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REPORTS OF CASES

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1936

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HENRY P. STODDART
OFFICIAL REPORTER

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

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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IN MEMORIAM

JAMES RENWICK DEAN

At the session of the Supreme Court of the State of Nebraska, June 1, 1936, there being present Honorable Charles A. Goss, Chief Justice, Honorable William B. Rose, Honorable Edward E. Good, Honorable George A. Eberly, Honorable L. B. Day, Honorable Bayard H. Paine, and Honorable Edward F. Carter, Associate Justices, and Honorable Lewis H. Blackledge and Honorable Harry D. Landis, District Judges, the following proceedings were had:

May it Please the Court:

Your Committee on Memorial to James Renwick Dean ask leave to submit the following memorial and tribute:

James Renwick Dean, a member of this court for many years, died at his home in Broken Bow, Nebraska, on the 5th day of January, 1936. During his lifetime, he made many and valuable contributions to the advancement of the profession of law, to the progress of the judiciary, to the enrichment of the science of jurisprudence, and to the promotion of the welfare of his state. It is therefore fitting that, here in this magnificent building erected by the state he loved so well, we as fellow members of his profession should submit to you, his former colleagues on the bench, a tribute to appear permanently in the books of that science which he so faithfully served.

He was born in St. Louis, Missouri, September 15, 1862, the son of Henry and Ellen Margaret Dean. He was educated in the public schools at Decorah, Iowa, and at the University of Michigan, from which latter institution he received the degree of Bachelor of Laws in 1885. In the

same year, he was admitted to the bar of the State of Illinois and practiced law in the City of Chicago until 1889, when he moved to Broken Bow, Nebraska, and there took up his residence and the practice of law in this state. He established such a splendid record as a lawyer and upright citizen that, in the year 1909, when the Supreme Court of Nebraska was by constitutional amendment enlarged from three to seven members, Governor Sheldon selected and appointed him as one of the four additional members of this court to serve until the succeeding general election. In the year 1916, he was elected by the people of the state at large for a full six-year term as a member of this court, and was reelected in the year 1922 and again in the year 1928 from the Sixth Supreme Court Judicial District. After a service of eighteen consecutive years on this bench, he was forced to retire because of illness. His last term expired just a year prior to his death. He was married at Broken Bow, Nebraska, on January 14, 1892, to Jennie E. Sutton, and to this marriage two children were born, Paul and Dorothy. His wife and children survive him.

As a lawyer, James R. Dean made an impression on his day and generation. He possessed strong qualities of mind and body which induced him to labor for things that were useful, exalted and right. To him professional success was not the sole test to be applied in determining the position or standing of a lawyer. With special talents one may devote them to acquiring wealth, or to a struggle for fame, or for pleasure, yet Judge Dean believed that the real test of the character and standing of a lawyer is to be judged not by what he has secured for himself but to what extent he has employed his ability and talents in elevating the ideals and standards of law and justice.

His goal was ever even-handed justice between man and man. His lode-star was the ascertainment of what was right. His opinions were clear, terse and readable, and disclosed extreme painstaking care and industry in their preparation. He weighed deliberately and dispassionately, decided impartially and justly. More could not be asked of any judge.

To the bar of Nebraska, Judge Dean bore a near and close relationship that brought out his fine social qualities, his strong and splendid nature, and the loyalty he extended to those that came within his circle. He was a man of impressive stature and handsome appearance with a suggestion of power, courage and good nature. In character he was upright and true. He was kind and sympathetic in nature, charitable in thought and expression, and possessed a straightforward and gentle manner. To friends, associates and members of the legal profession, as well as all others he came to know, he was sociable, sincere, unselfish and loyal. He accomplished much during his life in an unassuming and unostentatious way. The whole pattern of his life was that of a simple, direct and honest man.

Judge Dean will be remembered in this state for his sterling character as a man and his splendid record as a lawyer and as a member of this court for many years. He gave the best that was in him to the work of this court and the spirit of the man is found in his opinions. It is only necessary to read them to understand that an exalted and rugged sense of duty controlled him in all his official acts.

Resolved, that this tribute to Judge Dean's character as a man and to his ability as a lawyer and as a judge be spread upon the records of this court, and that a copy be sent to members of his family.

Respectfully submitted,

WALTER D. JAMES
JESSE L. ROOT
THOMAS S. ALLEN
NEIL H. MAPES
N. P. MCDONALD
Committee

Honorable Walter D. James.

If it Please Your Honors:

I would like to supplement the foregoing memorial by a few personal observations.

Words are wholly inadequate to express the feeling that I possessed with respect to Judge Dean. His kind and sympathetic interest, his counsel and guidance, his personal friendship and understanding, have meant much to me. His passing marked a deep personal loss.

In the fall of 1918, the post of secretary to Judge Dean became vacant, and it was my good fortune to be selected by him to fill the post. I was then attending the Law College of the University of Nebraska. I served as his secretary for a year and a half during the nine months of my senior year in the Law College, and for nine months succeeding my graduation. During that time I came to know and appreciate the real man that he was.

He was human. He loved to stop and visit with people and ascertain their point of view. No matter what their station in life was, high or low, bank president or elevator boy, he was always glad to exchange greetings and swap stories. The welfare of his fellow men was a matter of genuine interest to him.

He was generous. Many were the persons that he helped and many were the charities that he contributed to, of which no one except those closely associated with him knew anything about. He did not advertise his benefactions but received quiet enjoyment from the mere fact of helping others.

He was kind. This characteristic was perhaps more noticeable than others, and was reflected in the opinions that he wrote; he tempered the written letter of the law with a kind and sympathetic interpretation that revealed the big heart that he possessed.

He was just. He respected the oath that he took as a judge and lived up to it. One incident happened while I was his secretary that I will never forget. It was during the celebrated Cole and Grammer litigation. One Friday

afternoon he came up from the consultation room and the lines in his face seemed deeper and heavier. At that time the new Capitol building had not been built and his office was in the west wing of the old Capitol. His desk was immediately in front of a large window facing west. Seating himself at the desk he said: "We adopted the opinion in the Grammer case today." The sun shone from the west on his white hair as he wheeled around in his chair and looked out the window. After remaining silent for a time he said: "I dislike to see the imposition of the death penalty on any person. I would like to see capital punishment abolished altogether. But the law provides for its imposition in a proper case and it is my duty to follow the law as it is."

In the deliberations of our committee, I think a true appraisal of Judge Dean was aptly expressed in one sentence by Judge Root, a former colleague of his upon the bench. Judge Root stated, and the sentence is contained in the report of our committee: "The whole pattern of his life was that of a simple, direct and honest man."

Of the seven men that graced this bench while I was in his office, six have now had memorials presented to this court. Judge Sedgwick died at Christmas time of that year. Judge Cornish passed away the following spring. At intervals in the following years Judge Aldrich, Judge Letton and Chief Justice Morrissey passed on. Judge Dean was next of the last to go. Only His Honor, Judge Rose, sitting on this bench today, now remains to carry on. That was a great court, and not the least among them was Judge Dean.

In closing may I express this sentiment: He lived a good life; he left his impression on the world; and his memory will not soon be forgotten.

Judge Jesse L. Root.

May it Please the Court:

Permit me, please, to add my tribute to the memory of Judge Dean.

Permit me also to paraphrase Shakespeare: The good that Judge Dean did lives after him; there was no evil to inter with his bones; and more important is the fact that he was a soldier of the Cross, a sturdy, Christian gentleman. And so it is, that thousands of his friends believe, at rest, he sleeps in peace beneath "that green tent whose curtain never outward swings."

Honorable Thomas S. Allen.

May it Please the Court:

It requires an effort to realize that within this chamber the familiar face and form of Judge Dean can no longer be seen. It seems but yesterday that he was here, a living and intense personality. My acquaintance with him goes back for more than a third of a century, to the time when he was beginning the practice of law at Broken Bow. Always during the intervening years he was my friend. He had all the struggles of a young lawyer incident to building up a professional position, the maintenance of business connections, interest in community enterprises, in all of which he met many men of many kinds and retained their friendship, which perhaps explains much of his ability to succeed and to serve. Judge Dean had a sense of the personal worth of the individual. We all talk about democracy and the worth of personality. Judge Dean went far towards realizing it. To him the legal profession was not just a means of making a living; it was an opportunity for the right adjustment of human affairs. To him politics was not a clash of partisanship. It was a way to promote the best living for all the people.

When Judge Dean first came to the bench, then an unknown lawyer from a western county, some one who knew

him and knew his ability said: "He may not know the law as older men, but he knows life." His service here soon convinced us all that he not only knew life, but he knew the law as well. His opinions scattered through the Nebraska Reports are sound and logical and will stand the test of time. Nothing was slurred over, nothing was guessed at, and what is of a great deal more importance, he put his own personality and the milk of human kindness into all of his opinions. His mind was broad and comprehensive and always responsive to facts and argument. By reading and studying his opinions, it is easy to see that he hated injustice and loved fairness. The wronged and oppressed always had in him a defender.

Judge Dean believed that there is still a place and a recognition for the man of ability and honesty who comes willing to serve in the legal profession. As a judge he displayed all the virtues and none of the vices sometimes found in public servants. He was patient, courteous, attentive and human. He did not let passion sway him or prejudice influence him. I think his outstanding characteristic was that he did not care to be known for his sagacity, but rather to be respected for his sincerity, honesty and impartiality. That he succeeded well, all just men must admit. Whether we view him as a citizen, lawyer or judge, he was always the same—strong, capable and warm in his friendships, a good citizen, a good judge, a man of the highest character.

Honorable Neil H. Mapes.

Judge Dean was a friend of all good. Courageous in principle, but never permitting his courage to carry him beyond the limitations of the law. His sympathies were with justice in all things. At times the letter of the law irked him, but he did his duty as he saw it; no judge can do more.

Charles A. Goss, Chief Justice.

Many years ago, I remember translating from the Latin of an old philosopher this sentiment: "Count no man happy until he dies well." As I understand the context, the theory of that ancient was that no man could be rightly appraised until he had passed away with no blemish on his character.

Measured by this standard, Judge Dean died well. The memorial and other tributes today by those who knew him will attest to this. The proceedings are ordered spread upon the journal and printed in the next Nebraska Report. They will thus be made a part of the permanent records of the court.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1936

ALBERT O. ELVIDGE ET AL., APPELLEES, V. IRVIN S. BRANT, APPELLANT.

