S. E. 931, the court said: "But we cannot construe the statute as intended to give us the power and authority to substitute our judgment for that of the commission, in a matter purely legislative or administrative. Such a construction would practically emasculate the statute and rob it and the commission of their proper authority and jurisdiction." It is with this rule in mind, therefore, that we undertake the consideration of the issues raised by this appeal.

To determine whether or not the orders of the commission complained of are valid, it might be well to consider the purposes that were intended to be accomplished when the railway commission was clothed with the power to regulate and control the operation of taxicabs. The situation is aptly expressed by a text-writer, as follows: "The policy of regulation upon which our present public utilities commission plan is based and which tends to do away with competition among public utilities, as they are natural monopolies, is at once the reason and the justification for the holding of our courts that the regulation of an existing system of transportation, which is properly serving a given field or may be required to do so, is to be preferred to competition among several independent systems. In requiring a proper service from a single system for a city or territory, in consideration for protecting it as a monopoly for all the service required and in conserving its resources, no economic waste results and service may be furnished at the minimum cost. The prime object and real purpose of commission control is to secure adequate sustained service for the public at the least possible cost, and to protect and conserve investments already made for this purpose. Experience has demonstrated beyond any question that competition among natural

monopolies is wasteful economically and results finally in insufficient and unsatisfactory service and extravagant rates. Neither the number of the individuals demanding other service nor the question of fares constitutes the entire question, but rather what the proper agency should be to furnish the best service to the public generally and continuously at the least cost. Anything which tends to cripple seriously or destroy an established system of transportation that is necessary to a community is not a convenience and necessity for the public and its introduction would be a handicap rather than a help ultimately in such a field." 3 Pond, Public Utilities (4th ed.) sec. 775.

After assuming the regulation and control of the operation of taxicabs on May 4, 1932, the railway commission on May 9, 1932, promulgated certain regulations applicable to taxicabs being operated in the city of Omaha. Regulation No. 1 (f) provided in part as follows: "The commission shall grant, with or without a hearing, but upon written application therefor, a permit or certificate to each company for the number of taxicabs it or he was lawfully operating as taxicabs on May 4, 1932." The railway commission then determined that the Publix Company had 10 cabs in operation on that date; Checker Company 18; Safeway Company 4; Yellow Company 78; and Peoples Company 10. The railway commission then issued certificates of convenience and necessity to the various cab companies to operate taxicabs as follows: Yellow Company 88; Peoples 10; and in addition thereto certificates for the operation of 6 taxicabs held by other cab companies were permitted to be assigned to the Peoples Company; Checker 18; and Safeway 4. The Publix Company did not acquiesce in the order and appealed to this court. During the pendency of the suit it operated taxicabs in the city of Omaha. After this court ruled adversely to the contentions of Publix Company in the case of *In re Yellow Cab & Baggage Co., supra,* Publix Company made application for certificates of convenience and necessity for 30 cabs, the Safeway for 15, and the Checker for 30. This appeal is based on the refusal of the

railway commission to grant certificates of convenience and necessity for the number of taxicabs prayed for.

On the hearing the railway commission determined that 134 taxicabs were required to satisfy the needs of the city of Omaha for the purpose of taxicab transportation. This finding is based on conflicting evidence and will not be disturbed on appeal in accordance with the rule hereinbefore set forth. For the purpose of this appeal, therefore, it is established that certificates of convenience and necessity for 134 cabs are all that the railway commission could be required to issue on the findings as determined by them.

The evidence shows, however, that the Yellow Company holds a certificate of convenience and necessity for 88 taxicabs, although it operates only 60 to 65 taxicabs and has 78 taxicabs available for service. It would seem, therefore, that the inclusion of the 88 taxicabs of the Yellow Company in the 134 taxicabs to be granted certificates to supply the taxicab needs of the city of Omaha would necessarily result in a shortage of taxicabs to the same extent, as the whole of the 88 Yellow Company cabs was not being used. The fact that the Yellow Company was operating only 60 to 65 cabs instead of 88, for which it holds a certificate of convenience and necessity, clearly shows, under the findings of fact made by the railway commission, that the taxicab needs of the city of Omaha would require the issuance of additional certificates of convenience and necessity. It cannot seriously be contended that, if the taxicab requirement of the city of Omaha is 134 taxicabs, the Yellow Company, or any other cab company, may be permitted by the arbitrary action of the railway commission to hold certificates of convenience and necessity for taxicabs that it is not using and permit the taxicab-hiring public in the city of Omaha to suffer because thereof. If the taxicab business in Omaha requires 134 cabs to handle the business satisfactorily, and the railway commission has so found, the public demand should be met by having that many taxicabs in actual operation for that purpose. If one cab company does not have the necessary units to provide the service required

of it, or refuses to provide such service, necessarily the applications of others to provide it should be considered and not arbitrarily denied.

It is not the province of this court to try this case *de novo* or to substitute its judgment for that of the railway commission. The matter of the issuance of certificates of convenience and necessity rests entirely with the railway commission. Their issuance is based on findings of fact made after a hearing. Many factors should be considered by them in arriving at a proper conclusion. It must be borne in mind that it is not the policy of the law in the regulation and control of public utilities to promote competition between common carriers as a means of providing service to the public. The policy is that through regulation of an established carrier or carriers occupying a given field and protecting it from competition it may be able to serve the public more efficiently and at a more reasonable rate than would be the case if other competing businesses were authorized to serve the public in the same territory. This does not mean that, in assuming the regulation and control of common carriers already operating, the railway commission may arbitrarily turn the business to one carrier and thereby destroy the property interests of the others. It is the duty of the railway commission to control and regulate public utilities that are considered as natural monopolies, but it is not its province to create such monopolies by its own arbitrary action. The rule undoubtedly is that existing carriers shall receive a fair measure of protection against ruinous competition. Where existing carriers can serve the public efficiently, the railway commission undoubtedly has the power to deny the application of a new carrier to operate. The fact that the taxicab trade may desire to patronize one carrier and not another is not a controlling feature. The public, and not individuals, is to be most considered. Under this theory, certificates of convenience and necessity should be granted, if any are to be granted, to existing carriers if they are able to show their ability to furnish the required service to the public, on the

theory that existing investments should first be protected, everything else being substantially equal. We assume that the railway commission, in determining that 134 taxicabs were necessary to meet the taxicab needs of the people of Omaha, considered the service, investment and the ability of the Street Railway Company to give the same service, and properly so. Likewise, the investment, existing service and the ability to render the additional service required are factors that cannot be overlooked when existing cab companies apply for certificates of convenience and necessity. To permit one cab company to hold a certificate of convenience and necessity on cabs that it is not operating, when other existing cab companies have shown by evidence a willingness and ability to provide the service, amounts, in our judgment, to arbitrary and discriminatory action on the part of the railway commission. We therefore conclude that the order of the commission, under the peculiar circumstances of this case, in refusing to grant additional certificates of convenience and necessity to the appellants, or some of them, was arbitrary and cannot be sustained.

The appellants next complain of the action of the railway commission in imposing conditions and limitations on the issuance of certificates of convenience and necessity on taxicabs operated by them on and prior to May 4, 1932. Under the regulations of the railway commission promulgated on May 9, 1932, for the control and regulation of taxicabs in the city of Omaha, it was provided in effect that a certificate of convenience and necessity should be issued to each cab company for the number of taxicabs it was lawfully operating on May 4, 1932, as a matter of form. The record indicates that this regulation is still in force and necessarily the commission should comply therewith and issue the certificates to the cab companies for the taxicabs they had in operation on that date without requiring compliance with arbitrary conditions precedent thereto.

Complaint is also made of the acts of the railway commission in refusing to issue additional certificates of convenience and necessity to the Publix Company for the rea-

son that the taxicabs were "driver-owned," as distinguished from "company-owned," vehicles. We have searched the regulations promulgated by the railway commission and have been unable to find any regulation requiring a taxicab to be company owned, as a condition precedent to the issuance of a certificate of convenience and necessity. Since no such regulation has been promulgated, the railway commission is without the present authority to require it. The question as to whether such a regulation, if adopted, would be unreasonable and arbitrary is not therefore before the court at this time.

There can be no question, however, that an applicant for a certificate of public convenience and necessity, claiming to be a common carrier, may be required to have such an interest in the taxicabs to be operated under the certificate that they are subject to the control of the applicant, otherwise the regulations and orders of the railway commission directed to the applicant would be ineffective as to the taxicabs not under the applicant's control and the interests of the public could not be protected. It appears from the record, however, that the president of the Publix Company desired the certificate of convenience and necessity in the name of the Publix Company for the "driver-owned" cabs in question and agreed to accept the condition of the railway commission that they be company owned. Without passing upon its reasonableness, we conclude that the Publix Company is not in a position to urge the unreasonableness of an imposed condition that it invited the railway commission to make by agreeing to comply with it if made. The Publix Company as a common carrier must have legal control of the cabs for which it seeks a certificate of convenience and necessity or the certificate should not be granted. The interest of the Publix Company in the cabs proposed to be used being in question, the offer to comply with the condition, if imposed, precludes a review by this court, the evidence under such a situation being sufficient to sustain the reasonableness of the order.

Complaint is further made by appellant Checker Com-

pany of a requirement that it change its color scheme on its taxicabs in service on May 4, 1932, as a condition precedent to the issuance of certificates of convenience and necessity to which it was entitled as a matter of course, under the provisions of regulation No. 1 (f). It appears from the record that the Yellow Company, in its objections to the issuance of any certificates of convenience and necessity to the Checker Company, contended that the color scheme it was then using on its taxicabs trenched upon the color scheme used by the Yellow Company on its cabs. That the claimed infringement had existed long prior to the date that the regulation and control of taxicabs had been assumed by the railway commission is amply borne out by the record. It is also undisputed that litigation had never arisen over this controversial matter. It appears to us that, the power of the railway commission to control and regulate the taxicab business in Omaha not having been invoked until long after this controversy arose, it would amount to arbitrary action on the part of the railway commission to attempt to decide a matter that is ordinarily for the courts, and to secure its enforcement by refusing to issue certificates of convenience and necessity unless it was complied with. The record does not show an order of the commission requiring a change of color scheme on the taxicabs of the Checker Company issued after a hearing, and from which the Checker Company could have perfected an appeal to have the legality and reasonableness of the order tested. We are constrained to hold that conditions precedent to the issuance of a certificate of convenience and necessity, regulatory in their nature, that are not based upon a regulation or order of the commission regularly made, are arbitrary and discriminatory and of no force and effect.

We concede that a negative order of the railway commission is not ordinarily subject to review on appeal. But where it appears, as in the case at bar, that the purported negative order of the commission amounts to a finding of the legality of all the certificates of convenience and necessity held by the Yellow Company, under the circumstances

shown in this case, we have come to the conclusion that the order appealed from is not in fact negative in character. The hearing from which the present appeal was taken developed into an investigation of the whole taxicab business in Omaha and was so treated by the commission. The commission in its opinion passed upon many matters that ordinarily would not be raised on applications for additional certificates of convenience and necessity. The railway commission having treated every issue that has arisen in the taxicab business in Omaha as before it, we shall do likewise. Under the circumstances, the denial of the applications of appellants was equivalent to an approval of the certificates already granted. As we have before stated, the order of the railway commission approving the action of the Yellow Company in holding certificates for taxicabs that it is not using, and at the same time treating them as a part of the number of taxicabs required to satisfy the taxicab needs of the city of Omaha, is unreasonable and arbitrary. In determining whether an order is negative, we must look past the form and at the result that is accomplished. We cannot refuse to review an order because it is negative in form, if the real purpose is to accomplish that which otherwise would not be sustained.

We therefore hold that the order of the railway commission complained of is unreasonable and arbitrary in the respects noted in this opinion, which fact imposes upon the railway commission the necessity of such further action, viewed in the light of the necessities of the case presented, as the proper exercise of its powers requires.

JUDGMENT ACCORDINGLY.

PUBLIX CARS, INC., APPELLANT, V. YELLOW CAB & BAGGAGE COMPANY ET AL., APPELLEES.

FILED FEBRUARY 14, 1936. No. 29432.

Automobiles: TAXICAB COMPANIES: COMPLAINT: DISMISSAL. Where reasonable grounds for investigation exist, the railway commission may not dismiss a complaint filed under the provisions of section 75-506, Comp. St. 1929, without a hearing on the merits.

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

Johnsen, Gross & Crawford, for appellant.

Kennedy, Holland, De Lacy & Svoboda, for Yellow Cab & Baggage Co., appellee.

Brome & Thomas, for Peoples Cab, Inc., appellee.

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

CARTER, J.

This is an appeal from an order of the railway commission dismissing, without prejudice, a complaint filed by Publix Cars, Inc., against the Yellow Cab & Baggage Company and the Peoples Cab, Inc., without a hearing on the merits of the complaint.

It appears from the record that on July 5, 1934, Publix Cars, Inc., filed a complaint against the appellees herein alleging that each of them holds certificates of convenience and necessity for the operation of taxicabs in the city of Omaha that are not in fact being operated. The complaint further alleges that the Yellow Cab & Baggage Company has for 18 months been allowed to retain certificates of convenience and necessity for 10 taxicabs for which it has not qualified any insurance coverage and under which it has, during such period, operated no taxicabs. The complaint further states that the railway commission has determined that 134 taxicabs are sufficient to meet the public demand for taxicab service in the city of Omaha. Appellant prays

for a revocation of the certificates of convenience and necessity for 10 taxicabs held by the Yellow Cab & Baggage Company, and for the revocation of the certificates for 2 taxicabs held by the Peoples Cab, Inc. Appellant also prays for an order reallocating the certificates in question to it in order that it may meet the demands for service made upon it by the public.

The Yellow Cab & Baggage Company and the Peoples Cab, Inc., filed motions to dismiss the complaint, which were sustained by the railway commission without a hearing on the merits.

The record shows that, at the time the complaint herein was filed with the railway commission, the appellant was prosecuting an appeal to this court to reverse an order of the commission denying it certificates of convenience and necessity for additional taxicabs. This is set out as a ground for the dismissal of the complaint because it is claimed that the appeal from a previous order of the commission suspended the right of the commission to reallocate the certificates by virtue of section 75-508, Comp. St. 1929. This can have no application to the charge that the Yellow Cab & Baggage Company and the Peoples Cab, Inc., are holding certificates unlawfully. The revocation of certificates of convenience and necessity for nonuser is in no way dependent upon the outcome of the appeal in the case mentioned. It appears from the complaint that the commission had determined that 134 taxicabs were sufficient to satisfy the needs of the taxicab public in Omaha, and certificates of necessity and convenience were issued for 134 taxicabs. It will be noted therefore that, according to the findings of the railway commission, any number less than 134 taxicabs could not provide the service demanded by the taxicab-hiring public in Omaha. To permit the Yellow Cab & Baggage Company, under these circumstances, to hold certificates on cabs that were not in operation would be unreasonable and arbitrary. Such was the holding in *Publix Cars, Inc., v. Yellow Cab & Baggage Co., ante,* p. 401. The complaint states facts which, if supported by sufficient

evidence, would require the entry of an order by the commission revoking the certificates of convenience and necessity for the taxicabs not in use.