FILED MAY 12, 1936. No. 29680.

1. **Pleading:** CONSTRUCTION. "Where an objection that a petition does not state a cause of action is not interposed until after the commencement of the trial of a case, the pleading will be liberally construed, and, if possible, sustained." *Welch v. Adams*, 87 Neb. 681, 127 N. W. 1064.
2. **Evidence.** "Where there is integration (formal written agreement) of part of the terms of a contract, prior written agreements and contemporaneous oral agreements are operative to vary these terms only to the same extent as if the whole contract had been integrated." Restatement, Contracts, sec. 239.
3. ———. "(1) An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration, nor a written agreement by a subsequent integration relating to the same subject-matter, if the agreement is not inconsistent with the integrated contract, and

   "(a) is made for separate consideration, or

   "(b) is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract.

   "(2) Where no consideration is stated in an integration, facts showing that there was consideration and the nature of it, even if it was a promise, or any other facts that are sufficient to make a promise enforceable, are admissible in evidence and are operative." Restatement, Contracts, sec. 240.

4. ———. "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." Comp. St. 1929, sec. 20-1217.
5. **Judgment:** VACATION. "After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate the judgment except for the reasons stated and within the time limited in chapter 20, art. 20, Comp. St. 1929." *Lyman v. Dunn*, 125 Neb. 770, 252 N. W. 197.
6. **Vendor and Purchaser.** "In the absence of specific provision to the contrary, the vendor must convey a title which is free from encumbrances." 66 C. J. 903.
7. **Contracts:** BREACH: DAMAGES. "The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which a fulfilment of the contract would have prevented or the breach of it has entailed." 17 C. J. 847.

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

Kelsey & Kelsey, for appellant.

Deutsch & Young, contra.

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

GOSS, C. J.

Defendant appeals from a judgment against him for $6,000 following the verdict of a jury.

The petition alleges that in May, 1933, Golden Star Creamery, Inc., was engaged in the manufacture and distribution of butter and other dairy products at Norfolk, plaintiffs were employees in charge of its operation, and defendant was a wholesaler of butter and other food products at Reading, Pennsylvania; that the creamery company was the owner of certain described real estate in Norfolk, with its plant mortgaged as real estate and its equipment by a collateral chattel mortgage to Lincoln Safe Deposit Company, as trustee for bondholders, in the sum of $30,000; that during September, 1933, with the

aid of plaintiffs, defendant negotiated the purchase of the mortgage and bonds for $20,000, and in November, 1933, they were delivered to him for that sum, and defendant became the owner by deeds and bills of sale of all the creamery property in consideration of his agreement to forbear any right to a deficiency judgment against Golden Star Creamery, Inc., or to enforce any rights against its directors and stockholders; that defendant went into possession of the creamery property about January 1, 1934, subsequently foreclosed and received sheriff's deed and bill of sale on or about July 19, 1934, and is now the owner in fee simple of all of said property.

The petition further alleges that on or about December 15, 1933, defendant orally agreed with plaintiffs to perfect a corporate organization in the event of the acquisition of the creamery property and to sell and convey the property to the corporation in consideration of the issuance of capital stock to him, and, in consideration of $3,000 then paid by plaintiffs and, in the further consideration of their assistance, to issue to them 20 per cent. of the capital stock thereof; that defendant further orally agreed to furnish to the corporation any money necessary for working capital, to be repaid from the earnings of the corporation, and as a memorandum of the oral agreement defendant prepared an instrument in writing, which was executed by plaintiffs and defendant, a copy of which is attached as an exhibit; that defendant knew and supposed that plaintiffs understood the written agreement to embrace only the terms of the oral agreement and plaintiffs did so understand it; that about January 1, 1934, defendant, having possession and ownership of the property described as of the Golden Star Creamery, Inc., commenced the operation of the plant; that plaintiffs had previously been employed by him to manage and operate the same, and that they in all respects performed the oral agreement and offered to assist in any way in perfecting the corporate organization, but, notwithstanding, defendant wholly failed, and on or about October

13, 1934, expressly refused, to perfect the corporate organization and in any manner to perform the oral agreement; that the plaintiffs had then fully performed all of the oral agreement on their part to be performed; that by reason of the breach of the contract plaintiffs have been damaged to the extent of one-fifth of the value of the corporate stock of such corporation, holding title to the property described with available working capital, and they pray judgment for $10,000 with interest.

The agreement is as follows:

"This agreement made this 16th day of December, 1933, by and between Irvin S. Brant of Reading, Pennsylvania, first party, and A. O. Elvidge and George J. Savage, second parties, witnesseth:

"Whereas, first party is endeavoring to purchase the buildings, equipment, etc., of Golden Star Creamery, Inc., and if he does so purchase, he proposes to organize a corporation to conduct and carry on a creamery business in Norfolk, Nebraska; and second parties desire to purchase stock in said creamery company and are willing at this time to pay to first party the amount of such purchase price, stock to be delivered when said new organization is completed, and it is desired to state the terms of the agreement.

"Now therefore, in consideration of the premises and each party for a valuable consideration received by him, it is agreed as follows:

"1. There is paid by second parties to first party at this time, the sum of $3,000, which is in payment for the stock hereinafter described, if any and when same is issued.

"2. First party, if and when he acquires the said property of said Golden Star Creamery will form a corporation with a paid-up capital of three hundred (300) shares of the stated par value of $10 per share, and upon the forming of said corporation, second parties assisting in the formation thereof as subscribers to stock, sixty (60) shares of said stock will be delivered to second

parties; or in the event that the number of shares in said corporation should be changed, then second parties are to have one-fifth of the total number of shares of paid-up stock of said corporation, and first party agrees that said corporation shall issue said stock to second parties, or that the same shall be transferred to them.

"3. Second parties agree that the $3,000 now paid to first party is in payment for said shares of stock so to be purchased by them from first party, and agree to accept said shares of stock as the full consideration for said $3,000.

"It is mutually understood by all of the parties to this contract that they each and every (one) understand the situation, that there are no representations of any kind or nature of said stock made by any of them, and that each and every party to this transaction enters into the same on his own knowledge and not on any representation or statement made by any of the other parties to this transaction.

"This agreement shall be binding upon parties hereto, their heirs, representatives and assigns.

"Made, executed and delivered in duplicate the day and year first above written.

"Witness: Charles H. Kelsey. (Signed) Irvin S. Brant
"First Party.
"A. O. Elvidge
"G. J. Savage
"Second Parties."

The answer alleges that, in addition to the principal mortgage and bond lien, the Golden Star Creamery property had a large amount of taxes unpaid and there were other liens and encumbrances; alleges that he purchased the notes, bonds and mortgages representing $30,000 of indebtedness and went into possession of the property as mortgagee on December 16, 1933, commenced an action to foreclose, has received a deed and bill of sale of the property, but a motion to set aside the sale was filed and has never been disposed of; denies each and

every other allegation of the petition; defendant further pleads a "tentative plan" that, if and when he secured title to the property, he would cause to be organized a corporation and would either lease the property under terms by which he would receive 6 per cent. interest on the total amount of indebtedness which he had purchased, or he would convey the property and take back a mortgage for the total amount due on the debts and all expenses, the new corporation to contract with defendant to apply all profits to pay the principal and interest; that plaintiffs paid to defendant $3,000 to secure stock, and that articles of incorporation have been filed and the corporation is acting, but that the time for completing the transaction has not arrived because of the inability of defendant to secure title and to issue the stock; defendant expressly denies that there was any agreement by which the property secured by him under the mortgages purchased was to become part of the assets of the corporation free and clear of encumbrances.

Defendant further alleges that plaintiffs took part in the negotiations by which defendant purchased the bonds and mortgages and organized the corporation, either to receive from it a rental or a mortgage for the amount due, as heretofore stated, and they are therefore estopped to assert that the property is to go into the new corporation on any other basis than that alleged by defendant. Plaintiffs' reply traverses the answer.

No objection was made to the petition until the trial had started. Then defendant interposed the objection that the petition did not state a cause of action against defendant. "Where an objection that a petition does not state a cause of action is not interposed until after the commencement of the trial of a case, the pleading will be liberally construed, and, if possible, sustained." *Welch v. Adams*, 87 Neb. 681, 127 N. W. 1064, and cases cited.

Defendant's position is that the agreement pleaded by plaintiffs—that defendant was to organize a corporation and to pay plaintiffs for their money and services one-

fifth of the stock in the corporation—was not proved by competent and material testimony. His reason is that all of the negotiations of the parties were merged in the written contract of December 16, 1933.

That the written memorandum is not clear and unambiguous appears from the pleadings of the parties and also from the agreement itself. It says that "It is mutually understood by all of the parties to this contract that they each and every (one) understand the situation;" in his demurrer *ore tenus* defendant stated that "such contract is indefinite and uncertain;" there is no provision by which plaintiffs are expressly permitted to recover back the $3,000 advanced for stock; not only the pleadings but the evidence show that the written contract was ambiguous, indefinite and uncertain; it was necessary to have the evidence submitted to a jury to determine the real and entire agreement, oral and written, between the parties.

On the theory that the agreement was partly written and partly oral, we quote from Restatement, Contracts, sec. 239: "Where there is integration (formal written agreement) of part of the terms of a contract, prior written agreements and contemporaneous oral agreements are operative to vary these terms only to the same extent as if the whole contract had been integrated." In Nebraska annotations to this section it is said: "The parol evidence rule does not apply unless the written instrument fairly covers the matters dealt with in the oral agreement. In other words, it must be an integration thereof. (Citing cases.) Where the integration does not purport to cover the whole agreement, oral testimony is admissible to supply omitted portions not inconsistent with the writing. (Citing cases.) So where integration shows on its face that it does not cover the entire agreement. (Citing cases.)"

Section 240, Restatement, Contracts, is as follows:

"(1) An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration,

nor a written agreement by a subsequent integration relating to the same subject-matter, if the agreement is not inconsistent with the integrated contract, and

"(a) is made for separate consideration, or

"(b) is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract.

"(2) Where no consideration is stated in an integration, facts showing that there was consideration and the nature of it, even if it was a promise, or any other facts that are sufficient to make a promise enforceable, are admissible in evidence and are operative."

Our Code is much broader than the general rule. Section 20-1217, Comp. St. 1929, says: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it."

We think the court did not err in overruling the demurrer to any evidence and in receiving oral testimony as to the real contract between the parties.

Defendant pleaded that the foreclosure of the mortgage he had acquired had never been fully disposed of. The evidence shows that the sale had been confirmed and he had received his sheriff's deed, but thereafter the trustee in bankruptcy of the Golden Star Creamery, Inc., had filed a motion to vacate the decree of foreclosure and order of confirmation. While the motion was filed during the same term at which the confirmation was had, nothing had been done to secure action upon it and several terms of court have succeeded. The matter must come within some of the provisions of section 20-2001, Comp. St. 1929, to authorize a vacation of the order at a subsequent term. This comes within none of those provisions. "After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate the judgment except for the reasons stated and within the time limited in chapter 20, art. 20,

Comp. St. 1929." *Lyman v. Dunn,* 125 Neb. 770, 252 N. W. 197.

Complaint is made of instructions Nos. 6 and 7. We do not deem it necessary to quote them. Instruction No. 6 required a clear meeting of the minds whether the contract was in writing or parol or both. It required plaintiffs to prove the alleged agreement in "clear and express terms," which is as strong if not stronger than by a preponderance of the evidence as set forth elsewhere in the instructions. It set forth the following elements to be proved by plaintiffs: (1) That defendant would acquire the property both real and personal of Golden Star Creamery, Inc.; (2) that he would organize a new corporation; (3) that he would convey the property so acquired to it; (4) that he would issue 20 per cent. of the stock to plaintiffs for the $3,000 paid him and for other services of the plaintiffs; and (5) that the property when conveyed to the new corporation would be free from encumbrances except taxes.

Defendant objects to the last-numbered element because, he argues, it was too far separated from the rest by a semi-colon. On the other hand, plaintiffs say that the instruction was erroneous on that point because it was not necessary as a matter of law for them to prove more than the agreement of defendant to convey; that the law implies from such an agreement that the property shall be free from encumbrances. "In the absence of specific provision to the contrary, the vendor must convey a title which is free from encumbrances." 66 C. J. 903.

By instruction No. 7, also complained of by defendant, the court instructed the jury: "You are instructed that an agreement to convey land is in legal effect an agreement to convey a title to the land, and in the absence of a stipulation to the contrary the law implies an undertaking on the one conveying the same to make a good title clear of encumbrance." This instruction correctly states the law, and the other one (No. 6) favored defendant by requiring plaintiffs to prove that the agreement between

the parties was that the property was to be conveyed free of encumbrances.

There was no evidence of any stipulation or provision to the contrary as to the encumbrances on the property to be conveyed by defendant to the new corporation. Indeed, defendant testified that he never agreed to convey any property to it. The jury settled that question.

Defendant is willing to pay back the $3,000, but objects to the rest of the verdict.

"The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which a fulfilment of the contract would have prevented or the breach of it has entailed." 17 C. J. 847—citing *Schrandt v. Young*, 2 Neb. (Unof.) 546, 89 N. W. 607. This opinion was written by the late Judge George A. Day, then a commissioner of this court. See, also, *Western Union Telegraph Co. v. Wilhelm*, 48 Neb. 910, 67 N. W. 870, and *Diels v. Kennedy*, 88 Neb. 777, 130 N. W. 740.

Other errors are assigned, but we think they are covered by the preceding discussion. We find no prejudicial error. The judgment of the district court is

AFFIRMED.

CITIZENS NATIONAL BANK OF MUSKOGEE, APPELLANT, V. ROSCOE RAWLEY, APPELLEE.

FILED MAY 12, 1936. No. 29670.

1. Assignments: EVIDENCE. An assignee of a chose in action makes a *prima facie* case by proving the execution of a valid legal contract, the assignment thereof, the performance by the assignor, and the failure of the debtor to pay the contract price.
2. ———. The assignee of a chose in action acquires no greater rights than those of the assignor.
3. ———: DEFENSES. "An assignee's right against the obligor is subject to all limitations of the obligee's right, to all absolute and temporary defenses thereto, and to all set-offs and counter-

claims of the obligor which would have been available against the obligee had there been no assignment, provided that such defenses and set-offs are based on facts * * * arising thereafter prior to knowledge of the assignment by the obligor." Restatement, Contracts, sec. 167 (1).

4. Evidence. Where a defendant pleads a set-off or counterclaim, as in this case, which is denied, the burden of proving it is upon him.
5. ———. Payment is a defense which, to be available, must be pleaded and proved.
6. Assignments: DEFENSES: NOTICE. Notice is immaterial unless the party liable on the assigned contract has after the assignment acquired some defense. As to such defenses, the assignment takes effect from the time notice is given the obligor.

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

Fradenburg, Webb, Beber, Klutznick & Kelley, for appellant.

Marcell & Caldwell, contra.

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

DAY, J.

The Citizens National Bank of Muskogee, Oklahoma, brings this action upon an assignment of a contract to drill an oil well by Hutchinson with Roscoe Rawley. Hutchinson contracted with Rawley on July 5, 1933, to drill an oil well to a depth of approximately 1,500 feet for $1,250 in cash and, in the event of a producing well, an assignment of an undivided one-half interest in the lease on said land. Hutchinson on July 8, 1933, assigned this contract to the bank as collateral and was on that day loaned $550, and later was advanced other sums upon the credit of this contract. The plaintiff's petition alleged the contract between Hutchinson and Rawley, the assignment thereof to the bank for a valuable consideration, performance by Hutchinson of the contract, and the failure of Rawley to pay the contract price to it. The defendant's

answer is a general denial, and in addition a plea of payment to Hutchinson without knowledge or notice of the assignment.

At the conclusion of the plaintiff's testimony, the trial court directed a verdict in favor of defendant. The correctness of this judgment is challenged by this appeal. In reviewing a peremptory instruction in favor of defendant, it is a well-established rule that this court will assume the existence of every material fact which the evidence tends to prove. *Paxton v. State*, 59 Neb. 460, 81 N. W. 383; *Gilbert v. Bryant*, 125 Neb. 731, 251 N. W. 823. Measuring the plaintiff's evidence by this standard, it is established that the contract was executed and assigned to the bank for a valuable consideration; that Hutchinson did not repay the bank the loans made to him; that the defendant has not paid the bank anything on the assigned contract; and that the contract has been fully performed by Hutchinson.

An assignee of a chose in action makes a *prima facie* case by proving the execution of a valid legal contract, the assignment thereof, the performance by the assignor, and the failure of the debtor to pay the contract price.

Of course, the assignee of a chose in action acquires no greater rights than those of the assignor, and the debtor may usually avail himself of the defenses available to him against the assignor. *Lincoln Nat. Bank & Trust Co. v. School District*, 124 Neb. 538, 247 N. W. 433.

In Restatement, Contracts, sec. 167 (1), this rule is announced: "An assignee's right against the obligor is subject to all limitations of the obligee's right, to all absolute and temporary defenses thereto, and to all set-offs and counterclaims of the obligor which would have been available against the obligee had there been no assignment, provided that such defenses and set-offs are based on facts existing at the time of the assignment, or are based on facts arising thereafter prior to knowledge of the assignment by the obligor." This states the well-established law of Nebraska as evidenced by the cases cited

in the Nebraska annotations, among which is *Henefin v. Live Stock Nat. Bank,* 116 Neb. 331, 217 N. W. 91. See, also, *Lincoln Nat. Bank & Trust Co. v. School District, supra,* and *State v. Platte Valley State Bank,* 128 Neb. 562, 259 N. W. 643.

But where a defendant pleads a set-off or counterclaim as in this case, which is denied, the burden of proving it is upon him. If the assignor owed defendant herein money prior to the execution of the contract as is contended, the burden is upon him to prove the same as a defense. *Ellis v. Cothran,* 117 Ill. 458, 3 N. E. 411; *Sayles v. Quinn,* 196 Mass. 492, 82 N. E. 713; *Muir v. Kalamazoo Corset Co.,* 155 Mich. 441, 119 N. W. 589.

It is the general rule that the defense of payment must be specially pleaded if it is to be relied upon. Payment is specially pleaded in this case, but it is an affirmative defense. In the instant case, payment is not established by the plaintiff's evidence. The rule is well established in this state that payment is a defense which, to be available, must be pleaded and proved. *Ashland Land & Live-Stock Co. v. May,* 51 Neb. 474, 71 N. W. 67; *Omaha Alfalfa Milling Co. v. Hallen,* 105 Neb. 193, 179 N. W. 1010; *Wyman v. Williams,* 52 Neb. 833, 73 N. W. 285.

Much of the oral argument before the bar of this court concerned the admissibility of evidence as to the notice of the assignment given the defendant. Notice is immaterial unless the party liable on the assigned contract has after the assignment acquired some defense. As to such defenses, the assignment takes effect from the time notice is given the obligor and not from the time of the assignment. In the absence of such defenses, want of notice is immaterial and is not required by our statutes.

REVERSED AND REMANDED.

EDWARD C. HEMMER, APPELLANT, V. METROPOLITAN LIFE INSURANCE COMPANY, APPELLEE.

FILED MAY 12, 1936. No. 29654.

1. **Insurance: CONTRACT.** When the certificate delivered to an employee, to certify that he is insured under a group or master policy issued to his employer, is also executed by the same insurance company which issued the group policy, then such policy, the application therefor, the certificate given the employee, and all amendments and riders attached to each, together constitute the entire contract between the employee and the insurance carrier.
2. ———: ———: **CONSTRUCTION.** When the language in an insurance policy is ambiguous, indefinite, or its provisions are in seeming conflict, such language should be construed most strongly against the company, which with great care had chosen the language in which the policy is couched.

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

Fradenburg, Webb, Beber, Klutznick & Kelley, for appellant.

Harley G. Moorhead, contra.

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

PAINE, J.

Plaintiff brought action for total and permanent disability under the terms of a group insurance policy issued to the employees of defendant company. Defendant filed demurrer to the amended petition, which demurrer was sustained, from which ruling the plaintiff appeals.