Our statutes provide for the filing of a complaint, a hearing and an order in matters of this kind. A hearing on the merits is required when there appears to be a reasonable ground for investigation. Comp. St. 1929, sec. 75-506. To say that there does not appear to be a reasonable ground for investigation of the complaint cannot be justified. It was not so considered by the commission itself in its findings. In its opinion, the commission says: "In consideration of the evidence received in the hearing on application No. 10837, the commission took into consideration the fact that the Yellow Cab & Baggage Co. was operating only 78 taxicabs, although holding certificates for operation of 88; and that the Peoples Cab, Inc., was operating only 14 taxicabs, although holding certificates for operation of 16 taxicabs, when it decided that public convenience and necessity did not warrant any additional certificated operations." With this information, the railway commission is not in a position to say that reasonable grounds for investigation did not exist. An inquiry and hearing into the matters complained of, as required by the statute, contemplate a hearing on evidence and an order based thereon. The commission is required to act justly and reasonably and not to defeat the purpose of the statute by its own arbitrary action. We are of the opinion that the complaint filed in the case at bar states facts which, if proved, require the affirmative action of the commission, and its dismissal of the complaint amounts to arbitrary action on its part.

The order of the commission dismissing appellant's complaint cannot therefore be sustained, which fact imposes upon the commission the necessity of taking such further action as may be required by the facts presented.

JUDGMENT ACCORDINGLY.

STATE, EX REL. MAX G. TOWLE, APPELLEE, V. ABE EYEN, APPELLANT.

FILED FEBRUARY 14, 1936. No. 29469.

1. **Evidence** examined, and *held* sufficient to support the findings of the trial court.
2. **Nuisance:** INJUNCTION. A court of equity has jurisdiction to enjoin the maintenance of a nuisance, and in so doing it may extend its powers, if the necessities of the case require, even to the extent of enjoining the continuation of the business which occasions such nuisance.

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

John J. Ledwith and *Herman Ginsburg,* for appellant.

Max G. Towle and *Farley Young, contra.*

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

CHASE, District Judge.

This is a suit in equity brought by the state of Nebraska on the relation of the county attorney of Lancaster county to enjoin the maintenance of an alleged nuisance. The petition avers that the defendant is operating a business under the name of Abe's Beer Tavern Café in the incorporated village of West Lincoln, Lancaster county, Nebraska. The petition further states that the business conducted by the defendant is a nuisance, in that it occasions noxious exhalations, noisome and offensive smells, is injurious and dangerous to the health, comfort and morals of the citizens of said county, and that the property of persons living in the vicinity is decreased and rendered valueless thereby. A trial was had upon the issues, resulting in a finding against the defendant perpetually enjoining him from conducting such business. From the decree of the trial court the defendant has appealed to this court.

Several assignments of error are urged for reversal. The consideration of two propositions will successfully dispose of all the questions raised. Therefore, our inquiry will be

confined to a discussion of the following propositions: First, is the evidence sufficient to warrant the trial court in finding the business to be a nuisance? Second, did the trial court extend its injunctive powers beyond the necessities of the case?

We deem it unnecessary to set forth the evidence in detail. A number of witnesses testified as to the character of the place; that on numerous occasions they had seen and heard various acts of misconduct committed by the patrons of the defendant at and near his place of business; that the patrons would often become intoxicated, noisy, profane, and vulgar, and this conduct was carried on nearly every night by people congregating at the defendant's place of business, and was worse between the hours of 12 o'clock midnight and 4 o'clock in the morning. From a careful examination of the whole record, we are convinced that the defendant's place of business became a trysting place for people of both sexes of vulgar, dissolute, obscene and roistering habits, that they trespassed upon the property of persons living near-by, and that these repeated nocturnal orgies were destructive to the peace, morals, good order and comfort of the entire community. There is also evidence that alcoholic liquors were used and dispensed upon the premises in violation of law; while the evidence does not show that the defendant himself ever engaged in any boisterousness or ever sold any intoxicating liquors. From an examination of the entire record, we are driven to the conclusion that the evidence is amply sufficient to support the findings of the trial court that the place of business operated by the defendant constituted a nuisance.

The next question which confronts us is whether the court extended its injunctive powers beyond the necessities of the case. In its decree it enjoined the defendant from conducting a beer tavern or any other business of a like nature upon the premises. It is against this provision of the decree that the defendant launches his main attack. His contention is that the court went far beyond the necessities of the case in enjoining the operation of his business

or any other of a like nature on the premises. The evidence shows that the defendant was the recipient of a license emanating from proper authorities to vend the beverage known as beer, with an alcoholic content not less than 3.2 per cent. by volume. Under such circumstances the mere operation of a beer tavern and dance hall would not amount to a nuisance *per se,* hence the court must go further and inquire into the manner and results of such operation.

The defendant cites a number of cases in which the courts have held that the restraint should not be exercised beyond the necessities of the particular case. *Stuhr v. City of Grand Island,* 120 Neb. 491, 233 N. W. 886. The cases cited by the defendant and upon which he relies for reversal show they are directed against acts wholly within the control of the party enjoined, such as the keeping and feeding of live stock in a certain locality, manufacturing asphalt, the keeping and feeding of poultry in a prohibited area, disposing of sewage into an open ditch, which are, in their very nature, acts of commission. In those cases the court directed its injunctive powers against a repetition of such acts, and the defendant contends that if the court entered an injunction in this case it should only have enjoined the acts which constituted the nuisance, rather than enjoining the operation of the business itself. The instant case presents a problem of an entirely different character from the ones above mentioned. The unlawful conduct of the defendant is not based upon acts of commission, but acts of omission in not properly controlling the behavior of persons and patrons while at his place of business. The injury does not result from the defendant's misfeasance, but from his nonfeasance. When we consider the character and propensities of the persons who congregated at the defendant's place, as shown by the evidence, we are convinced that, however hard the defendant may have tried to do so, it was beyond his power to control their conduct and behavior.

The law hedges about the ownership of property with certain restraints and liabilities. It is a well-settled rule

that the owner of property will not be permitted to use the same in such a manner that will unnecessarily injure another. *Patterson v. Kentucky,* 97 U. S. 501, 24 L. Ed. 1115; *Munn v. Illinois,* 94 U. S. 113, 24 L. Ed. 77.

If the powers of the court in cases such as this are required to be limited to such an extent as to enjoin only the appellant from allowing misbehavior, vulgarity and profanity in and about his place of business, such a limitation would have the effect of rendering the exercise of such powers useless to prevent the mischief that was the cause of the injury. In a situation as shown by this record, if the evidence so justifies, the court may enjoin the operation of the business so as to prevent the injury and damage to the community committed by persons whose conduct and behavior are beyond the control of the appellant.

In the granting of the injunction complained of, the trial court did not extend its powers beyond the necessities of the case. The evidence is amply sufficient to support the findings and the decree is a proper one and is therefore

AFFIRMED.

CHARLES GIDLEY, APPELLANT, V. WILLIAM GIDLEY ET AL., APPELLEES.

FILED FEBRUARY 14, 1936. No. 29454.

1. **Deeds:** UNDUE INFLUENCE. The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor.
2. ———: ———. Undue influence exercised by any one, whether he or another gains by its exercise, renders the will or other instrument thus procured worthless.
3. ———: ———. A case of undue influence is made out where it is shown by clear and satisfactory evidence (1) that the testator or grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; (4) that the result appears to be the effect of such influence.
4. ———: ———: BURDEN OF PROOF. Generally, the one attacking an instrument on the ground that its execution was pro-

cured by undue influence has the burden resting on him to establish that fact, but the circumstances under which a conveyance is made, the condition of the grantor at the time, and the injustice to him and his heirs, if it is upheld, may be such as to cast upon the grantee the burden of showing that it is untainted with undue influence, imposition or fraud, but is the intelligent and deliberate act of the grantor.

5. ———: ———: CANCELATION. Evidence examined and *held* to be sufficient to establish the charge that the deeds involved in this action were obtained by undue influence and should be canceled, and the title to the real estate involved herein quieted and confirmed in the plaintiff.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Reversed, with directions.*

John J. Ledwith and *J. H. Barry*, for appellant.

Schiefelbein & Donato, contra.

Heard before GOOD, EBERLY and DAY, JJ., and RAPER and PROUDFIT, District Judges.

PROUDFIT, District Judge.

This action was brought in the district court for Saunders county, Nebraska, by the plaintiff against the defendants for the purpose of procuring a decree canceling certain deeds, more fully set out hereinafter, and quieting title in the plaintiff to certain real estate hereinafter more fully described. Plaintiff, appellant, alleges in substance that he is 64 years of age, a son of Sarah A. Gidley, now deceased; that the defendants Nellie Mead and William Gidley are also children of Sarah A. Gidley, and respectively the sister and brother of the plaintiff; that one Nathaniel Gidley, now deceased, was also a son of Sarah A. Gidley, and a brother of Charles Gidley, the plaintiff herein, and that at his death he left surviving him as his only heir at law and the only person interested in his estate his son, Merrell Gidley, defendant herein; that the defendant Matilda Gidley is the wife of Merrell Gidley, and by reason thereof claims some interest in the real estate hereinafter described; that the defendant Edward A. Mead is the husband of Nellie Mead, and by reason thereof claims some interest in said real

estate; that the defendant ——— Houfek, real name unknown, is the wife of Gus Houfek, and by reason thereof claims some interest in said real estate.

That on and prior to the first day of July, 1931, the plaintiff was the owner in fee of the following described real estate to wit: The west half of the northwest quarter, and the north half of the southwest quarter of section 22, township 16 north, range 6 east of the sixth principal meridian, in Saunders county, Nebraska, having become the owner thereof by conveyance from his said mother, Sarah A. Gidley, the deed bearing date January 6, 1928.

That on or about July 17, 1931, Nellie Mead and William Gidley, defendants herein, and Nathaniel Gidley induced the plaintiff to convey to the said William Gidley and Nathaniel Gidley the fee simple to his said real estate, reserving to himself a life estate in said real estate, and providing that the defendant Nellie Mead was to be paid $5,000 each by William Gidley and Nathaniel Gidley, said sums to be a charge upon the lands so conveyed to the said William and Nathaniel Gidley; that plaintiff's signature to said deeds was obtained by the said defendants and Nathaniel Gidley falsely and fraudulently representing to him that such procedure on his part was necessary to carry out his mother's intentions and desires in regard to said real estate, and that he relied upon said representations, and under the duress imposed upon him signed said deeds; that said deeds were executed without any consideration whatever passing to this plaintiff or from the defendants, and the said Nathaniel Gidley; that said plaintiff is deaf and was deaf at the time of the execution of said deeds, illiterate, could not read or write, had very limited business experience, and did not understand the nature of the deeds so executed; that all of the statements and representations of the said defendants and the said Nathaniel Gidley were false and untrue, and were known by them to be false and untrue, and were made with the intent to cheat and defraud plaintiff in pursuance of a fraudulent conspiracy entered into prior to the said 17th day of July, 1931.

That on or about the 15th day of April, 1932, the defendant William Gidley and Nathaniel Gidley, and defendants Nellie Mead and Edward A. Mead conveyed said premises to the defendant Gus Houfek, which deed has been recorded in the deed records of Saunders county, and in pursuance of said deed the said Gus Houfek has taken possession of said premises and has attempted to oust plaintiff therefrom and is now claiming to be the owner of said real estate, claiming the rights of exclusive possession and control of same; that plaintiff has no adequate remedy at law, and prays for cancelation of the said deeds, the removal of the clouds against the real estate because of said deeds, the quieting and confirming of the title in himself, and enjoining the defendants and all persons claiming under them from asserting any rights therein, and equitable relief generally, and costs of suit.

The answer of defendants Nellie Mead, William Gidley and Merrell Gidley admits the allegations of paragraphs 1, 2 and 3 of the petition, and denies every other allegation therein, and prays that the petition be dismissed at the cost of plaintiff.

The defendant Gus Houfek answers and alleges:

(1) Denies the allegations of paragraph 8 of the petition, denies that said defendant claims to be the owner of said premises and that he has ever attempted to oust plaintiff therefrom and exclude him from the same.

(2) Having no personal knowledge of other matters contained in the petition, he neither affirms nor denies same.

(3) Alleges that said real estate was conveyed to this defendant solely for the purpose of the trust expressed therein, and that this defendant neither has nor claims any interest therein except such as is necessary to carry out said trust, and said defendant prays that the petition as to him be dismissed at plaintiff's cost, and that he go hence without day.

It appears from an examination of the record in this case that the plaintiff is the son of Jesse Gidley and Sarah A.

Gidley, both now deceased. Jesse Gidley by his will devised his estate to his wife, Sarah A. Gidley, and to his children in the shares and proportions set forth in said will. It is not necessary to refer further to this will except to call attention to the first clause of the last paragraph, which is as follows:

"My son, Charles Gidley, is given nothing under and by the terms of this will, for the reason that his mother, Sarah A. Gidley, has made and will make ample provision for him in her last will."

And to the eighth paragraph, which is as follows:

"To my beloved wife, Sarah A. Gidley, I give, devise and bequeath the north half of the southwest quarter, and the west half of the northwest quarter of section twenty-two (22), in township sixteen (16) north, range six (6) east, in Saunders county, Nebraska, to her and her heirs forever."

The will of Jesse Gidley was executed September 3, 1918. On the same day Sarah A. Gidley executed her will, by the terms of which she made, with other devises and bequests, this disposition of the above described real estate:

"Third. I give, devise and bequeath to my son, Charles Gidley, the north half of the southwest quarter and the west half of the northwest quarter of section twenty-two (22), in township sixteen (16), range six (6) east, in Saunders county, Nebraska, and to him and his heirs forever." (Being the last devise to the said Sarah A. Gidley by Jesse Gidley.) Parenthetical matter inserted by the writer.

The will of Jesse Gidley was admitted to probate in Saunders county on May 10, 1920. On the 12th day of July, 1921, Sarah A. Gidley executed a codicil to her will which contained the following paragraphs:

"First. I give, devise and bequeath to my son, Charles Gidley, the use and income of the north half of the southwest quarter and the west half of the northwest quarter of section twenty-two (22), township sixteen (16), range six (6), Saunders county, Nebraska, during his natural life-

time, only, he to pay the taxes, insurance premiums and keep improvements thereon in suitable repair, instead of the provisions made for him in paragraph three of said will and testament and which paragraph I hereby cancel and annul.

"Second. Subject to the provisions of this codicil made for my son, Charles Gidley, I give, devise and bequeath the west half of the northwest quarter of said section twenty-two (22) to my son, William Gidley, on condition that, within one year from the time he receives possession of said real estate, he shall pay to my daughter, Nellie Mead, the sum of five thousand ($5,000) dollars, and subject to the same provision in favor of my son, Charles Gidley, I give, devise and bequeath the north half of the southwest quarter of said section twenty-two (22) to my son, Nathaniel Gidley, on condition that he shall pay to my daughter, Nellie Mead, within one year after he comes into possession of said real estate the sum of five thousand ($5,000) dollars. Provided that if the said Nellie Mead shall not be living at the time of the death of the said Charles Gidley, and shall not leave her surviving issue of her own body, then said bequests to her shall fail and shall be considered canceled, annulled and void."

Another codicil was executed December 19, 1929, but, as it has no bearing on the issues herein, no further reference will be made to it.

On the 6th day of January, 1928, Sarah A. Gidley, for the expressed consideration of one dollar and love and affection, executed a warranty deed purporting to convey to Charles Gidley the foregoing described real estate in fee simple. On the 30th day of June, 1931, Sarah A. Gidley died, and her will and codicils were admitted to probate on the 18th day of September, 1931.