The plaintiff was an employee in the Omaha office of the Metropolitan Life Insurance Company, and was eligible to participate in a policy of group insurance in said company. Such insurance took effect April 1, 1929, when he began his employment as their agent. He was unable to continue his duties on June 24, 1933, because of a fall,

in which he was injured, which had occurred in December, 1932. The shock to his lower spine had caused the use of his lower limbs to be impaired, resulting in general arthritis, so that he could not keep up his work after said June 24, 1933, from which date he began to receive the temporary disability payments, which continued for one year. After he had received temporary disability benefits for one year, he applied for total and permanent disability benefits. It is admitted that more than five years had then elapsed since he was first employed by the company on April 1, 1929, yet the fact was that he had not been able to perform any services for the company after the date he began receiving his temporary disability, and therefore the defendant argues, in support of its demurrer, that plaintiff never completed five full years of service, as he was not active in the company's service after the beginning of the payment of the temporary disability.

One should not become confused by the fact that it so happened that the employer for whom the plaintiff worked was, in the final analysis, the same company which issued the group insurance policy under which all employees were insured. The defendant claims that the group policy provided that any employee with five years of service, who had been a continuous contributor to the group insurance for not less than four years and six months, could make proof for total and permanent disability benefits as soon as he had received temporary disability benefits for one year, and insists that, as plaintiff was employed on April 1, 1929, at the time that he applied for total and permanent disability benefits he had never completed five years' service.

On the other hand, the plaintiff calls our attention to the photostatic copies of the two instruments attached to the petition as exhibits. The first is certificate No. 5681, issued to the plaintiff, and consists of four pages, and is founded on group insurance contract No. 50, which consists of 24 pages.

The plaintiff insists that under paragraph 3 of the certificate, and on page 3D of the master or group policy, appears the following paragraph, identical in each instrument, and reading as follows: "The service of an employee who has been in receipt of disability benefits shall be deemed to terminate, as of the last day of the period for which such benefits were paid, unless he shall immediately have been granted and shall have actually resumed active employment with the employer."

It clearly appears from this paragraph that the "service" of the plaintiff did not terminate when he began to draw temporary benefits, but continued up to the very last day of the time of payment of such temporary benefits, at which time he had then been in "service" more than the required five years, and was eligible to draw total and permanent disability benefits so far as the provision requiring five years' service with the company was concerned.

We are directed to examine several authorities by the defendant company. In *Thull v. Equitable Life Assurance Society*, 40 Ohio App. 486, 178 N. E. 850, recovery was sought for the death of an employee under a group insurance policy issued upon the employees of a manufacturing company. This employee was temporarily discharged July 17, 1930, and was instantly killed in an automobile accident August 3, 1930. The group policy provided the employees should be insured for the term they shall remain in the employment of the manufacturers. This employee had been paid off in full July 17, and 60 cents had been deducted for the group insurance policy for the month preceding the date of his discharge. It was held that the certificate delivered to the employee was no part of the contract of insurance; that such certificate is only a recitation of his right of protection under the terms of the group insurance policy, and that the certificate can give no greater rights than is provided in the policy itself. Doubtless the certificate in this case was one issued by the manufacturing company, and very

properly the insurance company issuing the original group policy would not be bound by a certificate issued by the firm which bought the group policy.

However, in the case at bar the more usual custom was followed of having the same company which issues the group policy No. 50 also issued the certificate No. 5681 to the employee, and in such case the application, the group policy, the certificate, and all riders or amendments attached would together constitute the entire contract between the parties.

In the case of *Leach v. Metropolitan Life Ins. Co.*, 124 Kan. 584, 261 Pac. 603, it is held that, where an employer insured its employees under a group insurance policy and later makes application for additional insurance, which is accepted, the original application, the original policy, and insurer's acceptance of the amendments, and all other writings constituting the contracts must be considered and construed together in order to ascertain the intention of the contracting parties as to the insurance effected by such contracts. Several other cases are cited in the annotation on group insurance found in 55 A. L. R. 1245: *Bradley v. Prudential Ins. Co.*, 70 Fed. (2d) 988; *Seavers v. Metropolitan Life Ins. Co.*, 230 N. Y. Supp. 366, 132 Misc. Rep. 719; *Gulf Refining Co. v. Home Indemnity Co.*, 78 Fed. (2d) 842.

It appears to the court that there is no conflict in the case at bar between the provisions of the group policy and the certificate issued to the plaintiff and founded thereon, and that there were just two requirements necessary before he could begin receiving total and permanent disability benefits under this group policy. The two requirements were, first, that his disability must have continued for 53 weeks, which it had in the case at bar; and, second, that he must have completed five years of service for the company before the date of the commencement of such disability. His time of employment was but four years, two months and 23 days when his disability payments began, yet the year during which he

drew temporary disability counted as "service" because he was legally still in service, according to the paragraph cited herein.

Provisions in contracts of insurance, which are clearly set forth in appropriate language, and upon which the calculations of the insurer are based, should be enforced, and the court will not rewrite contracts for the parties. *Himelbloom v. Metropolitan Life Ins. Co.*, 128 Neb. 52, 257 N. W. 525; *Williams v. Union Central Life Ins. Co.*, 291 U. S. 170, 78 L. Ed. 711; *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N. W. 397.

In construing these instruments, we find very helpful the following paragraphs from Restatement, Contracts, sec. 235:

"(c) A writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together."

"(e) If the conduct of the parties subsequent to a manifestation of intention indicates that all parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation."

In the case at bar, the paragraph of the exhibit attached to the petition which has given us the greatest difficulty is the one reading:

"(c) Total and Permanent Disability Insurance, benefits under which are payable monthly while the employee is totally and permanently disabled, as a result of bodily injury or disease, so as to be prevented thereby from engaging in any occupation or performing any work for wage or profit, and provided such disability has already continued for a period of at least fifty-three (53) weeks and provided that the employee had completed five years of service on the date of the commencement of such disability."

It is contended by the plaintiff that the last two words, "such disability," refer only to "total disability," and that he had completed five years of service at the time he made his application therefor. However, in the very

same sentence, "provided such disability has already continued for a period of at least fifty-three (53) weeks," the words "such disability" in this clause, the defendant insists, refer back to the date of his original injury, to wit, June 17, 1933, at which time he had not been in service for five years. We cannot bring ourselves to say that the same identical words used in the same sentence refer to one thing the first time they are used and to an entirely different thing the second time they are employed. The more rational interpretation is that, where this paragraph is headed in heavy type, "Total and Permanent Disability Insurance," the words "such disability" refer in both cases to one and the same thing, to wit, to total and permanent disability. If it does mean that, then when plaintiff made out his new proofs to secure total disability insurance he would have been in service for five years, as service is defined in the policy, and his disability, which was total all the time, but upon which he had only been allowed to draw temporary benefits up to that time, had continued for more than 53 weeks, and the district court's judgment was, therefore, wrong. This paragraph is explained by the plaintiff to mean a certain definite thing, and by the defendant just as positively to mean an entirely different thing.

It has been held by this court many times that, when the language in an insurance policy is ambiguous, indefinite, or its provisions are in seeming conflict, such language should be construed most strongly against the company, which with great care had chosen the language in which the policy is couched. *Arendt v. North American Life Ins. Co.*, 107 Neb. 716, 187 N. W. 65; *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338, 83 N. W. 78.

It is our conclusion that the petition, with the group policy and certificate attached as exhibits, was not vulnerable to a demurrer, and the ruling of the court thereon is hereby

REVERSED.

GOOD, J., dissents.

UNION CENTRAL LIFE INSURANCE COMPANY, APPELLEE, V. ANNIE M. BURGESS, APPELLANT: WILLIAM A. GEIGER, APPELLEE.

FILED MAY 12, 1936. No. 29667.

1. **Appeal.** In an equity case, the sufficiency of the evidence contained in a bill of exceptions is properly for our consideration, notwithstanding the failure to file a motion for a new trial in the district court.
2. **Contracts.** When a person making an offer for "immediate acceptance" places an interpretation of the meaning of that term in the offer, an acceptance within the interpretation thus placed upon it is sufficient to constitute a contract.

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

R. E. Bannister and *D. E. Harper*, for appellant.

Frank M. Johnson, R. O. Williams, Willis R. Hecht and *Cloyd E. Clark, contra.*

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

CARTER, J.

This is an action brought by the Union Central Life Insurance Company to foreclose a real estate mortgage on 160 acres of Dawson county land. From the entry of a decree of foreclosure for the full amount of plaintiff's mortgage, the defendant, Annie M. Burgess, appeals.

Appellee first contends that the failure of appellant to file a motion for a new trial precludes this court from considering the question whether the findings and judgment of the trial court are supported by sufficient evidence. This question was well considered in *Douglas County v. Barker Co.*, 125 Neb. 253, 249 N. W. 607, wherein this court said:

"Prior to 1905, under the provisions of section 675 of the Civil Code then existing, an appeal in actions in equity was provided in which no motion for a new trial was

necessary. *Swansen v. Swansen,* 12 Neb. 210; *Smith v. Silver,* 58 Neb. 429.

"Section 1, ch. 174, Laws 1905, was next enacted, which, except as to the time limited for filing of transcript on appeal, was identical with section 20-1912, Comp. St. 1929. In construing this language, this court declared: 'To secure a review of an equity case in this court, the filing of a motion for a new trial in the court below is not required.' Further, that 'the amendment of 1905 did not change this rule.' *Ogden v. Garrison,* 82 Neb. 302. See, also, *Dodge v. Healey,* 103 Neb. 180. It follows that in the instant case, notwithstanding the absence of a motion for a new trial, the evidence contained in the bill of exceptions is properly for our consideration."

This action, being one to foreclose a real estate mortgage, is equitable in its nature and falls within the above rule. A motion for a new trial was not required to secure a review of the evidence in this court, and the contention of appellee is without merit.

The only question left for our consideration is whether the offer of settlement made by the appellee, Union Central Life Insurance Company, was accepted by the defendant, Annie M. Burgess, in such a way as to constitute a binding contract between the parties. It is not disputed that this issue was properly raised by the pleadings. Does the evidence support the finding and judgment of the trial court that there was no acceptance of appellee's offer?