On the 17th day of July, 1931, Charles Gidley signed two deeds, one of which purported, for the expressed consideration of one dollar and love and affection, to convey to William Gidley the west half of the northwest quarter of section 22, township 16, range 6, Saunders county, Nebraska,

in fee simple, "On condition that he pay to my sister, Nellie Mead, * * * $5,000 within one year after my death, or within one year from the time he (the grantee) receives possession of said real estate, said $5,000 to remain a lien upon said real estate until fully paid, reserving, however, unto myself (the grantor) the use, income and profits from said real estate during, and for, my natural life." Parenthetical matter inserted by the writer.

One of said deeds for a like consideration purported to convey to Nathaniel Gidley in fee simple the north half of the southwest quarter of section 22, township 16, range 6, in Saunders county, Nebraska, on like terms and conditions. Copies of said deeds appear in the bill of exceptions at pages 107 and 108, respectively.

It does not appear that any consideration was actually paid for the execution of these deeds, and there is no contention on the part of the appellees that they parted with anything of value in order to obtain said deeds.

On the 15th day of April, 1932, William Gidley, Nathaniel Gidley, Nellie Mead and Edward A. Mead, for the expressed consideration of one dollar and the trusts therein expressly set forth, executed a trust deed to Gus Houfek, and thereby conveyed to him the real estate hereinbefore described, upon the trusts and conditions as follows in substance: Charles Gidley to have the use of the buildings and 18 acres immediately adjacent thereto, to be used by him without rent, charge or any other payment therefor whatsoever during his life, or until the real estate be sold, subject to the power of sale contained in said deed of trust, the remainder of the 160-acre tract to be rented out by the trustee, who would collect rents, and out of the proceeds pay the necessary expenses in connection with the farm, such as taxes, upkeep, interest, or any indebtedness secured by said real estate, in accordance with said trust deed, and any other necessary expenses, and after said expenses were paid, the remainder of said rent to be paid to the said Charles Gidley. Said instrument purports to authorize the trustee to raise funds for the use of the said Charles Gidley

by the sale or mortgage of the real estate in the event that the rents therefrom shall not be sufficient to meet his requirements, the trustee to exercise his judgment as to whether he will sell or mortgage, said trustee to have authority to either mortgage or sell without obtaining the consent of any of the other parties to said deed, but, in the event a sale of the real estate is desired, the consent of the said Charles Gidley shall be obtained. There is a further provision that in the event of sale the proceeds of said sale shall be invested and the income used for the support of Charles Gidley, and, in the event the income therefrom is not sufficient, then the principal of said trust fund may be drawn upon for such purpose. It is further provided therein that the trustee shall pay out of said trust fund the reasonable and necessary funeral expenses and expenses of the last sickness of the said Charles Gidley, and that, subject to such payment, said real estate, or the money into which it may have been converted, shall be divided equally among the grantors, Nellie Mead, Nathaniel Gidley and William Gidley, or their heirs, devisees or legatees, should any of said persons die prior to the death of the said Charles Gidley. It is also provided in said instrument that the trustee shall be compensated for his services in connection with said trust.

The trial court dismissed plaintiff's petition, and he brings his appeal to this court.

Errors relied upon for reversal are: (1) That the court's finding is not supported by sufficient evidence; (2) that the court's finding was contrary to the evidence; (3) that the finding of the court is contrary to law; (4) errors of law occurring at the trial and duly excepted to.

Due appreciation of the picture presented by this record requires a careful consideration of the background. Jesse Gidley, father of plaintiff, appellant, was possessed of a considerable estate, and provided for its distribution by a will which was duly admitted to probate in Saunders county. By the terms of said will ample provision was made for the defendants William Gidley and Nellie Mead, and

also for Nathaniel Gidley, who would have been a defendant in this action except for the fact that he died before the action was commenced, and his successor in interest, Merrell Gidley, is joined in the case as a defendant. No provision was made for Charles Gidley in the will, Jesse Gidley, the father, stating that he made no provision for Charles for the reason that Charles' mother, Sarah A. Gidley, had made and would make ample provision for him. On the same day that Jesse Gidley executed his will on September 3, 1918, Sarah A. Gidley also executed her will, in which she devised in fee simple to Charles the real estate described in the pleadings herein. In July, 1921, Sarah A. Gidley executed a codicil to her will whereby she changed the devise to Charles Gidley from a devise in fee simple to a life estate in said real estate, remainder in fee in one eighty-acre tract over to William Gidley, the remainder in fee in the other eighty-acre tract over to Nathaniel Gidley, conditioned upon William and Nathaniel each paying to Nellie Mead $5,000.

The record further discloses that in this state of affairs Nellie Mead recommends to her mother that she make a deed outright to Charles so that there would be no doubt about his getting his portion of the estate. At that time, January 6, 1928, the deed conveying the land to Charles in fee simple was executed by his mother. It appears that this deed was taken by the scrivener, Gus Houfek, and he was told at the time that it was to be filed upon the death of Sarah A. Gidley.

In addition to these facts it should be borne in mind that the appellant, Charles Gidley, did not meet the defendants upon a common level and on equal terms, as he was illiterate, and further handicapped by a very marked degree of deafness and having had very little experience save that in which he was assisted by others.

The defendant most active in the transactions complained of appears to have been a very keen business woman, and from developments it would seem that she had an eye on the main chance. The uncontradicted testimony discloses

the fact that Nellie Mead, defendant, and one of the appellees, was the active party in the negotiations and in procuring the execution of the deeds to William and Nathaniel, and that she was to be a substantial beneficiary of such transactions. It is true she testifies that she considered that it was necessary for Charles' protection to have his fee simple title converted into a life estate with remainder over to her brothers, but it must be borne in mind that by the provisions of her father's will she was to receive in real estate and money the equivalent of $10,000, and that Charles was to receive nothing except such provision as might be made for him by his mother; that his mother in her will devised the quarter section of land involved herein to him in fee simple, and thereafter made a codicil to her will whereby his fee simple was converted into a life estate only, the remainder to pass to the brothers, William and Nathaniel, and they were each to pay Nellie $5,000. By the terms of the codicil these payments were not made a charge on the land, but the provision was that, in the event of Nellie's death without bodily issue before the death of Charles, said payments were to be canceled and annulled.

Nellie testified that, after the codicil above mentioned was executed in 1921, she thought that for Charles' protection he should have the fee simple title to the said real estate and so advised her mother, and eventually, in January, 1928, the mother executed such deed and it was left in the hands of the scrivener with instructions to file same upon the death of the mother. Within a very few days after her mother's death Nellie forms the conclusion that for Charles' protection his fee simple title should be converted into a life estate with remainder over to the two brothers, William and Nathaniel, each to pay her $5,000, and said payments to be made a charge upon the real estate affected, which provision materially improved her situation over that created by the codicil which had been revoked by the deed of January, 1928.

It is contended by the appellant that he was misled and deceived by his sister as to his mother's real purpose and

intention concerning himself, and that she unduly influenced him to execute the deeds to his brothers. The record shows without contradiction that the appellant was to a large degree dependent upon his brothers and sister for advice in the conduct of his business affairs, that he relied upon them, considered them trustworthy, that he respected the wishes of his mother that he should make such disposition of the property as he did, under the influence and urging of Nellie. The sincerity of the desire of the sister and brothers to protect their unfortunate brother Charles might well be questioned when they disregarded the provision of law authorizing the appointment of a guardian who would be required to give bond and be under the supervision and direction of the court, and took his matters into their own hands and formulated a proceeding whereby the three would be the ultimate beneficiaries to the exclusion of the other lawful heirs of the said Charles. The practical result of the actions of the sister and her two brothers was to place Charles under the control and supervision of one who assumed the power of a guardian over his property, but one who had not given bond for the faithful performance of his duty, nor was he under the supervision of a probate court. While arrogating to themselves the powers of a probate court in placing Charles' property under the control of a third party, they did not see fit to accord the one whose welfare they asserted they were so solicitously seeking the protection of a bond or the supervision of a court, and, further, the ultimate effect of their actions was to divert Charles' estate from his rightful heirs to their own gain and profit.

A careful reading of this record has forced the writer of this opinion to the conclusion that the strong mind and determined spirit of Nellie Mead so dominated and controlled the weaker mind of her brother Charles that the deeds executed by him reflected her wishes and purposes rather than his own. It is urged by the defendants in this case that these matters were all talked over in the presence of Charles and he was given to understand fully what was

taking place and why. But it must be remembered that he was very deaf. It has been held as a general principle that the burden of proof rests on one who attacks a conveyance on the ground of its execution under undue influence to establish that fact. However, it has been held by our court in *Bennett v. Bennett,* 65 Neb. 432, 91 N. W. 409, that the circumstances under which a conveyance was made, the condition of the grantor at the time, and the injustice to him and his heirs, if it is upheld, may be such as to cast upon the grantee the burden of showing that it is untainted with undue influence, imposition or fraud, but is the intelligent and deliberate act of the grantor. The principle underlying the cancelation of instruments procured by undue influence is set forth in 31 C. J. 1183, as follows:

"All that can be said, in the way of formulating a general rule on this subject, is, that whatever destroys free agency, and constrains the person whose act is brought in judgment, to do what is against his will and what he would not have done if left to himself, is 'undue influence,' no matter by what means the control is exercised, whether the control is exercised by physical force, duress, fraud, threats, importunity, or any other species of mental, moral or physical coercion. The means employed, the extent or degree of the influence, or by whom the influence is exerted, is immaterial, for the test always is, was the influence, whether slight or powerful, sufficient to destroy free agency, so that the act put in judgment was the result of the domination of the mind of another rather than the expression of the will and mind of the actor."

Citing *Carroll v. Hause,* 48 N. J. Eq. 269, 27 Am. St. Rep. 469. In the cited case the court says:

"Undue influence exercised by any one, whether he or another gains by its exercise, renders the will or other instrument thus procured worthless."

In *Skrinsrud v. Schwenn,* 158 Wis. 142, 147 N. W. 370, it is said:

"A case of undue influence is made out where it is shown

(1) that the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. As the law now is, these facts must be shown by clear and satisfactory evidence."

The case at bar appears to meet all these conditions.

One of the leading cases in Nebraska on the subject of undue influence is *Munson v. Carter,* 19 Neb. 293, 27 N. W. 208, where it is stated:

"Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party which controls the free action of his will, and prevents voluntary action in the making of a contract or execution of a deed for real estate, equity may relieve against the same on the ground of undue influence."

Cited with approval in *Blumer v. Albright,* 64 Neb. 249, 89 N. W. 809, and in *Macke v. Jungels,* 102 Neb. 123, 166 N. W. 191.

Referring to the proposition of defendants that the plaintiff was informed as to the entire transaction of which he now complains, that he understood what same was about, in *Brummond v. Krause,* 8 N. Dak. 573, 80 N. W. 686, it is said:

"It is not enough for one who has made a written contract with illiterate and infirm persons to show that the contract was read to them. It must also appear that they understood it and assented to it knowingly. * * * An actual understanding of the meaning of the instrument must appear before there can be a binding assent. As well might a claim of knowledge of the contents of a written instrument be based upon proof that it was exhibited to one who was blind, or read to one who was deaf, as to rely upon an interpretation thereof to persons who, from mental infirmity and dense ignorance, are not able to understand its meaning."

The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor.

It is worthy of note that the defendants William Gidley

and Merrell Gidley did not testify; that the witness, Charles Whitten, who it does not appear has any direct interest in the result, testifies to a conversation between Charles Gidley and defendant Merrell Gidley, in which Merrell said he would give the land back to Charles. At the time, however, Merrell did not have title, as his title was by inheritance from his father, Nathaniel, and Nathaniel had joined in the trust deed to Houfek, so that it was not in Merrell's power to convey to Charles. Also it is in the record that the defendant William Gidley had told Carl Gidley that he, William, would talk with Nathaniel and Nellie and see that Charles got his land back; but at that time William had also deeded to Houfek and therefore could not convey to Charles. While Houfek's testimony relates entirely to his actions as scrivener on the occasion when Sarah A. Gidley executed her deed, and in taking the acknowledgment of Charles to the two deeds which are the basis of this action, he did not testify as to his interest under the trust deed, but in his answer alleges that his only interest in the premises is to fulfil the trust.

If the deeds to the Gidley brothers cannot be upheld, it follows as a matter of course that the trust deed to Houfek must fall with the other deeds. Nellie Mead testified that they took nothing from Charles, that by these deeds he still had a life use of the premises, but by the trust deed given to Houfek they had severely limited his life use at least, and by the deed to the Gidley brothers they had certainly deprived the grantor of the power of sale or other disposition of the real estate involved, so that he had surrendered his control of this property to his brothers and sister and received no consideration whatever therefor, and that he was induced to take this action by reason of the undue influence exercised over him by Nellie Mead, William and Nathaniel Gidley. The deeds cannot be upheld in equity, but should be canceled, as well as the deed from the Gidley brothers and Nellie Mead to Gus Houfek, and the title to said real estate quieted and confirmed in the plaintiff, appellant, Charles Gidley.

The judgment of the lower court should be and is hereby reversed and remanded, with directions to enter a judgment in conformity with this opinion, at the cost of appellees.

REVERSED.

MARIE VYBIRAL, APPELLEE, V. ROBERT SCHILDHAUER, APPELLANT.

FILED FEBRUARY 14, 1936. No. 29455.

1. **Bills and Notes.** A promissory note or other contract in writing, in the absence of fraud or mistake, cannot be varied, qualified or contradicted by evidence of a prior or contemporaneous agreement resting in parol.
2. **Mortgages:** FORECLOSURE: PLEADING: WASTE. A mortgagee has the right to maintain a suit to prevent waste by mortgagor in possession where the security of the mortgage debt is impaired or there is danger of the mortgaged property becoming insufficient security for the mortgage debt, and a mortgagee may properly include such application to prevent waste in the petition to foreclose the mortgage.
3. **Waste.** The removal of growing timber may be an element of waste, where it is being carried on to an extent calculated to render the land insufficient security for the amount due on the mortgage.
4. **Process:** ABUSE. "Abuse of legal process consists in the malicious use or misapplication of that process to accomplish some purpose not warranted or commanded by the writ. In brief, it is the malicious perversion of a regularly issued process whereby a result not lawfully or properly attainable under it is secured." 1 R. C. L. 102, sec. 2.

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

Allen G. Fisher and *Charles A. Fisher*, for appellant.

Nichols & Johnson and *Clifford L. Rein, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and RAPER and PROUDFIT, District Judges.

RAPER, District Judge.

Plaintiff, Marie Vybiral, began this action to foreclose a mortgage dated March 13, 1926, which was duly executed by Robert Schildhauer and Grace Schildhauer and recorded, securing a note for $8,500, due on March 13, 1931. On March 23, 1931, an extension agreement and five interest coupons attached, for annual interest, were executed and delivered to plaintiff by the Schildhauers, which is in the ordinary form of such instrument, and extended payment of the mortgage debt for five years, interest at 6 per cent. payable annually, and the agreement to pay the principal sum and coupons being given in consideration of the extension of time for the payment of the original note and the mortgage. The mortgage and extension agreement contained an acceleration of maturity clause giving the mortgagee the option to declare the whole sum due in case of default in the payment of the interest. The mortgagors failed to pay the interest coupon due March 1, 1932, and on January 4, 1933, plaintiff began this action, and in her petition elected to declare the whole sum due.