The record discloses that the defendant, Annie M. Burgess, had at all times mentioned herein been the owner of the real estate given to secure appellee's mortgage, she having acquired the same by will from her deceased husband. On August 27, 1934, the taxes against the land and the interest on the mortgage had become delinquent. The Union Central Life Insurance Company, hereinafter called the insurance company, by its manager, Stanton Allen, wrote a letter to Annie M. Burgess containing the following statement: "Consequently, we would not feel justified

in accepting less than $10,500 or thereabouts at this time, and if you are in position to offer the company that much they will withdraw the foreclosure just as soon as you have a signed contract with at least $1,000 in earnest money payment to bind the contract, otherwise the foreclosure will proceed until other arrangements have been made."

On October 23, 1934, Allen wrote another letter to Annie M. Burgess in which he said: "We would not, therefore, want to drop below our offer of $10,500 but, if you want to meet us half way on it, we will give you $250 cash for a deed with possession to be given March 1, 1935, or we will take $10,500 in full settlement of the company's claim which, of course, is a very, very heavy scale down and it is only being made because of the fact that it will probably cost us about $1,000 to $1,200 in one way and another to get possession."

On October 27, 1934, Allen wrote a third letter to Annie M. Burgess, which letter is as follows:

"On August 27, I told you that we would be willing to recommend to our company that they take $10,500 in full settlement of their claim.

"Acceptance was not completed and the case is now in foreclosure.

"Then, again on October 23, in reply to your letter of October 20, I told you that we would still take $10,500 but neglected to state at that time that this would have to be for immediate acceptance. That is, we will not withdraw our foreclosure proceedings until we are paid enough cash down on this sort of a settlement to convince us that the deal is going to go through. In other words, we do not care to withdraw our foreclosure proceedings simply on the promise that you will get $10,500.

"Therefore, the foreclosure will proceed and we will take decree as soon as the district court meets in Dawson county, Nebraska, unless a definite arrangement has been made with you prior to that time and, as above stated, such arrangement would have to be accompanied by enough

cash or the proper representation by a responsible party to convince us that foreclosure need not be completed and that the deal for sale would be completed."

On November 8, 1934, Annie M. Burgess entered into a contract to sell the lands covered by the mortgage to William A. Geiger for the sum of $13,500, $1,000 of which was paid in cash and $1,500 to be paid to the insurance company as soon as the title was approved. Annie M. Burgess used the $1,000 as follows: Approximately $500 to purchase the second mortgage on the land; $307.40 to pay the delinquent taxes thereon; and $225 to pay the real estate agent's commission.

On November 12, 1934, Carl G. Yeutter, the scrivener of the contract, wrote to Allen and informed him of the whole transaction and inclosed a certified copy of the contract of sale. Yeutter also requested that the abstract of title be mailed to him in order that it might be extended and submitted to the purchaser's attorney for approval. This request was complied with.

On November 26, 1934, Allen again wrote Yeutter informing him that they were well pleased with the purchaser's responsibility and ability to pay and suggesting that, by dealing direct with the insurance company, a saving of $581 could be had by the purchaser. On November 28, 1934, Allen again wrote Annie M. Burgess that, because of her failure to immediately accept the company's offer, and "in view of the evident market value of the security," the offer was withdrawn. On December 3, 1934, Yeutter again wrote Allen advising him that the purchaser had found the abstract satisfactory and inclosing a draft for $1,500, as required by the insurance company in the offer it made to Annie M. Burgess. This draft was subsequently returned. It is not contended that the terms of the offer were not complied with other than the question of a binding acceptance.

We agree with appellee that it advised Annie M. Burgess by letter on October 27, 1934, hereinbefore quoted in full, that the offer to take $10,500 was for immediate acceptance.

But the company then proceeded to place its own interpretation upon the meaning of the term "immediate acceptance." It will be noted that, in making the explanation, the insurance company used the words "that is," "in other words" and "therefore," clearly intending to qualify the ordinary meaning of the words "immediate acceptance" as used in the letter. It was clearly the intent of this letter to define "immediate acceptance" as any time prior to the entry of a decree of foreclosure, which would be May 13, 1935. In the last paragraph thereof, the manager of the company says that the foreclosure will proceed to decree unless a definite arrangement is made *prior to that time,* which arrangement would have to be accompanied by enough cash or the proper representation of a responsible person to convince the company that foreclosure need not be completed *and that the deal for sale would be completed.* (Italics ours.) After an examination of the whole record, we are convinced that Annie M. Burgess accepted the offer within the time provided for by the offer itself. The insurance company, having qualified the meaning of the words "immediate acceptance," as contained in the offer, is bound by its action in so doing. An acceptance of the offer having been made prior to the entry of the foreclosure decree, it became a binding contract. The fact that the land had a higher value than the insurance company estimated cannot of itself justify the insurance company in not carrying out its agreement. The appellee is entitled to receive only $10,500 of the purchase price paid into court by the purchaser. The decree of the district court in other respects is correct.

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

REVERSED.

CALVIN J. RUCKER, APPELLEE, V. TAYLOR WARD, APPELLANT.

FILED MAY 12, 1936. No. 29607.

1. **Pleading:** CONSTRUCTION. "Where an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause, or after verdict, the pleading will be liberally construed in the light of the entire record, and, if possible, sustained. In such case, if the essential elements of plaintiff's case may be implied by reasonable intendment from the terms of the pleading assailed, they will be regarded as sufficiently alleged." *Dickinson v. Lawson*, 125 Neb. 646, 251 N. W. 656.
2. **Fraud:** PLEADING. The petition in an action to recover damages for injury caused by fraud is sufficient as against a demurrer *ore tenus*, although the words "fraud" or "fraudulent" are not used, if the acts of the defendant complained of in the petition are in their nature fraudulent; and, in such case, it is not necessary, in pleading due diligence on the part of the plaintiff to discover the fraud, to use the word "diligence" if the acts of the plaintiff alleged denote such diligence.
3. **Limitation of Actions:** FRAUD. "An action for relief on the ground of fraud must be commenced within four years after the discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery." *Coad v. Dorsey*, 96 Neb. 612, 148 N. W. 155.
4. ———. "One who wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit, cannot avail himself of the statutes of limitation as a defense." *Liberty Nat. Bank v. Lewis*, 172 Okla. 103, 44 Pac. (2d) 127.
5. **Instructions** of the trial court examined and *held*, when considered as a whole, to contain no such prejudicial error as to require a reversal of the judgment.

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

Cordeal, Colfer & Russell, for appellant.

Butler & James and *C. D. Ritchie, contra.*

Heard before GOOD, EBERLY and PAINE, JJ., and CLEMENTS and THOMSEN, District Judges.

CLEMENTS, District Judge.

This action was brought by the plaintiff to recover the sum of $800 which the plaintiff claims is due him from the defendant by virtue of an agreement relative to the sale of certain real estate formerly owned by the plaintiff. As the sufficiency of the petition is questioned, it will be necessary to set out the allegations of the parties with some particularity.

The plaintiff alleges that on or about the 19th day of February, 1925, he was the owner of certain described land in Hayes county, Nebraska; that the land at said time was encumbered by a first mortgage in the principal sum of $4,000 and a second mortgage in favor of the defendant in the principal sum of $2,500; that the amount then due and owing on said mortgages was the sum of $9,000; that on or about said date the defendant induced the plaintiff to convey said land to the defendant for the amount then due upon said mortgages, namely, the sum of $9,000, and agreed with the plaintiff that, if the plaintiff could sell said land within the next year thereafter for a sum greater than $9,000, the plaintiff should have and receive all of the sale price in excess of said sum of $9,000; that in consideration of said agreement the plaintiff executed and delivered to the defendant a deed for said premises.

That during the fall of 1925 the plaintiff obtained a purchaser for said land in one Harry Augustine at the price of $12,800, of which amount the sum of $3,000 was to be paid in cash, and brought said purchaser to the defendant. Thereupon the defendant privately and secretly continued and completed the negotiations and transactions with said Augustine and sold said land to said Augustine for the sum of $12,800; that said Augustine paid to the defendant for said land the sum of $3,800 in cash and gave a mortgage thereon in the sum of $9,000; that the plaintiff did not know that the defendant had received a cash payment of $3,800, but believed that said sale had been completed by the payment of $3,000 and that the

payment of the sum of $9,800 was deferred; that the defendant accounted to the plaintiff for the sum of $3,000 and informed the plaintiff that said sum of $3,000 was all the money paid by Augustine.

That thereafter, at various times, between the 1st day of March, 1926, and the 12th day of November, 1934, the plaintiff inquired of the defendant if the balance of said sum of $3,800 had been paid by said Augustine and each time the defendant said it had not been paid; that the plaintiff did not learn that said $800 had been paid by said Augustine to the defendant until about the middle of July, 1934.

Defendant admits that the plaintiff owned the land as alleged, that it was mortgaged as alleged, admits the transfer of the land by the plaintiff to the defendant, admits an agreement to pay a sum to plaintiff if said land was sold within a year for more than $9,000, but says that this amount to be so paid was the sum of $3,000 only, admits the land was sold within the year to Harry Augustine for the sum of $12,800, alleges that he paid the plaintiff $3,000, alleges, if any cause of action ever accrued to the plaintiff on account of the transaction mentioned in the petition, it accrued on the 1st day of March, 1926, more than four years before the commencement of this action, and denies all allegations of the petition not admitted or qualified.

The reply was a general denial. The case was tried to a jury.

In the beginning of the trial, the defendant interposed an objection to the introduction of any evidence for the reason that the petition does not state facts sufficient to constitute a cause of action. This objection was overruled, trial was had and cause submitted to the jury. The jury found generally for plaintiff in the sum of $1,327. Judgment in this sum was rendered. Motion for a new trial filed and overruled. The cause comes here on appeal.

Before stating the facts as they appear from the evidence, we will examine the defendant's first assignments

of error, namely, that the court erred in overruling the oral objections of the defendant to the introduction of evidence. The defendant contends that the petition does not state a cause of action for the following reasons: (1) It does not allege facts constituting fraud. (2) It does not allege the employment by defendant of any trick or artifice which prevented discovery by the use of ordinary diligence of the cause of action. (3) It does not charge that the plaintiff used diligence to discover the alleged fraud. While a demurrer *ore tenus* is recognized by this court as permissible practice, and if the pleading to which it is addressed is totally defective, it is error to admit any evidence under said pleading; still, in the construction of a pleading so attacked, this rule obtains: "Where an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause, or after verdict, the pleading will be liberally construed in the light of the entire record, and, if possible, sustained. In such case, if the essential elements of plaintiff's case may be implied by reasonable intendment from the terms of the pleading assailed, they will be regarded as sufficiently alleged." *Dickinson v. Lawson,* 125 Neb. 646, 251 N. W. 656. A careful consideration of the defendant's contention as to the sufficiency of plaintiff's petition to withstand a demurrer *ore tenus* leads us to the conclusion that the trial court committed no error in overruling the objection and that the petition states a cause of action.