This cause presents a very unusual procedure. The plaintiff's petition is in the usual form for foreclosure, and named Robert Schildhauer and Grace Schildhauer, the mortgagors, defendants, and also named some parties other than the mortgagors defendants, to remove a cloud on the title to the mortgaged premises. Service was had on those other defendants by publication, which is one of the grounds the defendant Robert Schildhauer, as will be later shown, claimed as damage in his cross-petition. In plaintiff's petition is incorporated an allegation that defendants Schildhauer were committing waste by removal of growing timber and that the premises would not satisfy the mortgage debt, and the petition prayed for foreclosure of the mortgage and injunction to prevent waste. The præcipe requested that the summons for Robert Schildhauer and Grace Schildhauer be indorsed "Foreclosure, restraining order, and equitable relief." Summons was issued January 4, 1933, with that indorsement and duly served on the

Schildhauers. On answer day Robert and Grace Schildhauer by special appearance moved to quash summons because it "has indorsed upon it 'foreclosure, restraining order, and equitable relief,' which is false and intended to mislead defendant unlawfully and an abuse of process," and further because said indorsement is a threat of extortion. Two affidavits were filed by plaintiff on April 11, 1933, in support of the allegation of waste. Defendants filed six affidavits on April 25 opposing plaintiff's prayer for injunction. The court overruled the special appearance April 28, 1933. The defendants Schildhauer filed an answer of ten pages, in which is renewed the motion to quash the summons, alleges that a mortgagor in possession is entitled to all the growing wood on the mortgaged premises, and attacks by way of argument a holding of the supreme court; alleges that plaintiff's action was prematurely brought, and denies all allegations of the petition which pertain to the foreclosure of the mortgage; admits the execution and recording of the mortgage; alleges that Grace Schildhauer was a married woman and had no separate estate and was not liable personally for the original debt. It may be here stated that the petition did not ask for deficiency against her. The answer set out a description and condition and value of the mortgaged property, and the manner in which certain timber land had been cleared so as to improve and increase the value of the ranch by providing more acreage for grazing, but containing a mass of irrelevant statements, some of which were on motion properly stricken. Defendants allege that they "canceled and satisfied * * * each of the covenants in the said mortgage by strict performance thereof, down to and including the execution, upon its due date, of the pleaded agreement of date March 23, 1932, and on March 1, 1933, and on March 1, 1934, and on March 1, 1935, and on March 1, 1936, and at no earlier dates. And these instruments were signed and delivered by Grace Schildhauer as joint maker and joint debtor, in consideration of the credit then extended to her, as owner of inchoate and homestead interest in fee thereof, and concerning

which separate estate she then contracted with the owner of these notes dated March 23, 1931, and which notes contain no acceleration clause."

On April 28, 1933, a hearing was had on application of plaintiff for restraining order, to prevent cutting of timber, and evidence was adduced by the parties, whereupon the court denied plaintiff's application at that time, with leave to reinstate the application during pendency if plaintiff desired.

The defendant Robert Schildhauer on May 23, 1933, filed a cross-petition alleging ownership of the premises, and improvements he had made, and the clearing of some of the wooded parts to improve the land by providing more tillable acreage and more grazing land and thereby enhancing its value; that in the fall of 1932 he made certain contracts with former customers for firewood to be taken from down and dead shrubbery and small saplings unfit for timber, to be cut out of the growth thereof; that plaintiff, by threatening that these customers could not be permitted to complete their contract or plaintiff would bring action for injunction against cross-petitioner, caused said customers to cease their preparations for said firewood. He alleges the execution and delivery of the note for $8,500 to plaintiff on March 13, 1926; that said note fell due on March 13, 1931, at which time an oral agreement was made between plaintiff and Robert and Grace Schildhauer, whereby plaintiff proposed to accept and did accept the five notes of cross-petitioner and Grace Schildhauer for the annual interest payable on the first day of March of the years 1932, 1933, 1934, 1935 and 1936, each for $510, and in consideration thereof plaintiff agreed that the payment of the principal sum of $8,500 should and shall be unconditionally extended until March 1, 1936, and no earlier date; that plaintiff intentionally violated said agreement and deprived cross-petitioner of the profits on the sales of wood, by filing her petition for foreclosure of the mortgage and alleging therein that cross-petitioner was committing waste by cutting and removing growing trees and praying for injunction to

restrain the removing or destroying growing trees, and that said acts of plaintiff were malicious. He claims damages in the sum of $1,850.

Trial was had on March 28, 1934. The court announced that plaintiff's action for foreclosure should be for the court, but the evidence could be introduced in presence of the jury, and at request of cross-petitioner a jury was called to try the issue on the cross-petition. At the close of a two-day trial the court directed a verdict for plaintiff on the cross-petition and found for plaintiff on her petition and entered decree of foreclosure of the mortgage. On the same day Grace Schildhauer filed request for nine months' stay. Robert Schildhauer moved for new trial, on the decree of foreclosure and on the court directing verdict on cross-petition. This motion was overruled September 21, 1934, and Robert Schildhauer appeals without supersedeas bond.

Appellant's claims for damage for abuse of process and for slander of title to land have no merit. An abuse of process is the employment of legal process for some unlawful object not the purpose which it is intended to effect. The supreme court of Illinois gives this definition: "'Abuse of process' * * * means the perversion of it,—i.e., accomplishing some illegal object or purpose for which such process was not legally intended." *Dixon v. Smith-Wallace Shoe Co.*, 283 Ill. 234, 119 N. E. 265. In *Ludwick v. Penny*, 158 N. Car. 104, 73 S. E. 228 (cited in note to *Malone v. Belcher*, Ann. Cas. 1915A, 830) it is said: "Two elements are necessary to an action for the malicious abuse of legal process: First, the existence of an ulterior purpose; and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process."

To make out a cause of action for abuse of process, the plaintiff must prove irregular steps taken under cover of the process after its issuance, and damage resulting therefrom. *Italian Star Line v. United States Shipping Board*

Emergency Fleet Corporation, 53 Fed. (2d) 359, 80 A. L. R. 576.

The facts upon which appellant bases his alleged cause of action are the allegation in the petition that defendants were cutting growing timber and prayer for injunction to stop defendants from removing growing timber, and having summons issued indorsed as hereinabove stated, and the publication of notice of action to quiet title on other defendants. There was no injunction issued, the court on a proper hearing having refused it. There was substantial evidence to support plaintiff's claim of waste. The court at the time he directed the verdict for plaintiff stated: "There certainly is not sufficient evidence to support a finding as to malice. Whether the defendant had a right to remove this timber is a matter which even legal minds in this room might very readily differ. It is a question of fact, depending upon the different circumstances there. Then there is no evidence from which the damages could be measured." The plaintiff was clearly within her legal rights in asking for the injunction to prevent waste. *Triplett v. Parmlee,* 16 Neb. 649, 21 N. W. 403; *Dixon v. Smith-Wallace Shoe Co.,* 283 Ill. 234, 119 N. E. 265. See, also, note in 48 A. L. R. 1156.

No indorsement on the summons was necessary. The indorsement that was made was proper and gives rise to no valid objection. It is needless to quote the evidence on appellant's cross-petition which occupies about 180 pages of the bill of exceptions, much of which, as the trial court stated, should have been excluded. The court's action in directing the verdict against the appellant is fully sustained by the pleadings and the evidence. There is no pleading or proof that appellant's title to the land was slandered.

The remaining question relates to appellant's plea that the foreclosure action was premature, and claim for damage because of appellee's breach of an oral agreement to extend date of maturity of the mortgage. The answer to plaintiff's petition does not allege that there was a verbal agreement to extend the maturity of the mortgage and extension agree-

ment, but in the cross-petition such agreement is pleaded. At the trial the appellant was asked as to such agreement, which was objected to and the court refused his testimony. He thereupon made the following offer of proof: "The defendant on the witness-stand offers to prove by his continued examination and the same offer is made relative to the proposed testimony of his wife, Mrs. Grace Schildhauer, that these notes were executed and delivered to the plaintiff pursuant to an oral and implied agreement for the extension, unqualifiedly, of the payment of a note for $8,500 therein described, which was not, by the terms of this agreement, to become due or collectible until March 1, 1936."

It will be noticed that the offer of proof does not state the facts which make the agreement, but says the notes were executed and delivered pursuant to an oral and implied agreement, which is a conclusion; and further there is no statement as to what part was oral and what part was implied, and does not state what consideration was given for such promise. The offer is insufficient to establish an oral agreement to vary the terms of the mortgage, the extension agreement and the coupon notes, even if such oral testimony was competent. However, the mortgage, the extension agreement and interest notes are complete and entire contracts, and as such they come within the rule which excludes oral testimony to change or vary their terms. No fraud is claimed. Parol evidence was not admissible to change or vary the terms of the mortgage, the extension agreement or the coupon notes. *Garneau v. Cohn*, 61 Neb. 500, 85 N. W. 531; *Faulkner v. Gilbert*, 61 Neb. 602, 85 N. W. 843; *First Nat. Bank v. Burney*, 90 Neb. 432, 133 N. W. 647.

Some other matters are discussed in the briefs which it is unnecessary to mention. The answer to plaintiff's petition and the cross-petition are exceedingly prolix and contain much extraneous and irrelevant matter which counsel should avoid in preparing pleadings.

The decree foreclosing plaintiff's mortgage and dismissing cross-petition of appellant is

AFFIRMED.

STATE, EX REL. WILLIAM H. WRIGHT, ATTORNEY GENERAL, PLAINTIFF, V. JOSEPH M. FITZGERALD, DEFENDANT.

FILED FEBRUARY 21, 1936. No. 29641.

Proceeding for disbarment. *Judgment of disbarment.*

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

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

PER CURIAM.

This is a proceeding for the disbarment of Joseph M. Fitzgerald. It comes before this court on the motion of the attorney general for a judgment on the report of the referee. The defendant filed an answer but did not appear and offer any testimony before the referee, although notified by registered mail of the time and place of hearing. The finding of the referee, supported by a preponderance of the evidence, is that the defendant has violated his oath as an attorney by conduct warranting his disbarment.

It is the judgment of this court that the findings and conclusions of the referee in his report are confirmed, and it is ordered that the admission of the defendant, Joseph M. Fitzgerald, to the bar of this state be canceled and annulled and his name stricken from the roll of attorneys and counselors at law.

JUDGMENT OF DISBARMENT.

ALBERT W. MILLER, APPELLEE, V. CITY OF SCOTTSBLUFF, APPELLANT.

FILED FEBRUARY 21, 1936. No. 29528.

Pleading: DEMURRER. To overrule a demurrer thereto, when a petition fails to state a cause of action, constitutes error.

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

Straight Townsend, for appellant.

Mothersead & York, contra.

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

GOSS, C. J.

The petition alleged that defendant is a city of the first class, having between 5,000 and 25,000 inhabitants; that the mayor and city council, by ordinances effective, respectively, February 7, 1928, and November 13, 1928, created sewer districts numbered 32 and 35, within the city; that on February 23, 1928, and February 28, 1929, respectively, they entered into contracts for the construction of the sewers contemplated, the contractor constructed the same, warrants were issued on April 4, 1928, and on May 7, 1929, respectively, to the contractor for the amounts due him under the contracts, and that certain described warrants were transferred by the contractor to plaintiff, who is the owner and holder thereof, and entitled to payment; and that no part of the warrants or of the contract price represented thereby has been paid.

Defendant demurred to the petition, the demurrer was overruled, defendant elected to stand on its demurrer, judgment was entered against it and it appealed. It assigns that the judgment is contrary to the evidence and contrary to law.

For further amplification of the brief statement of the petition, it may be said that the warrants, which were pleaded, all show on their faces that they were charged to the account of the respective sewer district funds. They were all indorsed by the treasurer as registered and presented but not paid for want of funds. The warrants in one district were so indorsed on April 4, 1928, and those in the other district on May 7, 1929. They were registered the same day they were issued. We think we have fully stated every material allegation of the petition.

The appellee states in his brief: "The city has failed to create a fund for the payment of these warrants." No-

where in his petition do we find any such allegation. Perhaps the implications from the petition are that funds were created, for, as we have stated, the warrants all show that they were charged to the respective sewer funds. For example, the first one pleaded says: "And charge to account of Sewer District No. 32 fund, for final estimate." All warrants bear like words save that some are attributable to district No. 35, these two districts being the only ones involved in this action.

Not only does the petition not set out clearly that a fund has been established or created, but it particularly fails to allege that, through some act of commission or of omission of the city, such a fund fails to serve its purpose, whereby the warrants have become the general obligation of the city, due and payable. If the mayor and city council followed section 16-649, Comp. St. 1929, and assessed the sewer taxes against the abutting property, and followed section 16-650, Comp. St. 1929 (which is the section under which payment of the contractor by the warrant method is provided for), then it was the duty of the city to provide a fund into which all special assessments "shall be paid, as collected, and out of which all warrants issued for such purposes shall be paid." For aught we know from the allegations of the petition, the city made the special assessments and created the fund but is endeavoring to collect a sufficient amount to reach in their turn and pay off the warrants held by petitioner. It may even be true that the city has the funds already collected and is waiting until plaintiff shall state a cause of action against it. The absence of facts stated in the petition bars speculation as to just how or why these warrants are general obligations of the city. That, as we understand it, is the theory on which plaintiff must recover, if at all.

We are of the opinion the plaintiff has failed to state a cause of action against the city and that the demurrer should have been sustained.

The judgment of the district court is reversed, with leave to plaintiff, if so advised, to amend his petition.

REVERSED.

V. I. DANIELS, APPELLEE, V. CITY OF GERING, APPELLANT.

FILED FEBRUARY 21, 1936. No. 29548.

1. **Municipal Corporations:** SEWER DISTRICT WARRANTS: LIABILITY OF CITY. Where a statute authorizes a city (1) to construct district sewers, (2) to levy special taxes against the property benefited in the district to create a fund to pay the cost of construction, and (3) to issue sewer district warrants to be called and paid in the order of their issuance, if neither the statute nor the warrants contain restrictions to the contrary, any such warrants, not paid because the special taxes have been foreclosed, and the fund has theretofore failed and will always continue to fail, are the general obligations of the city.
2. **Limitation of Actions:** CITY WARRANTS. The statute of limitations does not commence to run in an action against the city on such warrants until after it appears that the special taxes, levied to create such fund, have failed, and will continue to fail, to produce any payments to the fund.

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

Howarth N. Olsen, for appellant.

Floyd E. Wright, contra.

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

GOSS, C. J.

This case differs somewhat from the recently decided case of *Miller v. City of Scottsbluff, ante,* p. 440, 265 N. W. 415, in that the sewer districts involved here were formed under an earlier statute and in that this case was tried on its merits while that case was decided upon demurrer. This is an appeal by the city from a judgment in favor of the holder of unpaid warrants issued for the construction of sewers, where the sewer fund, established by the city to provide their payment, had failed. The uncollected sewer taxes had been wiped out by a foreclosure and sale by the county under the scavenger tax procedure.

The amended petition set up three causes of action to recover money claimed by plaintiff as owner of city warrants issued to provide payment for the construction of

city sewers in three different districts in the year 1917. Each cause alleged the creation of a district, the construction of the sewer by a contractor who had secured the contract, the levy of the special assessment on the real estate benefited, the creation of a fund for the special districts into which fund the assessments were to be paid for the purpose of paying the cost of the improvement, the provision for warrants to be drawn, and the drawing of such warrants to be paid out of the fund as called in the order of their issuance.

The first cause relates to district number one. It alleges that, out of the money coming into the fund, warrants numbered 1 to 37, inclusive, were paid, the payment of the last numbered warrant being made April 18, 1930, since which date there has never been any money in the fund; that plaintiff is the owner and holder of warrants numbered 38 to 41, inclusive, and warrants numbered 44 and 45; and that there is due plaintiff on said warrants the sum of $5,161.45, with interest at 7 per cent. from January 20, 1933.

The second cause of action relates to district number two. It alleges that warrants were called and paid out of the fund in the order of their issuance, the last being number 68, which was paid December 16, 1925, since which time there has never been any money in the fund; that plaintiff is the owner and holder of warrants numbered 71 to 75, inclusive, and number 80; and that there is due plaintiff on the warrants in this cause of action $1,793.42, with interest at 7 per cent. from January 20, 1933.

The third cause of action relates to district number three. It alleges that warrants numbered 1 and 2 were paid out of the fund created, the latter on April 26, 1920, since which time there has never been any money in the fund; that plaintiff is the owner and holder of warrants numbered 4, 5 and 8, on which there is due $1,334.06, with interest at 7 per cent. from January 20, 1933.

The amended petition on each cause set out that in 1928 the county of Scotts Bluff commenced its scavenger suit for

the collection of delinquent taxes, foreclosed and sold the lots for all the sewer taxes in the three districts and that the sale was confirmed in 1929; that none of the real estate sold for enough to pay anything into the sewer district funds and all of the special assessments were thereby canceled and that the contract price for construction of the sewers was the fair and reasonable value of the benefits received by the city as a result of the construction of the sewers; that the city has retained these benefits and paid for them except as to the warrants held by plaintiff, as heretofore pleaded, and has refused to pay the balance as demanded.

Defendant demurred to the petition, but its demurrer was overruled, whereupon defendant answered. The answer admitted some allegations of the petition and denied others. The effect of the answer was to raise two issues: First, that no cause of action arose on the warrants within the last ten years and therefore the cause of action was barred by the statute of limitations; second, that the warrants are not, do not purport to be, nor do they evidence, any obligation of the city of Gering; that the sewers were of no value or benefit to the city, and that all benefit, if any, was to the property within the respective sewer districts.

The issues were tried. The records were stipulated and received in evidence. This shows that plaintiff has invested in the warrants the amounts claimed. The only questions are whether the warrants, in the circumstances, were or became a general liability of the city, and, if so, whether recovery is now barred by the statute of limitations.

These sewers were constructed and the warrants evidencing their contract price were issued in 1917. Therefore they were devised under, and are ruled by, the statutes in force at that time, so far as applicable.

The sewer districts were created and the warrants were issued under section 5163, Rev. St. 1913. The section is too long to quote, but it authorizes the mayor and city council to levy special taxes against the lots in a created sewer district, to provide for their payment by bonds or by warrants,

and to provide that the special taxes shall constitute a sinking fund for the payment of such bonds and warrants, including interest thereon. It provides that "the entire cost of such sewers in any such street, avenue or alley shall be chargeable to the private property therein," etc. There is no statement contained in this statute indicating that it was intended to relieve the city from liability on the warrants in any and all circumstances. There is just the statement quoted that the entire cost shall be "chargeable" to the property specially benefited. The cost might in the first instance be chargeable to the property, but, in certain contingencies, the city might, nevertheless, be held liable for any failure to collect the taxes. The language of the statute does not prohibit that.

Then the preceding section 5162, Rev. St. 1913, gives the city power "to appropriate any and all moneys in the general fund against which there are no unpaid and outstanding warrants * * * for the purpose of conducting or aiding in the construction of a system of sewerage." This would seem to provide a source of payment for just such a liability as is argued here by plaintiff to have arisen under the assessment of the taxes by virtue of the provisions of section 5163, and under the facts as to the failure to collect them as established by the proofs on the trial of the case.

Alexander v. Bailey, 108 Neb. 717, 189 N. W. 365, was a suit to charge the city with general liability on paving bonds which had been issued under section 5110, Rev. St. 1913, authorizing such cities to pave streets, assessing the costs against the property according to benefits, the statute containing no provision that the bonds shall be payable only out of funds realized from the assessment. The section relates to paving almost as section 5163 relates to sewers. It was held in that case that, where a statute authorizes a city to pave streets but contains nothing to the contrary, there arises an implication that the city is authorized to enter into contracts for the performance of the work and also to pay for the same by a general tax levy. In that case the city had taken the bond method of paying for the work.

Ultimately the bonds became defaulted by reason of the special assessments failing to create a fund sufficient to provide for their payment. The city, believing the bonds were a general liability of the city, refunded them with bonds which were issued on the theory that the original bonds were a general liability. The suit was a test, in advance, of the liability on the refunding bonds. The district court decreed that they were not a general liability. This court reversed the judgment and held that the bonds were a general liability of the city.

Alexander v. Bailey, supra, cites a case in point, from which we quote briefly: "As between the city and the parties with whom it contracted to furnish the labor and material and to pave its streets, the city had power to render itself generally liable, notwithstanding the cost of the improvement was to fall ultimately upon the owners of abutting property. * * * The contractor is not in privity with the property owners, and has no means of enforcing collection against them. He looks alone to the city. There is nothing in the statute which imposes upon the person to whom the contract is let to pave the streets the requirement to look alone to the proceeds of the special assessments for his pay, or limiting his recovery to the funds realized therefrom." *Pine Tree Lumber Co. v. City of Fargo,* 12 N. Dak. 360, 96 N. W. 357.

We refer, also, to other cases cited and reviewed in *Alexander v. Bailey, supra,* but particularly to *United States v. Fort Scott,* 99 U. S. 152, which says: "It is true that section 17 declares that 'for the payment of said bonds' assessments shall be made 'upon the taxable property chargeable therewith;' that is, 'on all lots and pieces of ground to the center of the block, extending along the street or avenue, the distance improved.' But it is neither expressly nor by necessary implication provided that the holder of the bonds may not be paid in some other mode, or that the city will not, under the authority derived from other sections of the statute, comply with its promise to pay the bonds, with interest, at maturity. As between the city and its taxpayers,

it was certainly its duty, through the council, to provide, if practicable, payment by taxation upon the property improved, rather than upon all the taxable property within its corporate limits. But the duty to make such distribution of the burden of special improvements did not lessen its obligation, in accordance with its express agreement, to pay the interest and principal of the bonds at maturity. * * * There is no reservation, as against the purchasers of the bonds, of a right, under any circumstances, to withhold payment at maturity, or to postpone payment until the city should obtain, by special assessments upon the improved property, the means with which to make payment, or to withhold payment altogether, if the special assessments should prove inadequate for payment. Experience informs us that the city would have met with serious, if not insuperable, obstacles in its negotiations had the bonds upon their face, in unmistakable terms, declared that the purchaser had no security beyond the assessments upon the particular property improved."

It might be argued that there is a difference between paving and sewers, because the latter are almost entirely for the benefit of the lots they serve, while the former is to a larger extent for the benefit of all in the city who may use the streets. However, the legal principles applying to both are the same, and, in a very practical sense, the welfare of the entire community is concerned in the health and sanitation involved in sewer provisions for every inhabited part of the city.

To the argument that injustice will result from levying a general tax which will fall upon all taxpayers and particularly upon those within the sewer district who have already paid their special taxes, the answer is that the law makes the special assessments a matter between the city and its taxpayers with which bondholders, and, in this case, warrant holders, are not concerned. If special assessments are levied in sufficient amount, upon property of sufficient value, no loss will result when the city faithfully collects the taxes. If a loss must result, less injustice follows when

the loss is shared by all taxpayers than if it be made to fall upon an innocent warrant holder, who had no special benefit from the sewer, no recourse upon any one, and no remedy whatever if the city should be relieved of responsibility upon its obligations.

The statute of limitations against the claims is urged. The statute of limitations never was applicable until, after the sewers were constructed in 1917 and the warrants issued, the fund was actually created. In *Rogers v. City of Omaha,* 82 Neb. 118, 117 N. W. 119, the syllabus says: "The statute of limitations does not commence to run against warrants issued by a municipal corporation, payable out of a special fund to be created, until such fund has in fact been created, and there is sufficient money in the fund with which to pay the warrants."

In *Bacon v. Dawes County,* 66 Neb. 191, 92 N. W. 313, the syllabus says: "No right of action accrues upon county warrants until there is money for their payment in the fund upon which they are drawn, or the proper authorities have had opportunity to provide funds to pay them, and have neglected to do so."

The evidence shows that the fund was created and, as fast as there was sufficient money paid in, earlier warrants were paid. They were paid as late as 1930 in one of the districts, in 1925 in another, and in 1920 in the other. But it was not until 1929 or 1930, after the sale of all the delinquent tax land under the scavenger act, that the city learned that the special taxes could never supply the fund. Then, for the first time, the city attempted to repudiate its liability. As to the unpaid warrants involved here, the city had in fact created no fund. That fact was never discovered or disclosed until too late to defend on that ground. This suit was commenced on January 21, 1933. The statute of limitations had not run.

The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. A. OSCAR WIGGENJOST, APPELLEE.

FILED FEBRUARY 21, 1936. No. 29481.

1. **Municipal Corporations:** POWERS. To acquire the means of supporting life by honest labor and skill is an inherent right of a law-abiding citizen and municipal restrictions thereon do not exist unless authorized and imposed in plain terms of the law.
2. ———: ———. The vocation of painting and hanging advertising signs does not imply any sinister influence on the public, calling for municipal surveillance in the form of a license in addition to an inspector's regulatory permit and a fee for each sign.
3. ———: ———. Municipal power to regulate commercial sign painting and sign hanging does not imply power to exact from a sign painter an annual license to pursue his vocation in addition to an inspector's regulatory permit and fee.
4. ———: ———. Municipal power encroaching upon individual rights does not exist unless plainly conferred by the city charter or other law.
5. ———: ORDINANCES: VALIDITY. Provisions of a city ordinance requiring a sign painter to pay a 10-dollar annual license fee in addition to an inspector's regulatory permit and a fee of one dollar for each sign, *held* invalid as not within the powers granted by the home rule charter of the city of Lincoln.
6. ———: ———: ———. The invalidity of a license feature of a sign ordinance does not necessarily invalidate regulatory provisions of the same ordinance.

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

Loren H. Laughlin and *H. B. Porterfield,* for appellant.

Mockett & Finkelstein, contra.

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

ROSE, J.

In the municipal court of the city of Lincoln, the building inspector presented a complaint charging A. Oscar Wiggenjost, defendant, with violations of ordinance in the following particulars: First count, erecting and hanging a sign

for the Standard Market at 1535 O street without having registered to engage in the business of hanging and erecting signs; second count, erecting and hanging a sign for the Standard Market at 1535 O street without having obtained from the building inspector a permit to do so; third count, erecting and hanging a sign for The Lodge at 2135 O street without having registered to engage in the business of hanging and erecting signs; fourth count, erecting and hanging a sign at The Lodge at 2135 O street without having obtained from the building inspector a permit to do so.

On this complaint a warrant for the arrest of defendant was issued. He appeared before the municipal court and pleaded not guilty. Upon a trial he was convicted and sentenced to pay a fine and the costs of prosecution. From the sentence imposed upon him he appealed to the district court and there demurred to each count of the complaint. The demurrer was overruled as to the second and fourth counts, charging that defendant erected and hung signs without permits from the building inspector and sustained as to the first and third counts, charging that defendant erected and hung signs without registering or procuring a license to engage in that business. The city, prosecuting in the name of the state, stood upon its demurrer and the prosecution was dismissed as to the first and third counts of the complaint. From the dismissal the city appealed to the supreme court.

The question presented by the appeal is the validity of that part of ordinance 3208, called the "Sign Ordinance," which forbids any person from engaging in the business of painting, placing, erecting or maintaining advertising signs without first procuring from the city an annual license and paying therefor a fee of $10.

The demurrer assails the license feature of the sign ordinance on the grounds, among others, that the home rule charter of Lincoln does not confer on the city the power to require a sign painter to procure a license and to pay $10 as conditions of his right to pursue his vocation; that the burden imposed is an unreasonable interference with per-

sonal, contractual and property rights guaranteed by both the state and federal Constitutions.

The home rule charter confers upon the city power "to regulate and prevent the use of streets, sidewalks, and public grounds for signs, signposts, awnings, telegraph, telephone or other poles, racks, bulletin boards, and the posting of hand bills and advertisements." Comp. St. 1929, sec. 15-208. The ordinance regulating the painting, construction and hanging of signs covers in detail the entire subject and makes provision for the complete protection of the public. Proper materials and workmanship are required by the sign ordinance. The building inspector is authorized to prevent the erection or use of any sign on street or sidewalk, if not in compliance with specifications for the protection of the public. Notice of the hanging of a commercial sign is required. Each person engaged in painting and hanging signs is required in every instance to procure a permit from the building inspector and to pay therefor a fee of one dollar for each sign of the class erected by defendant. These precautions were taken by the city under the power of regulation conferred by the home rule charter, and it is argued that power to exact an annual license and an additional fee of $10 is included in or implied by the regulatory grant. The power of a city to regulate an innocent vocation does not imply the power to prohibit it unless a license is procured. The right to acquire the means of supporting life by honest labor and skill is an inherent right of a law-abiding citizen. Municipal restrictions on that right must be found in plain terms of the city charter or other law. The vocation of painting and hanging advertising signs does not imply any sinister influence on the public, calling for municipal surveillance in the form of a license. The home rule charter does not confer on the city in direct terms power to prohibit a sign painter from pursuing his vocation, unless he procures in advance an annual license and pays therefor a fee of $10. The power to regulate sign painting and sign hanging does not imply the power to license a sign painter. Municipal power encroach-

ing upon individual rights must be plainly conferred by law. "The power to license must be plainly conferred, or it will not be held to exist." *Gray v. City of Omaha,* 80 Neb. 526, 114 N. W. 600. In that case an ordinance making it unlawful for any person to construct artificial stone, asphalt or other composite walks without procuring a license and paying a fee of $10 for each year, or fraction of a year, was held unreasonable and void.

The general welfare clause of the home rule charter is invoked to sustain the license feature of the sign ordinance, but this construction would carry implication too far. Before hanging a single sign defendant was required by the sign ordinance, in addition to a permit costing one dollar, to pay a 10-dollar license fee for an entire year. This license burden seems better calculated to increase the mournful numbers already on public relief than to promote public peace, public health or public safety.

The power to tax a business for the purpose of raising city revenue is also invoked to sustain the license. This position is clearly untenable. The title and body of the sign ordinance show definitely that the legislative measure is regulatory in character and does not even purport to levy a tax for revenue.

While the license feature of the sign ordinance is not enforceable against defendant for the reasons stated, it does not follow that other provisions are invalid. *Morgan v. State,* 64 Neb. 369, 90 N. W. 108. Finding no error in the proceedings and rulings of the district court, the judgment below is

AFFIRMED.

E. M. JARMAN, APPELLANT, V. W. R. SEXTON, APPELLEE.

FILED FEBRUARY 21, 1936. No. 29546.

1. **Landlord and Tenant:** LEASE: BREACH: DAMAGES. "The measure of damages for the wrongful eviction of a tenant by his landlord, or for wrongfully withholding possession of the leased premises, is ordinarily the rental value of the property for the

unexpired term, less the amount of rent reserved by the lease." *Shutt v. Lockner*, 77 Neb. 397, 109 N. W. 383.

2. ———: ———: ———: ———. "In a proper case special damages in addition may be awarded, where such damages are certain and the natural result of the wrong complained of." *Shutt v. Lockner*, 77 Neb. 397, 109 N. W. 383.

3. **Pleading.** Petition for damages for alleged breach of a lease by lessor in withholding from lessee possession of the leased premises *held* demurrable.

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

J. J. Harrington, for appellant.

Emmet A. Harmon, contra.

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

ROSE, J.

This is a controversy over damages for alleged breach of a lease in which defendant demised to plaintiff 160 acres of land in Holt county.