It is true that the acts of defendant complained of in the petition are not denominated fraud, nor are the acts of the plaintiff in trying to discover the truth named diligence, but this is not necessary if the defendant's acts as alleged were in their nature fraudulent and the alleged acts of plaintiff denoted diligence. "It is not essential that the words 'fraud' or 'fraudulent' be used in an action based on deceit or false representations." *Dolan v. Buckley,* 197 Ia. 1363, 199 N. W. 302. The defendant's seventh and eighth assignments of error may be considered together.

They are: (7) "The verdict and judgment are not sustained by the evidence." (8) "The verdict and judgment are contrary to the evidence."

From the admissions of the parties and the evidence introduced at the trial the following facts may be reasonably inferred: The ownership of the land by the plaintiff. Its transfer to the defendant upon an agreement that, if the defendant could find a purchaser for it within one year who would buy it at a sum in excess of $9,000, plaintiff was to have such excess. The finding of a purchaser by the plaintiff within the year who agreed to purchase the land for $12,800, pay $3,000 of said sum in cash, give a mortgage on the land for $9,000, the balance of the cash payment, namely $800, to be deferred for a time. That the plaintiff took the purchaser to the defendant who completed the sale, that sale was consummated at a price of $12,800, a mortgage of $9,000 taken, and the defendant induced the purchaser to pay the whole balance, namely $3,800 in cash. That the plaintiff did not know that more than $3,000 had been paid. That defendant paid the plaintiff $3,000 on said agreement and told the plaintiff that the balance, namely $800, had not been paid, but if it was paid in the future plaintiff would get it. That at various times thereafter the plaintiff asked the defendant if the $800 had been paid and told the defendant that he needed the money. That each time the defendant told him the $800 had not been paid. That in 1934 the plaintiff asked the defendant if the money had been paid, and the defendant answered, "He didn't think he (the purchaser) would ever be able to pay that." That the plaintiff had no knowledge that the $800 had been paid until July, 1934, when on inquiry of the purchaser he elicited that fact. The purchaser lived about ten miles from the plaintiff and plaintiff had seen the purchaser frequently between the time of the sale of the land and July, 1934. There was a sharp conflict in the evidence as to the agreement to pay to plaintiff all for which the land sold in excess of $9,000 and as to what was told to plaintiff

by defendant at the time the sale was completed, but the jury heard the evidence, saw the witnesses on the stand and their manner of testifying, and found generally for the plaintiff. They must have believed the plaintiff's evidence was true. We are not disposed to question the correctness of their finding in that respect.

The defendant does not seriously contend that we should do so. On page 21 of his brief, after calling attention to this conflict in the evidence, he says: "However that may be, the question is not important, as the decision in this case depends upon different considerations." The defendant's contention is that, admitting the truth of the plaintiff's evidence, it does not support the verdict of the jury for two reasons: (1) Because it does not prove fraud on the part of defendant. (2) Because it does not show diligence on the part of plaintiff in the discovery of the alleged fraud. We do not think this contention is tenable. The defendant's statement that the $800 had not been paid was false. In view of the circumstances and his continued denial that this money had been paid him, there can be no question but that the statement was made for the purpose of defrauding the plaintiff of money rightfully his due and which, by reason of this false and fraudulent representation, the defendant was able to convert to his own use. The statement was material, it was made with the intent to deceive, the defendant relied upon it and was injured. In short, it has every element of a fraud perpetrated by a false and fraudulent representation.

Is the plaintiff barred from recovering the amount found by the jury to be due him and of which he has been deprived by the defendant's fraud, for want of diligence in discovering the fraud?

It must be remembered that the plaintiff did not know any fraud had been practiced on him. He expected the payment of the $800 to be deferred. The inquiries made of the defendant were not made to discover fraud, but because he needed the money. He accepted the answers

of the defendant as made in good faith. Nothing had come to his knowledge that raised a suspicion that the defendant's answers were untrue until his inquiry of Augustine in 1934. The position of the defendant seems to be, conceding that the defendant told the plaintiff at various times the payment of $800 had not been made and that his answers were false and meant to deceive, still the plaintiff was not justified in believing them, but should have made an investigation to determine their falsity.

The defendant cites a number of cases that hold that, where the means of a discovery of a fraud are available to a party, he will be deemed to have discovered the fraud when, in the exercise of reasonable diligence, it could and ought to have been discovered. He argues from this that, because the plaintiff by making inquiry of Augustine could have discovered before the bar of the statute that the $800 had been paid, it should be held that he then discovered it. We think the defendant does not quite comprehend what is meant by the courts when they say "means of the discovery of a fraud." This is made plain by one of the cases cited by defendant. *Duxbury v. Boice*, 70 Minn. 113, 72 N. W. 838. In this case, the court said:

"To ascertain what constitutes 'a discovery of the facts constituting the fraud,' reference must be had to the principles of equity in which this provision had its origin, and which the legislature must be presumed to have had in mind when they enacted the statute. In granting relief on the ground of fraud the foundation principle of courts of equity was that the party defrauded is not affected by the lapse of time so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed. * * * But equity aided the diligent, and not the negligent. It was opposed to stale claims, and would not permit a party to prolong, by his own laches, the time during which he might apply for relief. Hence, in actions in equity, the rule was that the means of knowledge were equivalent to actual knowledge; that is, *that a knowledge*

of facts which would have put an ordinarily prudent man upon inquiry which, if followed up, would have resulted in a discovery of the fraud was equivalent to actual discovery." (Italics ours.)

Understood in this way, the rule laid down by these decisions squares with the holdings of this court where we say:

"An action for relief on the ground of fraud must be commenced within four years after the discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery." *Parker v. Kuhn*, 21 Neb. 413, 32 N. W. 74; *Coad v. Dorsey*, 96 Neb. 612, 148 N. W. 155.

The defendant has not pointed out, nor can he, from the evidence, one fact or circumstance discovered by the plaintiff before 1934 that would lead the plaintiff to believe or raise a suspicion in his mind that any fraud had been perpetrated on him. He had the positive statement of the defendant that the money had not been paid. He had a right to rely on this statement and was not called upon to make an investigation as to its truth or falsity.

"A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." *Perry v. Rogers*, 62 Neb. 898, 87 N. W. 1063.

The defendant strenuously contends that, because the purchaser, Augustine, lived within ten miles of the plaintiff and the plaintiff saw him numerous times before it is claimed the action was barred by the statute and could have learned of the payment of the $800 by inquiry from him, this shows such negligence on his part that he should not be permitted to maintain this action. In view of the fact that the plaintiff was making inquiries of the defendant and that nothing had come to his knowledge to raise a suspicion that the defendant's answers were untrue, we

cannot agree with this contention. In a recent case handed down by the Oklahoma court, *Liberty Nat. Bank v. Lewis,* 172 Okla. 103, 44 Pac. (2d) 127, this question was raised and decided adversely to defendant's contention. The Oklahoma case is almost identical with the instant case. The plaintiff left a note with the bank for collection, the bank made the collection but told the plaintiff the note had not been paid. After the statute had run, the plaintiff discovered the falsity of this statement. When an action was brought to recover the amount collected, the bank contended that inquiry of the maker who lived in the same neighborhood would have revealed that the note had been paid, and therefore the plaintiff was charged with constructive knowledge of the fraud. After stating the law as follows: "One who wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit, cannot avail himself of the statutes of limitation as a defense;" the court rejected the contention of the bank, and in the opinion said: "We are not of the opinion that the fact of plaintiff's living in the same community with the maker of the note, and that he could have gone to the maker and learned that the payment had been made, should take this case out of the operation of the principle above announced."

The last assignment of error that need be noticed is the defendant's complaint as to the court's instructions. In his motion for a new trial, the defendant alleges error in the giving of every instruction, 13 in number, however he confines his argument to instructions No. 6 and No. 9. Instruction No. 9 is as follows:

"In the event you find, from a preponderance of the evidence, that the plaintiff had knowledge at a time more than four years prior to the commencement of this action (this action having been commenced February 8, 1935) that the defendant had collected the sum of $3,800 in money, in addition to securing a $9,000 mortgage from the

said Augustine, then the plaintiff's right to recover herein is barred by the statute of limitations; and, if you so find, your verdict should be in favor of the defendant."

We do not understand that the defendant contends that this instruction is not correct so far as it goes, but he insists that the court should also have instructed:

"That the action must have been commenced within four years after the discovery of the facts constituting the alleged fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would have led to discovery of the alleged fraud."

This correctly states the law, but it is not applicable to the facts in this case. There was no evidence that any fact or circumstances was discovered by the plaintiff before 1934 that should have raised a suspicion in his mind that he had been defrauded. This case was not tried on that theory and no evidence of such a nature was sought to be introduced. The case was tried upon the theory that the plaintiff did not have a right to rely upon the statements of the defendant that the $800 had not been paid, and that his failure to investigate to discover the falsity of such statements was such negligence as would bar his recovery.

The defendant's complaint as to instruction No. 6 is confined to the last five lines of paragraph D thereof. Instruction No. 6 purports to give a summary of the material allegations of the petition. The last five lines of paragraph D of such instruction are as follows:

"That plaintiff was induced and persuaded to refrain from investigating, through other sources, as to the payment of said $800, by reason of misrepresentation of the defendant Ward, to the effect that such payment of $800 had not been made."

The plaintiff did not plead, in terms, that plaintiff was induced and persuaded to refrain from investigating through other sources as to the payment of said $800 by reason of misrepresentations of the defendant Ward to

the effect that such payment of $800 had not been made. The jury should not have been told that this was a material allegation of the petition. However, we do not think the defendant was injured thereby. In instruction No. 1 all the allegations of the petition are correctly set out. The statement complained of in paragraph D of instruction No. 6 is a legitimate inference from the allegations of the petition and the evidence. The only objection the defendant could have to it is that it was included in an instruction which purported to state the material allegations of the petition. As a statement of the law of the case, it was far too favorable to the defendant. It confined the plaintiff's right to recover to one theory only. We do not think the defendant has been prejudiced by the giving of this instruction, and we think the instructions, when considered together as a whole, contain no such prejudicial error as to require a reversal of the judgment.