The petition contains in substance allegations that the lease was executed in writing and delivered May 21, 1934; that for $25 paid in cash plaintiff rented the land and the hay and the pasture growing thereon from May 1, 1934, to May 1, 1935; that defendant breached the lease August 13, 1934, and sent plaintiff a 25-dollar check, the amount of the rent paid; that the check was promptly returned; that defendant, without consent of plaintiff, rented the demised premises to Riley Carter, who entered thereon and harvested and removed the hay, thus depriving plaintiff of possession of the land and of his right to the hay and the pasture; that when defendant breached his contract the net value of the hay was $925 in addition to $100 for loss of the pasture. There was a prayer for damages in the sum of $1,025.

To the petition defendant interposed a general demurrer which the trial court sustained. Plaintiff elected to stand

on his petition and the action was dismissed. Plaintiff appealed.

The question presented by the appeal arises on assigned error in the sustaining of the demurrer.

For the alleged breach of the lease for which plaintiff paid $25 as the full amount of the rent for the entire year, he demands damages in the sum of $1,025. The petition was obviously drawn on the theory that plaintiff was entitled to the value of the hay, less the cost of harvesting it, and also entitled to the value of the pasture. That theory may properly be considered in testing the petition when attacked by demurrer. Damages recoverable on any other theory were not contemplated. The proper measure of recovery for an actionable breach by lessor of a covenant for possession has been stated as follows:

"The measure of damages for the wrongful eviction of a tenant by his landlord, or for wrongfully withholding possession of the leased premises, is ordinarily the rental value of the property for the unexpired term, less the amount of rent reserved by the lease.

"In a proper case special damages in addition may be awarded, where such damages are certain and the natural result of the wrong complained of." *Shutt v. Lockner,* 77 Neb. 397, 109 N. W. 383. See, also, *Herpolsheimer v. Christopher,* 76 Neb. 355, 111 N. W. 359; *Sneller v. Hall,* 90 Neb. 100, 132 N. W. 934; *Sibert v. Hostick,* 91 Neb. 255, 135 N. W. 1054.

Considering the same question, Chief Justice Morrissey said:

"Apparently the jury arrived at the amount of recovery by ascertaining the total value of the crop produced and deducting therefrom the cost of production, and the rent reserved. This is not the proper measure of damages. In *Shutt v. Lockner,* 77 Neb. 397, this court had occasion to consider a somewhat similar question. The product in that instance was hay which had been harvested and its market value determined before the cause was tried. The plaintiff in that case insisted that the profits were definite, certain,

and recoverable as damages. In its discussion of the subject the court pointed out that the cause of action arose when the contract was breached, and said:

" 'Had the action been commenced and tried at that time, the amount of hay which the land would produce, the market value of the hay when harvested, and other elements which would enter into the question of whether the plaintiffs would profit or lose from their venture were matters of conjecture and speculation. Clearly no rule of law administered by our courts would allow damages to be predicated on opinions that might be formed relating to these questions. The fact that these questions had been determined by lapse of time when the case was tried does not in the least change the rule of law as to the evidence admissible to establish the plaintiff's damage.' " *Phillips v. Bossung,* 108 Neb. 658, 189 N. W. 172.

Plaintiff did not allege any damages measured according to the established rule of law and evidence applicable to the alleged breach of lease pleaded as a basis of recovery, but did state in his petition that defendant sent him a check for the return of the rent for the entire term. The petition shows that plaintiff himself assumed obligations beyond the payment of rent. He made the lease a part of his petition. He agreed to protect the buildings; to keep the well and windmill in repair; to destroy all weeds along the fences and about the buildings before the seeds ripen. He did not allege on his part the performance of any of these obligations. The lease shows also that defendant reserved the right, if deemed necessary, to go upon the premises and harvest the crops. There is nothing in the petition to show that plaintiff, prior to August 13, 1934, could not have taken possession of the premises and have harvested the hay for his own benefit. In these views of the entire record, the petition was demurrable.

AFFIRMED.

HOLGER NIELSEN, APPELLANT, V. YELLOW CAB & BAGGAGE COMPANY, APPELLEE.

FILED FEBRUARY 21, 1936. No. 29541.

1. **Negligence:** "LAST CLEAR CHANCE." "The rule of the 'last clear chance' is based upon the idea that, when any person is in a place of danger, whether negligent or not, one who knows, or who might know, and under the circumstances ought to know, of the danger, must use every precaution to avoid injuring him." *Johnston v. Delano*, 100 Neb. 192, 158 N. W. 1034.
2. ———: ———. "In the absence of proof of opportunity to avoid injuring such person after his danger was discovered, or ought to have been discovered, there is no reason for the application of the 'last clear chance' doctrine." *Johnston v. Delano*, 100 Neb. 192, 158 N. W. 1034.
3. **Appeal.** Where evidence is insufficient to support a verdict for plaintiff, error, if any, in the giving or refusing of instructions is not prejudicial to him.

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

Smith & Schall, James C. Kinsler and *A. Marvin Lungren*, for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

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

GOOD, J.

From an adverse verdict and judgment in a personal injury action, plaintiff has appealed.

In his petition plaintiff alleged that he was struck and injured by one of defendant's taxicabs while he was in the act of crossing Sixteenth street in the city of Omaha, on the evening of October 20, 1933. Plaintiff charged a number of acts of negligence. Defendant admitted that plaintiff was injured at the time and place alleged, but denied that the injury was the result of any negligence of defendant, and alleged that plaintiff's injury was the result of his own negligence.

The record reflects the following facts: At about 8:25

in the evening of October 20, 1933, plaintiff was walking along the north side of Nicholas street, started to cross Sixteenth street, which is 60 feet wide between curbs, and reached a point midway between curbs, or the center of Sixteenth street. One of defendant's taxicabs was traveling south on Sixteenth street and about 10 feet west of the center of the street. When the taxicab reached the north line of Nicholas street there was a collision between the taxicab and plaintiff. The evidence is undisputed that plaintiff had reached the center of the street, and it is also undisputed that the taxicab was traveling south on Sixteenth street, with the left, or east, side of the cab 10 feet west of the center of the street.

The evidence on behalf of defendant is that, as the taxicab approached the north line of Nicholas street and when within 15 or 20 feet thereof, the plaintiff either turned or stepped back towards the west side of Sixteenth street and stumbled and fell, or collapsed, against the left front fender of the taxicab and received the injuries of which he complains. Plaintiff's deposition was taken before the trial, and he testified that he had not seen the taxicab at any time before he was struck; that he did not remember anything after stepping from the curb into the street until he recovered consciousness in the hospital. He also testified, upon this trial, that he did not see the taxicab at any time before he was injured, but testified that he did not turn back after reaching the center of the street.

The driver of the taxicab testified that when the taxicab reached a point 15 to 20 feet from the north line of Nicholas street plaintiff turned and started westward and apparently stumbled and fell across the front fender of the taxicab. A passenger in the taxicab testified that he had seen plaintiff when he entered the street and when the taxicab was 100 yards north of Nicholas street; that, as the cab approached Nicholas street and when within 15 or 20 feet thereof, plaintiff stepped back, swayed and collapsed; that he saw him in the act of falling; that plaintiff would not have been touched by the taxicab if he had not fallen, and that if he

had remained in his position in the center of the street the taxicab would have passed 10 feet west of him. The evidence is undisputed that the taxicab had been traveling at the rate of 25 miles an hour but decreased its speed to 20 miles as it approached the intersection of Sixteenth and Nicholas streets. Since plaintiff had reached the center of Sixteenth street and was injured 10 feet west thereof, it is evident that he must have retraced his steps or he could not have come in contact with the taxicab.

Plaintiff has invoked the doctrine of the "last clear chance." It is evident that plaintiff, himself, was guilty of negligence in not looking and seeing the taxicab approaching him when he started to retrace his steps to the west side of Sixteenth street. It is also evident that he was not in a position of peril, so far as defendant was concerned, until he turned and attempted to retrace his steps. The evidence discloses that when he started to turn back, and when it would be apparent that he was in a position of peril from the taxicab, it was within 15 to 20 feet of the place where the collision occurred, and that less than one second of time elapsed from the time that he became in a position of peril until the injury occurred. The driver of the taxicab applied his brakes vigorously, and the taxicab was stopped within a distance of 10 feet after the impact. Clearly, there was insufficient time for the defendant's driver, in the exercise of ordinary care, to have stopped the taxicab or to have avoided the collision.

In *Johnston v. Delano,* 100 Neb. 192, 158 N. W. 1034, it was held: "The rule of the 'last clear chance' is based upon the idea that, when any person is in a place of danger, whether negligent or not, one who knows, or who might know, and under the circumstances ought to know, of the danger, must use every precaution to avoid injuring him.

"In the absence of proof of opportunity to avoid injuring such person after his danger was discovered, or ought to have been discovered, there is no reason for the application of the 'last clear chance' doctrine." See, also, *Anderson v. Missouri P. R. Co.,* 95 Neb. 358, 145 N. W. 842; *Kruger v.*

Omaha & C. B. Street R. Co., 80 Neb. 490, 114 N. W. 571. Under the circumstances disclosed by the record, it is clear that the doctrine of the "last clear chance" is not applicable.

The evidence is that the street was well lighted; that the taxicab, as it was approaching Nicholas street from the north, was clearly visible and could have been seen by plaintiff, had he looked. That he did not look and did not see it discloses that he was guilty of gross negligence. The driver of the taxicab had no reason to anticipate that plaintiff would turn back and be in a place of peril, until he actually saw the plaintiff retracing his steps. It was then too late for the driver, in the exercise of the utmost care, to have prevented the accident. The evidence is insufficient to support a finding that plaintiff was injured by any negligent act of the defendant.

There are numerous assignments of error relating to the giving and refusing of instructions. It is unnecessary to consider any of these assignments. Even if there was error in any of the instructions, it was not prejudicial to the plaintiff, since, under the facts disclosed, he was not entitled to a verdict in his favor.

AFFIRMED.

ANNA LADMAN ET AL., APPELLANTS, V. FARMERS & MERCHANTS BANK OF MILLIGAN ET AL., APPELLEES.

FILED FEBRUARY 21, 1936. No. 29550.

1. **Gifts.** To constitute a gift *inter vivos*, the transfer of possession and title must be absolute and go into immediate effect.
2. ———. In an attempted gift *inter vivos*, if anything remains to be done by the donor to complete the transaction, it amounts to an executory agreement and does not constitute a completed gift.
3. ———. Where a donor retains control over the subject of a gift, with a reservation by him of the right to use all or any part thereof, no valid gift is effected.
4. **Escrows.** When an escrow agreement is impossible of completion, parties to such agreement are entitled to a return from escrow-

holder of instruments deposited for the purpose of the agreement.

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

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

Sloans, Keenan & Corbitt, F. C. Radke, William J. Gartland and *Waring & Waring, contra.*

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

GOOD, J.

Plaintiffs, two of the children of Barbara Ladman, deceased, commenced this action to recover funds which they allege had been deposited in escrow, and that the escrow agreement had failed and could not be carried out. Emil Ladman, defendant, another child of Barbara Ladman, filed an answer and cross-petition, claiming the same relief. Later they changed their position and asked for alternative relief; that the escrow agreement be terminated and recovery had of the alleged deposit of money in escrow, or that the escrow agreement be carried out according to its terms. The other defendants, in effect, denied that there was any escrow agreement or funds deposited in escrow. The trial court found against the plaintiffs and Emil Ladman and for the other defendants. Plaintiffs have appealed.

A somewhat extended statement of the facts is necessary to an understanding of the situation. Jan and Barbara Ladman were husband and wife and had five children, namely: Joseph, James, Emil, Anna and Mary. In 1895 Jan and Barbara separated but were not divorced. Jan took up his residence in Montana, and Barbara remained in Nebraska, making her home in Milligan, Fillmore county, where she owned a residence property. At the time of their separation Barbara owned 160 acres and Jan owned 80 acres of land. The 80 acres owned by Jan was conveyed to the son Joseph, Jan retaining a life interest, for which

Joseph was to pay him $100 a year as long as he lived. It appears that the son James also removed to Montana. Joseph remained upon the land conveyed to him by the father.

In November, 1932, Barbara became very ill and sent for Charles Smrha, president of the Farmers & Merchants Bank of Milligan (hereinafter referred to as the bank), and had him draw a will for her, which was duly executed. At that time $12,775, which Mrs. Ladman had on her person, was turned over to Mr. Smrha for deposit in the bank. Mr. Smrha took this money to the bank, deposited it and issued to Mrs. Ladman a certificate of deposit for the amount. A few days later, and on the 1st of December, Mr. Smrha was recalled to the residence of Mrs. Ladman. She had ascertained that if she left a will it would have to be probated and go through the court. She desired to avoid that act and undertook to make another disposition of her property and had the will destroyed. On that day the following instrument was prepared by Mr. Smrha and signed by Mrs. Ladman and all of her children:

"By this agreement be it agreed as follows:

"That Barbara Ladman deposits in cash—disposition of which is to be made as follows:

"These funds were accumulated by Barbara Ladman. She distributes them among her children in such a manner that each shall receive the same share, when there is added the farm and the dwelling in town, as well as other property which she owns, and there is subtracted what heretofore has been paid to each child. The funds will be deposited in such a manner that they shall draw interest and this interest shall go to Barbara Ladman until her death and she may take from the capital what may be needed for her maintenance and personal expense. The funds will be so deposited that they will be safe and that for each child there shall be set up that sum to which such child is entitled. Each child shall be entitled only to those funds which are set up in his name and to no others. All bonds, receipts, certificates, notes and other papers which represent the de-

posited funds shall be deposited in the Farmers & Merchants Bank at Milligan, Nebraska, where Barbara Ladman shall have access to them. The funds will be deposited to bear interest by agreement of all the children, Barbara Ladman, John Simacek, and Charles Smrha. Not until after the death of Barbara Ladman shall the money come into the hands of the children and that in the manner above set out.

"The agreement is that Barbara Ladman shall have the right to use said funds at will without whatsoever hindrance for any manner of personal need or for her care. Should the interest not be sufficient for her personal expense and needs, then she has the right to use of the capital so much as might be needed.

"Written at Milligan, Nebraska, December 1, 1932.

"In presence of: C. Smrha."

At this time Mrs. Ladman surrendered the certificate of deposit to, and the fund representing it was left in, the bank. Two days later the children, alone, executed an instrument, whereby they undertook to apportion among themselves their respective shares in the proceeds of the certificate of deposit. On the 26th of December, 1932, Mrs. Ladman departed this life. Shortly thereafter all of the children undertook to make a disposition of the real estate left by Mrs. Ladman. They agreed among themselves that there should be taken from the cash on hand in the Barbara Ladman account $500 from each of the shares of James, Emil, Anna and Mary, and that this amount should be paid to their father, in consideration of which he was to execute a deed, relinquishing his interest in the real estate owned by Barbara Ladman at the time of her death, and releasing his life interest in the 80 acres conveyed to the son Joseph. It was further provided that Joseph should execute a deed, releasing any interest in the 160 acres left by Barbara and that all of the children should execute a deed conveying the town property to a son of Joseph. It was agreed that all of the deeds should be deposited in the bank, and the $2,000 delivered to Jan Ladman, when all of the deeds, in-

cluding the one from him, had been received. Jan Ladman was not a party to this agreement.

The children executed all of the deeds required by their agreement and deposited them in the bank. James took the deed, which was to be executed by his father, to him in Montana. He refused to execute the deed, unless his son Joseph should pay him the full amount due of $100 per year for a period of something more than 30 years, less $200 which Joseph had previously paid, and unless each of the children should annually pay him $20 during his life. Emil and Anna, on learning of the attitude of their father, telegraphed and wrote to Mr. Smrha not to deliver their share of the $2,000 to the father. It appears that the father later signed the deed, but it was never delivered, and he has since departed this life. The escrow agreement has not been carried into execution, and cannot be, for the reason that Jan Ladman departed this life without ever having delivered the deed required by the escrow agreement. The fund, which the plaintiffs and Emil seek to recover, is the $500 which each alleges he or she deposited in escrow.

The question arises: Was there any deposit in escrow of $500 each by Anna, Mary and Emil? In turn, this depends upon whether or not the instrument above set out transferred the funds of Barbara Ladman, then in the bank, to her children. If that instrument was sufficient to constitute a gift *inter vivos,* then the money belonged to Barbara's children and there was, in effect, a deposit of $500 each in escrow; and since the escrow agreement cannot be carried out, each would be entitled to recover that amount from the escrow-holder. On the other hand, if that instrument was insufficient to create a gift *inter vivos,* then the fund in the bank was the property of Barbara Ladman and on her death passed to her personal representative, in which event the plaintiffs and Emil have made no deposit in escrow and could not recover in this action.

"To make a valid and effective gift *inter vivos* there must be an intention to transfer title to the property, as well as a delivery by the donor and an acceptance by the donee. * * *

To have the effect of a valid gift, therefore, the transfer of possession and title must be absolute and go into immediate effect, so far as the donor can make it so by intent and delivery, and must be so complete that if he again resumes control over it without the consent of the donee he becomes liable as a trespasser." 12 R. C. L. 932, sec. 10.

"If delivery is made to an agent of the donor, the gift is not complete until there has been a delivery to the donee or to someone for him, and the donor may reassert title to the property at any time before delivery by his agent. On a delivery to a third person as the agent of the donor the gift is not complete, and the death of the donor before the delivery to the donee works a revocation of the gift." 12 R. C. L. 934, sec. 11.

In 28 C. J. 629, it is said: "In order to be effectual a gift must be fully executed, for the reason that, there being no consideration therefor, no action will lie to enforce it. If anything remains to be done, the transaction is a mere executory agreement to give, and the title does not pass." In the same volume, at page 634, we find this statement of the law: "In order to constitute an effectual delivery the donor must not only have parted with the possession of the property, but must also have relinquished to the donee all present and future dominion and control over it, beyond any power on his part to recall. The surrender must be so full and complete that, if the donor resumes control over the property without the consent of the donee, he will be answerable in damages as a trespasser. The retaining of control in the hands of the donor over the subject of the gift, or the reservation by the donor of any right to retake the property or appropriate it to other purposes, avoids the gift."

In the light of these authorities, let us now examine the written instrument. In the first place, the instrument does not state the amount of any deposit made. The instrument does not designate any particular amount that shall go to any particular child. It leaves for future determination by some one, not designated, the amount that shall be set up

and belong to each child. It says: "The funds will be so deposited that they will be safe and that for each child there shall be set up that sum to which such child is entitled;" but no one is designated to make the set-up. Evidently, it would be within the power of Mrs. Ladman to determine that set-up. It is further provided: "Not until after the death of Barbara Ladman shall the money come into the hands of the children and that in the manner above set out." Again, it provides that Barbara may take from the capital what may be needed for her maintenance and personal expenses. Again, it is provided: "Barbara Ladman shall have the right to use said funds at will without whatsoever hindrance for any manner of personal need or for her care. Should the interest not be sufficient for her personal expense and needs, then she has the right to use of the capital so much as might be needed." The money to which she refers is in the bank, but she authorizes no one to turn the money over to the children or any of them. Moreover, it is further provided that the amount that each may possibly be entitled to shall be determined by some one in taking into consideration the distribution of the realty which Barbara owns and the advances that may have been made to the children, or, possibly, their obligations for borrowed funds from the mother. The written instrument neither designates nor authorizes any person to make definite and certain those matters which in the writing are left indefinite and uncertain. Clearly, this power remained in Mrs. Ladman. She never exercised it.

We are convinced that the instrument is wholly insufficient, in itself, to prove a gift to the children, and there is no other evidence in the record of a gift other than that contained in this instrument.

Plaintiff contends that this court has, in the case of *In re Estate of Ladman,* 128 Neb. 483, 259 N. W. 50, adjudicated that Barbara Ladman made a valid distribution of the fund in the bank. This contention is not well founded. The only question presented in that case was whether or not Barbara Ladman died intestate or testate. In commenting upon the

destruction of the will, the writer of the opinion did state that Barbara Ladman had made another disposition of her estate. It would have been more accurate if the writer had said that Barbara Ladman had attempted to make another disposition of a part of her estate. But the question of whether the instrument now before us was a valid instrument and constituted a gift *inter vivos* was not in issue and was not decided.

We therefore reach the conclusion that the money in the bank did not then belong to the children who attempted to make the escrow agreement. It belonged to the personal representative of Barbara Ladman. It follows that neither the plaintiffs nor Emil Ladman deposited any money in escrow, and they are not entitled to recovery of a money judgment in this action.

The judgment of the district court, in so far as it denied recovery of any of the funds, alleged to have been deposited by plaintiffs and defendant Emil Ladman in escrow, is right. Plaintiffs and Emil Ladman prayed for other equitable relief. Since it is apparent that the escrow agreement is impossible of execution, the several parties, who executed deeds and deposited them in escrow, are entitled to a return of such deeds. The cause is remanded to the district court, with directions ordering a return of the deeds, placed in escrow, to the persons executing the same. In all other respects, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

EDWIN H. TOWLE ET AL., APPELLEES, V. RICHARDSON COUNTY, APPELLANT.

FILED FEBRUARY 21, 1936. No. 29466.

1. **Appeal.** After the bill of exceptions has been quashed in the appellate court, it will be presumed that the findings of fact made by the trial court are supported by the evidence.
2. ———. Without a bill of exceptions, the only question to be considered by this court is the sufficiency of the pleadings to support the judgment.

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

J. H. Falloon and *Bayard T. Clark,* for appellant.

Mullen & Schepman, contra.

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

CARTER, J.

This is an appeal by Richardson county from a decree of the district court reducing the valuation of certain lands within Falls City School District No. 56 by 15 per cent.

The record discloses that the purported bill of exceptions filed in this case was quashed on motion of appellees. Under such circumstances, the only question before us is the sufficiency of the pleadings to sustain the judgment of the lower court. It will be presumed that the findings of fact made by the trial court are sufficiently supported by the evidence. *Lincoln Land Co. v. Commonwealth Oil Co.,* 109 Neb. 652, 192 N. W. 219; *Joyce v. Tobin,* 126 Neb. 373, 253 N. W. 413; *In re Estate of Raymond,* 128 Neb. 568, 259 N. W. 522.

The petition alleged that plaintiffs were the owners of lands used for agricultural purposes situated in Falls City School District No. 56, which district requires a tax levy for school purposes materially higher than the school taxes levied on like contiguous lands outside the district. It further alleged that, because of such higher taxes, the lands within School District No. 56 have a lower net revenue from the use thereof than other contiguous and nearby lands, otherwise of like character and value, which materially affects their market value. The petition further alleged that the assessment officers have refused to consider such tax condition in fixing the valuation of the lands in question for assessment purposes. Plaintiffs thereupon prayed for a decree reducing the assessed valuation of all agricultural lands within the district by 40 per cent. to secure uniformity with the assessed valuations placed upon

like lands outside the district but contiguous to or near the lands in question. The answer of the defendant county was a general denial.

Under the holding of this court in *Schmidt v. Saline County,* 122 Neb. 56, 239 N. W. 203, the petition in the case at bar states a cause of action. In that case, this court said: "The fact that a tract of land is subjected to an annual burden of $350 for taxation, while another tract, of like character and quality, lying adjacent thereto, is subjected to an annual burden of but $175 for taxation, has a tendency to, and no doubt does, affect the respective market or actual value of the two tracts. The one having the greater burden produces the smaller net income and, naturally, would be of less market value. Since taxes must be levied according to actual value, the taxing authorities are only concerned in determining what the actual value is, regardless of the causes which produce it, and to see that taxes are levied proportionately, according to the actual value, on all property."

Having determined that the petition states a cause of action, and it being presumed in the absence of a bill of exceptions that the evidence supports the findings of fact made by the court, the judgment ought to be and is

AFFIRMED.

VINTON S. HOWE ET AL., APPELLEES, V. PROVIDENT LOAN & INVESTMENT COMPANY, APPELLANT.

FILED FEBRUARY 21, 1936. No. 29424.

1. **Principal and Agent.** A principal is bound by the acts of his agent to the extent of the apparent authority conferred on him.
2. **Appeal:** INSTRUCTIONS. An instruction is erroneous which assumes a fact as established which is material to the case and as to the existence of which the evidence is conflicting.
3. ———: ———. Record examined, and *held* that the instruction complained of assumed the existence of a material fact in controversy, and constituted reversible error.

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

Claude S. Wilson, Roy F. Gilkeson and *Hymen Rosenberg,* for appellant.

O. B. Clark, contra.

Heard before GOOD, EBERLY and PAINE, JJ., and RAPER and PROUDFIT, District Judges.

PROUDFIT, District Judge.

This action is an appeal from the district court for Lancaster county, in which the appellees, Vinton S. Howe and Clara R. Howe, sought to recover damages from the appellant, Provident Loan & Investment Company, for damages for breach of an alleged oral contract of repurchase of certain securities which appellees had purchased from the appellant. A synopsis of the petition follows:

Appellees allege in their petition that they are husband and wife, and for more than 15 years have purchased bonds from the appellant, and that appellant orally represented to appellees that any of such bonds would be repurchased from appellees by appellant at par or face value of said bonds, together with all accrued interest, less one month's interest; that relying upon said representations and promises the appellees from time to time prior to July 1, 1932, purchased from the appellant certain bonds; that on April 1, 1929, July 1, 1929, September 1, 1929, and March 1, 1931, and at divers other times, appellant agreed with appellees that if the appellees would purchase bonds from the appellant, appellant, at any time appellees desired to cash said bonds or needed the money invested therein, would on request repurchase said bonds or any one or more of them at the option of appellees for cash, and pay immediately upon request of appellees the par or face value of said bonds, together with accrued interest less one month's interest; that appellees, relying upon said promises and agreements of appellant to repurchase said bonds, jointly purchased from the appellant on or about said dates certain bonds and paid appellant for same the consideration demanded and became the joint owners thereof; that on or about September 28, 1933, and again on December 20, 1933, and at other times,

appellees, desiring to cash said bonds, requested appellant to repurchase the same, and tendered to the appellant said bonds and offered to deliver and surrender the same to appellant; that appellant has at all times refused and declined appellees' tender of said bonds, and failed and refused to repurchase said bonds or any of them. Appellees pray judgment for damages accordingly.

The appellant in its answer admits that it sold to appellees bonds described in appellees' petition, but alleges that each and all of said bonds were sold to the appellees upon an express agreement in writing indorsed on each of said bonds; that said bonds and each of them were sold to the appellees without recourse on the appellant, and specifically denies in its answer that it or its officers, agents or servants ever represented or promised to appellees or either of them, either orally or in writing, that the appellant would repurchase said bonds sold to appellees on any terms or conditions whatsoever.

The trial was had to a jury, which resulted in a verdict and judgment in favor of appellees and against the appellant. Motion for new trial was filed by the appellant in due time and was overruled. Errors relied on for reversal are insufficiency of the evidence to support the verdict, and error in giving instruction No. 7.

In passing it may be well to say that the other errors complained of relate entirely to the sufficiency of the evidence. A careful reading of the record discloses the fact that there was sufficient evidence offered by the appellees and received, if believed, to support the verdict of the jury, and it should not be overturned unless there should be found reversible error in the admission or exclusion of evidence, or in the instructions to the jury given by the court. A careful reading of the record also discloses no reversible error in the admission of evidence or exclusion of same.

The appellant contends strenuously that there is reversible error to be found in instruction No. 7, which reads as follows:

"You are instructed that the employees of the company

mentioned in the testimony herein would have the same power and authority to bind the company by any agreement with the plaintiffs, if any you find was made."

At first reading this instruction would seem to be incomplete and that a phrase had been omitted therefrom. Evidently the court intended to say to the jury that the employees of the company mentioned in the testimony would have the same power and authority *as the executive officers of the company* to bind it by any agreement with the plaintiffs, if any you find was made. However, the meaning of the instruction is plain and the jury would undoubtedly understand from it that the law of the case was that the employees referred to in the testimony had the same power and authority as the executive officers of the company in respect to any agreement made with the plaintiffs, in the event that they found that any agreement was made. There is nothing in the record to indicate that any promise on the part of the appellant company to repurchase bonds sold by it was ever made to these appellees by any executive officer of the company. The promise relied upon was made by those who, for the purpose of this action, must be considered as employees of the appellant, and the case turns upon this proposition: Were the employees mentioned in the testimony authorized to make a repurchase agreement with the appellees when the bonds in question were sold?

The action was tried upon the theory of an express promise of the appellant corporation and not upon the existence of a custom in its business. The evidence comes far short of establishing express authority on the part of said employees to make a repurchase agreement in connection with the sale of the bonds involved herein, and the right to recover, if any, rests upon the apparent power of said employees to make such promise, as distinguished from their implied power.

It is well settled that the "principal is bound by the acts of his agent to the extent of the apparent authority conferred on him." *Webster v. Wray,* 17 Neb. 579, 24 N. W. 207.

"Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." *Thomson v. Shelton,* 49 Neb. 644, 68 N. W. 1055.

"The apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority which he has." *Creighton v. Finlayson,* 46 Neb. 457, 64 N. W. 1103. Cited with approval in *Cooper & Cole Bros. v. Cooper,* 90 Neb. 209, 133 N. W. 243.

Implied power rests upon a different basis. It arises when the situation is such that the agent by the exercise of his express power alone is not able to transact business committed to him, but finds the additional or implied power indispensable to the execution of such transaction; while the apparent power rests upon the power apparently conferred by the principal upon the agent in the transaction of his business. It is not necessary to a decision of this case to discuss the implied powers of the employees of the appellant herein, as the case does not turn upon implied powers, but upon apparent powers. The evidence presents this state of facts: The appellant occupied the same suite of rooms with another corporation, namely, the Provident Savings & Loan Association, and the employee who officiated in the major portion of the transactions with the appellees occupied an inclosed desk, called a cage in the evidence, convenient of access to the portion of the room occupied by the Provident Savings & Loan Association, as well as the portion of the room occupied by the appellant, and it appears that she was in the pay of the building and loan association, but devoted much of her time to the work of appellant, and for the purpose of this action may be said, as a matter of law, to have been an employee of the appellant. The business of appellant was that of the ordinary investment company, namely, making real estate loans, selling the notes or bonds in connection therewith, collecting the interest, and, in short, following the well known

routine of investment companies. Miss Ferguson, who was the chief witness for the appellant and the employee hereinbefore referred to, was active in the sale of loans, collection of interest, disbursement of proceeds of interest coupons when paid, and also of payments on principal notes. It is also undisputed that for many years appellant followed the practice of making repurchase agreements when investments were sold to their patrons, and, according to the testimony of Miss Ferguson, whenever a repurchase agreement was made such agreement was indorsed on the sales slip accompanying the other papers in connection with the investment, which set forth that appellant would, upon request of the holder of such note or bond, pay the principal note with accrued interest thereon, less thirty days' interest. It is also undisputed that bonds were sometimes repurchased where no agreement had been made, as a matter of accommodation to patrons. It is claimed by appellees that the bonds involved in this action were purchased from appellant (negotiations for the purchases being conducted through Miss Ferguson), and that in each instance she made an oral promise to repurchase said bonds at the request of the appellees for the face value of the bonds, less thirty days' interest. Miss Ferguson disputes this testimony and says positively that she made no such promise. She does admit that at certain times previous thereto she had repurchased certain bonds or coupons where there was no stamped indorsement of repurchase agreement on the sales slip, but that was not because of any agreement, but as a matter of accommodation to the patron, and that she had no authority to make any such agreement as relating to the bonds involved in this suit.