In view of the foregoing, the judgment of the trial court is

AFFIRMED.

JOSEPH C. MEISTER ET AL., APPELLEES, V. FRED C. KROTTER, APPELLANT.

FILED MAY 12, 1936. No. 29540.

1. Waters: OVERFLOW: DAMAGES: PROOF. In assessing recovery for permanent damages to land, the evidence must show with reasonable arithmetical certainty the values before and after the event which gives rise to the action. The jurors' view of the premises may supplement, but cannot be a substitute for, testimony on value.
2. ———: ———: QUESTION FOR JURY. Evidence examined as to whether erection of dam in river was cause of overflow of upper proprietor's land, and *held* to be in conflict and for jury's determination.

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

Cordeal, Colfer & Russell and *C. M. Bosley*, for appellant.

Edmund D. Shipley, contra.

Heard before GOOD, EBERLY and PAINE, JJ., and CLEMENTS and THOMSEN, District Judges.

THOMSEN, District Judge.

The plaintiffs claim damages resulting to their land from overflow claimed to be caused by defendant's erection of a dam in the Frenchman river. Defendant appeals from a verdict and judgment for plaintiffs.

The land involved is located about one-half mile from the town of Palisade, Nebraska. During the irrigation season the water from the river is diverted to the Culbertson irrigation canal. This canal or ditch has existed for 40 years. It lies north of the river in distances from the intake varying up to one-half mile. Following the meanderings of the river channel from its diversion point, it traverses about two miles when it again nears the ditch. At this latter point the ditch is about ten feet above the present water level of the river. It is near here where the defendant's river dam was erected. The ditch has a fall of approximately one and a half feet in one mile. The fall in the river's course to the dam is approximately four feet from a point about one mile above. The land of the plaintiffs lies immediately north of this latter point. The river passes through plaintiffs' land; the ditch bounds the land on the north. A waste-gate and spillway from the ditch, about one-fourth mile above the point mentioned, admits water on occasion through a former stream-bed to the Frenchman river. This waste-gate is about 32 feet wide. From November to about May all the water from the ditch is wasted through this source, flowing down the river through plaintiffs' land, through defendant's land, and eventually over defendant's dam. The dam is a substantial concrete structure. Its height by measurement of one witness is slightly over five feet; by the estimate of others as much as eight feet. Its

length is approximately 37 feet. Its foundation is either rock or clay with an apron of concrete extending 20 feet into the river. It raises the river level to the height of the dam. On the opening of the waste-gate the ditch may spill water to a height, it is claimed, of the water-head in the ditch, about three feet, thus further raising the river level.

Plaintiffs claim that, by the erection of the dam, backwater overflows part of their land, especially in the winter season, rendering the same waterlogged and increasingly unfit for agricultural and hog-raising purposes; that the flow of the stream is impeded, permitting its freezing in winter, thus unfitting it for watering uses. The defendant contends that the dam raises the water level to no greater height than normal; that 1,700 yards of gravel were removed in 1924 from the river bed in both plaintiffs' and defendant's land, and that by such removal and subsequent erosion during the next four years the river bed was lowered four to six feet; that the water level in the river now is no higher than its normal level in 1924. The dam was erected in 1930.

The defendant asserts, as a matter of law, his right, under his theory of the evidence, to restore the original water level, and though citing no cases to sustain this assumption, the application of the proposition is not challenged in the brief of plaintiffs. See *Johnk v. Union P. R. Co.*, 99 Neb. 763, 157 N. W. 918, and converse of the proposition in *Mitchell Drainage District v. Farmers Irrigation District*, 127 Neb. 484, 256 N. W. 15. Assuming, then, under the conditions, the absolute right of defendant to erect a dam so to raise the water level, the question of fact for solution is whether the water level was raised beyond what was the normal flow before the claimed erosion. The latter covers a period between 1924 and 1928.

The evidence is definitely in conflict. On plaintiffs' behalf some removal of gravel is admitted, but the claimed effect of lowering the water level and the subsequent claimed four to six foot erosion of the river bed is denied.

One witness, a ditch rider, who began work in 1926, testified that the river's water level was never lowered; and others described conditions from all times subsequent to 1920. Direct evidence of what constituted the height of normal flow is lacking. The defendant alone testifies to the claimed *erosion*. We find definitely no corroboration of this testimony. Alluvial deposits of sand and gravel from the ditch were a constant occurrence and cast doubt on the claimed erosion. Others on defendant's behalf give evidence to the height and flow of water and the position of nails on a bridge over a feed-stream from which the river's height at times may be inferred. From our interpretation of the testimony, this bridge is located on the section line at the Bobtail creek, a distance one-half mile south of the southernmost portion of plaintiffs' land. The elevation point was fixed as of 1915, the time the bridge was built. These witnesses do not testify to any continuous condition nor as to the rainfall at various times. The jury viewed the territory. Of course, the credibility of all such witnesses and the weight of the testimony were for the jury.

Formidable evidence of scientific measurements of various present heights was submitted. By these it is shown that the water level of the river at a point on the southernmost side of plaintiffs' land is 3.91 feet above the top of the dam, in the stream at the waste-gate 4.5 feet; and the land levels are at the first point mentioned 6.4 feet above the top of the dam and 4.5 feet at the second point. Other points are also selected showing height of both river and land above top level of the dam, from which should follow an inference of impossibility that the damming of the water could have had any effect on plaintiffs' land. At the time these measurements were taken two-tenths of a foot of water was passing over the dam. At that time plaintiffs assert the ditch carried 3.2 feet head of water. Upon release of this flood the spread of water would depend upon the volume at the point of release and the rapidity of its escape. Necessarily the height of the im-

pounded water in the river would be raised to some extent beyond the dam top. Elevations of the surface of the river through plaintiffs' land are also substantially higher than the top of the dam. This must be taken into consideration in estimating the effect of the release of the ditch water into a channel already filled with retarded water to a height of at least five feet at the dam site. No flooding of plaintiffs' land had occurred during the forty years between the building of the irrigation ditch and the erection of the dam. This seems strongly persuasive that seepage from the ditch or from a higher dam built by plaintiffs was not the cause. The time the latter was erected is not shown in the record.

Test holes were dug in various parts of the land in which the water rose to heights beyond the level of the dam top. The water in the river upstream was also higher. It is claimed that the river was retarded and its volume increased by the dam; that the river was so affected through plaintiffs' land. Of course, the whole stream would to some extent be affected and the water-table would be raised; so it does not follow that, because the test holes showed an elevation of water greater than the top of the dam, the damming of the water was not the cause of the water in the test holes. In some measurements the test holes showed water higher than the adjacent stream. Without a showing of the directly adjacent soil, this would not prove conclusively that the water in the test holes did not come from the stream; its source may have been a higher point in the stream, a soil through which the water could more easily percolate. Again, if the water-table were raised by elevating the stream, the plaintiffs would be entitled, under their pleadings, to recover for loss thus suffered. *Pierce Mill Co. v. Koltermann,* 26 Neb. 722, 42 N. W. 877. An upper riparian owner is not required to bear any burden which a lower proprietor creates by the erection of a dam. *Flader v. Central Realty & Investment Co.,* 114 Neb. 161, 266 N. W. 965. Moreover, if the jury found the elevation of the river had not been

changed by the removal of the gravel,—and this might easily be found, for the record shows many gravel and sand bars in the river and does not show from where the gravel was removed or that the claimed changed condition was continuous to the time of the erection of the dam,—then it would follow that the defendant had unlawfully changed the river's level five feet, and all the measurements become mere speculation as to what the conditions would be if the dam had not been built.

All the foregoing covers the defendant's first three assignments of error relating to the sufficiency of the evidence and its effect on instruction No. 8 given by the court.

Objection is made to the admission in evidence of the loss of hogs by drowning. By substituting the word "hogs" for "cattle" in the following, we find a satisfactory answer to this objection:

"The plaintiff, in testifying as to how the construction of the dam affected his land by raising the water above the natural flow, stated that it increased the danger of stock drowning therein, and that he had already lost some cattle in that manner. This was objected to, and on the ruling error is sought to be predicated. The statement was only made as an illustration of the damage occasioned by the rise of water in the stream because of the construction of the dam. The rule for measuring the damage sustained was correctly given the jury in the instructions of the court, which was stated to be the difference in the fair market value of the land immediately before and after the erection of the mill-dam. The jury could not have been misled by the testimony objected to, and none of the rights of the defendant were prejudiced thereby." *Jerabek v. Kennedy*, 61 Neb. 349, 85 N. W. 279.

The fourth and last assignment of error relates to the court's giving an instruction on the measure of damages. Although plaintiffs' counsel contends that the case was tried on the theory of temporary damages, and defendant's counsel is uncertain whether the pleadings and evidence

submitted the theory of permanent or temporary damages, the court instructed on permanent loss. The dam is built of concrete. It is a large and substantial structure. How large and substantial must such construction be before it may be classed as permanent? The test seems to us to be whether the barrier may readily be removed. No evidence on the subject appears in the record. In view of this lack of evidence and the description in the record, we assume the dam is a permanent one from which continuous effects may be expected. So what loss the plaintiffs may have suffered is permanent and the damages, though not immediately perceptible, would be suffered the moment the water was impounded. In the state of the evidence, the proper measure of their recovery is the difference between the value of the land affected before and after the dam was erected, taking into consideration the uses to which the land was put and for which it was reasonably suitable. *McClure v. City of Broken Bow*, 81 Neb. 384, 115 N. W. 1081. To determine any such loss, the present condition of the soil proximately caused by the damming of the water and all effects up to the present time would be relevant to determine its value. Those matters are shown in the evidence. What is not shown with reasonable arithmetical certainty, which in such cases is required, is the estimate of the land's value after the dam was built. The value before the erection is fixed at $200 an acre. The lesser value cannot be left entirely to speculation. Such value is generally fixed by experts, the major weight of whose testimony is their foundation. To know upon what facts and experiences a witness bases his opinion of value is the chief source of accuracy in judging the weight of his testimony and the reliability of his estimate. The foundation of jurors for judging value is not known nor shown in the record; and to permit jurors to rely on a mere view to reach a conclusion of value would lose the constraint of reasonable accuracy. Enough of speculation remains by permitting the jurors to fix the damages by considering both their view of the

premises and the testimony. *Town of Hingham v. United States,* 161 Fed. 295; *Republican Valley R. Co. v. Arnold,* 13 Neb. 485, 14 N. W. 478, criticizing *Fremont, E. & M. V. R. Co. v. Whalen,* 11 Neb. 585, 10 N. W. 491; *Fremont, E. & M. V. R. Co. v. Marley,* 25 Neb. 138, 40 N. W. 948.