The jury having found against the appellant, and there being sufficient evidence, if believed, on the part of appellees to support such finding, the verdict must stand unless there is error in the admission or exclusion of testimony, or any instruction. There does not appear to be any reversible error in the rulings on the admission and exclusion of evidence. Appellees assert that the question of authority of

the representative of the investment company is not in issue in this case; that the only issue is, was the repurchase agreement made by the appellant? and that that does not involve the authority of the representative of the company to make the promise. The authority of the representative or employee may be said to be fairly within the issue as there is no contention that the promise was made by any executive officer of the appellant, but the only promise or agreement was entered into by the employee, Miss Ferguson. However, in one transaction Miss Ferguson testifies that she did not act, but another employee, Miss Hill, who was working under her in the same office, conducted the negotiations. But a fair conclusion would be that both employees were in the same category.

"Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority.

"Whether or not an act is within the scope of an agent's apparent authority is to be determined under the foregoing rule as a question of fact from all the circumstances of the transaction and the business." *Holt v. Schneider,* 57 Neb. 523, 77 N. W. 1086; *Johnston v. Milwaukee & Wyoming Investment Co.,* 46 Neb. 480, 64 N. W. 1100.

"If differing, fair inferences may be drawn by candid, impartial minds from undisputed facts in evidence, the question to be determined is not one of law for the court, but one of fact, to be solved by the trier of the facts." *Thomson v. Shelton,* 49 Neb. 644, 68 N. W. 1055.

The authority of the employees to bind appellant by a promise to repurchase securities sold to appellees was directly in issue. The burden of proof was upon the appellees to establish the authority. Instruction No. 7 assumes that the authority existed and the jury were so informed. It

seems hardly necessary to cite any authorities to establish the proposition that such instruction was erroneous. In fact, this court has said in *Miller v. Central Taxi Co.*, 110 Neb. 306, 193 N. W. 919: "It is elementary that the jury and not the court is the trier of questions of fact." In *Ogden v. Sovereign Camp, Woodmen of the World*, 78 Neb. 806, 113 N. W. 524, it is said: "Where the facts are disputed, it is solely the province of the jury to determine the same; and, whether the facts be disputed or undisputed, if different minds might honestly draw different conclusions from them, the case is properly left to the jury."

The cause should have been submitted to the jury under appropriate instructions to determine whether or not the employees of appellant had the apparent authority to make the repurchase agreement, as alleged in the petition and testified to by the appellees; and in assuming, as a matter of law, that the authority existed the court erred, and said error was prejudicial to the appellant, and for that reason the action of the trial court should be reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

FIRST TRUST COMPANY OF LINCOLN, TRUSTEE, APPELLEE, V. W. BRUCE SHURTLEFF, APPELLANT: BOYD M. RAYNOR ET AL., APPELLEES.

FILED FEBRUARY 28, 1936. No. 29478.

Trusts. Record examined, and *held* (1) that Lincoln Safe Deposit Company held $5,000 cash deposited with it by W. Bruce Shurtleff, and participation certificates purchased with the fund, as collateral security for that amount until a certain $40,000 mortgage should be reduced to $35,000, when the sum was to be returned to him; (2) that said mortgage was so reduced and the deposit company failed to return the fund or the participation certificates in which it had been invested; (3) that plaintiff succeeded to the title of the deposit company as trustee of said fund represented by investment in said participation certificates; and (4) that Shurtleff is entitled to said participation certificates

and all income derived from them. *Ordered,* that the judgment of the district court be otherwise affirmed, but that it be reversed, with directions to turn over to Shurtleff the participation certificates and all income therefrom at any time coming into the possession of plaintiff.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed in part and reversed in part, with directions.*

Flansburg, Lee & Sheldahl, for appellant.

Stewart, Stewart & Whitworth, contra.

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

GOSS, C. J.

Aggrieved by the terms of a decree of foreclosure, defendant W. Bruce Shurtleff appeals.

Plaintiff alleged that on July 21, 1932, it was, by certain decrees of the district court for Lancaster county, duly appointed successor trustee to Lincoln Trust Company and to Lincoln Safe Deposit Company; that these concerns had on July 9, 1932, been adjudicated bankrupts by the United States district court at Lincoln, and that, on August 16, 1932, the defendant L. A. Ricketts was duly appointed trustee for the bankrupts. Plaintiff further alleged that the decree appointing it trustee provided that the rights enforced by it in the mortgaged property involved here should be retained by the United States district court and that, by the decrees, plaintiff has succeeded to all the rights, duties and interests of said companies, including the right to bring this action as trustee for the bondholders.

Plaintiff alleged that on December 1, 1925, defendants W. Bruce Shurtleff and Elsa A. Shurtleff, his wife, borrowed $40,000 of the Lincoln Safe Deposit Company and gave their 62 notes or bonds, bearing interest at 6 per cent., interest payable semiannually, and 10 per cent. after maturity, due on various dates, beginning in six months and

the last in five years (with the Lincoln Trust Company as trustee for the holders of said bonds, if held by other parties than the mortgagee), secured by a mortgage on described real estate, but which is commonly known as the Pershing Apartments; that as a part of the same transaction and as further security defendants Shurtleff assigned to the safe deposit company a certain $12,000 note and mortgage held by them on Kansas land, and commonly known as the McDonald mortgage; that later the Shurtleffs conveyed the Pershing Apartments to defendants Raynor and Erickson by a deed in which the grantees agreed to pay the notes and mortgage on the property; that on March 25, 1927, at the request of the Shurtleffs, the safe deposit company reassigned the McDonald mortgage to defendants Shurtleff and in consideration thereof defendant W. Bruce Shurtleff deposited with the safe deposit company $5,000, with the oral agreement (1) that it should draw interest at not less than 5 per cent. from March 25, 1927, until returned to Shurtleff or applied on the loan, (2) that it should be invested by the safe deposit company in investments acceptable to it, and (3) that said sum or investments purchased therewith should be held by the safe deposit company as collateral security for said loan; that thereafter with said sum the safe deposit company purchased certain "participation certificates" (and made some substitutions in these certificates); that on November 21, 1930, defendants Raynor and Erickson entered into extension agreements in writing, extending the maturity dates of bonds, with new coupons evidencing the interest, the last maturity date being extended to December 1, 1932; that as a part of the transaction of extension Raynor and Erickson, as further security, gave a chattel mortgage on the furniture, fixtures and equipment and assigned the rentals; that subsequent to the execution of the original bonds and mortgage the safe deposit company sold and transferred all of the bonds to various persons who are now the owners thereof; that the first 14 bonds, aggregating $6,000, have been paid with interest, that taxes for 1930 and subsequent years are

unpaid and original bonds totaling $34,000 are due and unpaid, so that plaintiff alleged upwards of $37,000 due and prayed foreclosure.

Defendant W. Bruce Shurtleff answered the petition, admitted the execution of the original mortgage, its extension by agreement with Raynor and Erickson, alleged that this extension relieved him from further liability, admitted that $6,000 had been paid on the original bonds, with interest, and that the interest has been paid on the remaining bonds up to December 1, 1931. Then defendant cross-petitions that he applied to the Lincoln Safe Deposit Company for a loan of $40,000, that he was informed the loan was approved for $35,000, but, if he wished $5,000 more, additional security for it would be required; that to secure the extra $5,000, and for that only, he transferred the $12,000 McDonald mortgage and obtained the $40,000 loan; that later the McDonald mortgage was reassigned to him and he deposited $5,000 in cash in accordance with an oral agreement between the safe deposit company and himself that (a) the money was to be held as collateral security for so much of the original loan as exceeded $35,000, and that as soon as the original loan was reduced to $35,000 the $5,000 cash would be returned to him; (b) that he was to receive interest at 6 per cent. semiannually on the $5,000 so long as retained by the company, and (c) that the $5,000 was not to be invested in securities of any type without express permission of Shurtleff; that the original loan was reduced to $35,000, but the safe deposit company refused, on request, to pay the $5,000 to Shurtleff and contrary to the oral agreement converted it and invested it in the participation certificates set out in the petition; that thereafter plaintiff, although it was its duty as trustee to be neutral, conspired with the bondholders to appropriate Shurtleff's $5,000 and interest from March 25, 1927, to date, and appropriated the rentals of the apartments.

In reply to the answer of Shurtleff, plaintiff alleged that in the answer filed by defendants Raynor and Erickson they allege that the real estate is the homestead of the Raynors

and claim that the chattel mortgage and assignment of rents are void and unenforceable; that in their answer said defendants asked that the extension agreements, the assignment of rents and the chattel mortgage be declared null and void and the real estate be declared to be the homestead of defendants Raynor (the transcript here contains no pleading of any kind by defendants Raynor and Erickson); plaintiff alleged that in compromise with said defendants plaintiff entered into a stipulation on December 7, 1933, with them admitting that the chattel mortgage is a first lien, giving plaintiff certain rents from the apartment building and allowing the Raynors to occupy one certain apartment rent free until December 31, 1934; plaintiff denied every allegation of the cross-petition not admitted.

The decree of the court found that the $40,000 bonds and mortgage, the extension agreement, the chattel mortgage and assignment of rents, were executed and delivered as alleged in the petition; that the $12,000 McDonald note and mortgage were transferred and delivered as further security and as a part of the same transaction; "The court finds that subsequent to the execution of said bonds said Lincoln Safe Deposit Company sold and transferred all of said bonds to various persons who are now the owners thereof;" that subsequent to the assignment of the McDonald note and mortgage to the safe deposit company and on March 25, 1927, "when all of said bonds were owned and held by other parties than the Lincoln Safe Deposit Company," Carlsen, then president of the mortgage company, reassigned to Shurtleff the McDonald note and mortgage without the knowledge or consent of the bondholders and accepted in lieu thereof from Shurtleff $5,000 in cash, which Carlsen, without the knowledge or consent of the bondholders, agreed to return to Shurtleff when the indebtedness was reduced to $35,000; that without the consent of Shurtleff the safe deposit company purchased, with the $5,000, participation certificates described in the petition; that by reason of the foregoing the "Lincoln Safe Deposit Company held said participation certificates in lieu of said

McDonald note and mortgage and as further security for said entire indebtedness evidenced by all of said bonds." The decree also found that, if the real estate and chattels on a sale failed to produce enough at sheriff's sale to satisfy the amount due plaintiff, then the plaintiff shall be entitled to a supplemental decree foreclosing Shurtleff's interest in the certificates. The decretal part follows the above findings.

Nowhere in its pleadings did plaintiff allege that the $5,000 cash was substituted for the McDonald note and mortgage by Carlsen, representing the safe deposit company, and Shurtleff, representing himself, without authority to Carlsen on the part of the safe deposit company, or of the bondholders. It is not alleged by plaintiff that the mortgagee did not own all the bonds, or that a single bond had been sold, at the time the substitution was made. There is no evidence that at that time any of the bonds had been sold or that the mortgagee did not still own all of the bonds. The evidence as to the ownership of the bonds is contained in a short stipulation made by the parties on the trial to the effect that "the bonds secured by the mortgage on the real estate involved in this action were sold by the original mortgagee to various parties who are now the owners and holders thereof." There was testimony by Carlsen saying "We didn't have the bonds," but the context shows that he was then being questioned about the Lincoln Trust Company and that his statement refers to that corporation and not to the safe deposit company. We are of the opinion that the pleadings and the evidence did not justify these particular findings that there was an agreement on the part of Carlsen, but made without authority, to return the $5,000 when the principal was reduced to $35,000. If he made the agreement when the mortgagee still owned the bonds, he had authority to bind the mortgagee.

The serious question here, however, is whether the evidence shows that the $5,000 was collateral for the whole $40,000 of the mortgage loan or whether, as Shurtleff claims, it was to be collateral for the first $5,000 of the loan

and was agreed to be returned when the mortgage debt was reduced to $35,000. This is the main issue in the case.

That the $12,000 McDonald mortgage was presumably collateral security for the whole $40,000 original mortgage debt is presumptively fixed by the recital in all of the original bonds signed by Shurtleff and wife describing the McDonald mortgage as collateral security. The assignment by the Shurtleffs of the McDonald mortgage also refers to it as collateral security for the $40,000 loan. As long as the bonds secured by the mortgage were not in the hands of innocent holders but belonged to the safe deposit company, oral testimony could be offered to show that the McDonald mortgage was collateral for only the excess of the mortgage over $35,000. Shurtleff testified in support of what he pleaded in that respect and his testimony on that is opposed by the testimony of Carlsen.

But as to the agreement between Carlsen, representing the mortgagee, and Shurtleff, as to the status of the $5,000, the evidence is quite different. A very convincing piece of evidence is the check itself by which the $5,000 was paid. The check was made by Shurtleff in favor of Lincoln Safe Deposit Company on March 23, 1927, and was cleared and stamped paid the next day. In the upper left-hand corner appears these words in writing: "To be held with Pershing Apt. loan and returned when principal is reduced to $35,000." Mr. Shurtleff is further corroborated in his version that he was to get the $5,000 back when the mortgage was reduced to $35,000 by Boyd M. Raynor. Mr. Raynor testified that, when he had his second interview with Mr. Carlsen, which was in November, 1930, about a renewal of the loan on the Pershing Apartments, he and Carlsen and Shurtleff were negotiating the matter in a back room of the safe deposit company and were discussing the $5,000 which Shurtleff had deposited. He testified: "I am not sure who did the talking, but I can give you the substance of the conversation. It was to the effect that, when the loan was reduced to $35,000 we were to become obligated direct to the Lincoln Trust Company and Mr. Shurtleff was to be out."

Frequently the witnesses and even the attorneys became confused as to Lincoln Trust Company and Lincoln Safe Deposit Company and used one name when it is clear they meant the other. They had the same offices and probably the same officers. Even the check heretofore referred to was indorsed by a stamp that printed the names of both companies. Mr. Raynor probably meant the safe deposit company when he named the other company. At any rate he was clear as to what was the substance of the agreement. The trial court found that Carlsen, as president, agreed to return the $5,000 when the mortgage loan was reduced to $35,000, but that the agreement was without authority because the rights of the bondholders had intervened and therefore Carlsen was without authority. As we have shown, it was neither pleaded nor proved that any of the bonds had been sold when the agreement was made. We find from the evidence that the agreement was made, that Carlsen had authority to make it, that it is enforceable, that the mortgage was reduced to $35,000, that the safe deposit company became trustee for Shurtleff for the return of the $5,000 and interest thereon, or for any investments it made in participation certificates, that plaintiff as successor trustee holds said participation certificates and any income derived from them as trustee for cross-petitioner, Shurtleff, and ought to assign and turn over to him all such certificates and income from them now held by it.

The judgment of the district court is affirmed as to the foreclosure, but as to the $5,000 claimed by Shurtleff, appellant, it is reversed, with directions to enter a decree in accordance with this opinion.

AFFIRMED IN PART AND REVERSED IN PART.