If the structure is regarded as permanent, the evidence is insufficient to sustain the verdict because the value of the land after construction of the dam is not shown; if it is regarded as a temporary obstruction, the measure of recovery for permanent loss submitted in this instruction is incorrect. In view of the foregoing, the judgment is reversed and the cause remanded.

REVERSED.

LAURETTA HEESACKER, APPELLEE, V. CHRIS BOSTED, APPELLANT.

FILED MAY 19, 1936. No. 29515.

1. **Automobiles:** LIABILITY TO GUEST: GROSS NEGLIGENCE. Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1933, means negligence in a very high degree, or the absence of even slight care in the performance of a duty.
2. ———: ———: ———. "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.
3. **Evidence** examined, and *held* insufficient to support the verdict and judgment.

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

Wear, Boland & Nye, for appellant.

Dorsey, Baldrige & Chew, contra.

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

EBERLY, J.

This is an action for personal injuries resulting from

an automobile accident which occurred on June 18, 1933. The plaintiff was riding with the defendant, in defendant's car, as his invited guest. Thus, the situation is within the purview of section 39-1129, Comp. St. Supp. 1933, the so-called "invited guest statute." So far as applicable to the present case, it provides, in effect, that the owner or operator of a motor vehicle shall not be liable for any damages to any person riding in said motor vehicle as a guest and not for hire, unless such damage is caused by the gross negligence of the owner or operator.

There was a trial to a jury. At the conclusion of the evidence, the defendant made a motion based upon its insufficiency, in the alternative, to either dismiss plaintiff's petition, or to direct the jury to return a verdict for the defendant. This motion was overruled. The verdict returned by the jury was for plaintiff. From the order of the district court overruling his motion for a new trial, and his motion to set aside the verdict and for judgment of dismissal, the defendant appeals.

The salient and controlling question presented by the appeal is the sufficiency of the evidence to support the judgment.

Preliminary to a consideration of the evidence is the determination of the proper construction of the statute referred to above. On the subject as related to the question of the sufficiency of the evidence contemplated by the terms of the legislation under consideration, we have said:

"A correct decision depends on the meaning of the term 'gross negligence.'

"The term 'gross negligence' has received the attention of many courts, with conflicting views as to its proper definition. The courts of some of the states appear to hold that, to constitute gross negligence, there must have been an intentional failure to perform a manifest duty, or the injury must have been inflicted intentionally, or in wanton disregard of the rights of others. Other courts have defined it less drastically.

"We are of the opinion that in adopting the guest act

the legislature used the term 'gross negligence' as indicating a degree of negligence. Negligence may be slight, ordinary, or gross. Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It may be said that it indicates the absence of even slight care in the performance of a duty, and such, we think, is the meaning intended by the legislature.

"What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine. Where a question of fact has been submitted to a jury upon conflicting evidence, this court, ordinarily, will assume the truth of the evidence tending to sustain the finding of the jury." *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96.

These principles so enunciated have been repeatedly approved by this court. See *Gilbert v. Bryant,* 125 Neb. 731, 251 N. W. 823; *Swengil v. Martin,* 125 Neb. 745, 252 N. W. 207; *Sheehy v. Abboud,* 126 Neb. 554, 253 N. W. 683; *Rogers v. Brown,* 129 Neb. 9, 260 N. W. 794.

Within the scope of the doctrine of "gross negligence," as thus announced, did the plaintiff, by her petition and the evidence introduced in support thereof, present an appropriate issue of fact for the consideration of and determination by the trial jury?

So far as charging gross negligence is concerned, the plaintiff pleads the following only: "In driving his said car at the time and place and in the manner aforesaid, the defendant was guilty of gross negligence, directly and proximately causing the plaintiff's injuries hereinafter set forth, in the following particulars, to wit: (a) In driving said car upon the road, knowing that one of its

rear tires was in the defective and unsafe condition hereinbefore described; (b) in driving said car at an excessive, dangerous, and unlawful rate of speed; (c) in attempting to pass said truck from the rear without moderating the excessive, dangerous and unlawful speed at which he was driving, thus causing his said car to swerve from side to side in the road and subjecting said defective tire to unnecessary strain and friction; and (d) in driving his said car at an excessive, dangerous and unlawful rate of speed, when he knew that one of its rear tires was in the defective, weakened and unsafe condition hereinbefore described."

The consideration of the evidence submitted to the jury, in connection with the allegations quoted, established the occurrence of the accident, and the infliction of serious injuries to the plaintiff as a result thereof.

There appears little or no conflict in the evidence as to the facts that comprise this transaction, and the sole question is to determine the proper deductions which the proved facts support, in relation, first, to the alleged use of a rear tire by the defendant, knowing that the same was in a defective and unsafe condition; second, to the driving of the car at the time of the accident at a dangerous, excessive and unlawful rate of speed while attempting to pass a truck on the public highway near Fremont, Nebraska.

It is to be kept in mind that the defendant was rendering wholly gratuitous services at the time of the accident, in transporting the plaintiff and her sister from Omaha, Nebraska, to the home of her parents in Humphrey, Nebraska. As to the occasion of the trip, plaintiff's witness says: "Well, Mr. Bosted had promised my folks a few weeks before my sister's vacation to take her home for the vacation, and my sister didn't know until the morning of that day that she was going to get off. About 10 o'clock she called me, and I in turn talked to Mr. Bosted. Mr. Bosted wanted to go to the air races that day and it disappointed him very much not to be able to see the races,

so I offered to put my sister on the train and Mr. Bosted thought that wasn't showing any appreciation at all for him to not take her, after telling my folks he would take her."

It appears, without question, that under this arrangement the trip to Humphrey was started, during which the accident in suit occurred.

As to the tire in which the blow-out occurred, and which all parties agree was the immediate cause of the accident, the defendant borrowed it from the T. J. O'Brien & Company for use while his own tire was being repaired. With permission of its owner, the defendant removed it from a "used car," kept in O'Brien & Company's place of business, and replaced the tire of his own car with it. This occurred three days before the accident, and during the intervening time the borrowed tire was in use on defendant's automobile. The tire itself was designated in the trade as a "Goodrich Silvertown, extra heavy, six-ply." Thus, according to plaintiff's uncontradicted witness, it was of a class of tires which are deemed very serviceable. This witness also testified that at the time of the trial this tire had gone approximately 10,000 miles, and while it will vary, the average approximate life of a Goodrich Silvertown tire is about 20,000 miles. This witness further testified: "Q. Looking at this tire now, Mr. Meyer, from your experience as a tire man, I will ask you to state whether that looks like a reasonable tire to be used, or not? A. From the tread on it, it is a reasonable tire, but there must be something wrong with it. It was dead or something, that caused it to go out. Looking at it from the surface, it looks reasonable, but the marks here show it has been bruised in different places, but you can't tell whether this was caused before that, but there are marks here (indicating)."

With reference to the presence of a "boot" in this tire, the plaintiff's evidence was as follows: "Q. Well, this is what they call a boot, is it (indicating)? A. Yes, sir. Q. Why do they use a boot in a tire? A. Sometimes a

large nail has gone through and torn it. Q. Does it show the tire was weakened? A. To some extent it has been. * * * Q. The application of a boot such as I hold in my hand is a common practice in the tire business, to repair a casing, isn't it? A. When a casing is somewhat defective, or possibly has a large nail hole in it, or some sort of hole, it prolongs the life of it. Q. Well, it is a common thing to use a boot? A. Yes, sir. Q. A great many of these boots are used in the repair of tires, aren't they? A. Yes, sir. Q. And that is especially true is it not of a six-ply tire, extra heavy, Goodrich Silvertown that has a good tread on it, isn't it? A. Is it usual for them to put a boot in, you mean? Q. Sure; on a tire that only had gone 10,000 miles and has a good tread, as this one has? A. Oh, any make of tire might have a boot in it. It don't have to be a Silvertown. * * * Q. Whether Goodrich, Firestone, U. S., or any of them? A. Yes, sir."

With reference to the "air container" being a part of the equipment of the tire in question, this same witness testified, in part, as follows: "Q. Isn't this exhibit which I hold in my hand, known as an air container, the latest invention in pneumatic tire construction? A. As far as I know, it is. Q. It is supposed to be, as far as safety is concerned, the safest thing on the road, isn't it? A. I can't say that definitely. Q. Well, from your experience? A. Yes, sir; from my experience it is as safe."

There is no definite evidence in the record that this tire, in which the "blow-out occurred," was removed from a "junked car" or a car about to be "junked;" and no affirmative evidence that its condition appeared to be, or in fact was, actually dangerous. Prior to the accident this tire had been in use three days; during these three days it had been run and no trouble was caused by the tire; and on the day of the accident it had carried the occupants of this car over the road for a distance of approximately 30 miles without evidencing defect or weakness. It is to be remembered that the mere fact that a "blow-out" occurred is no evidence of negligence on the part of the

owner of the car. *Tsiampras v. Union P. R. Co.*, 104 Neb. 205, 176 N. W. 366.

The striking character of the adventure under consideration is that it was undertaken solely for the benefit of the plaintiff and her friends, and that, in a general way, the plaintiff was well acquainted with the characteristics of the defendant as an automobile driver. It was wholly gratuitous on his part. This situation constitutes an element for consideration in connection with the question of the defendant's negligence. Thus, as pertaining to bailments, it has been said "that the degree of care required of the gratuitous bailee is such slight care as is taken by every man of common sense of his own property." 3 R. C. L. 101, sec. 26. See, also, 6 C. J. 1125.

In *O'Shea v. Lavoy*, 175 Wis. 456, 185 N. W. 525, the supreme court of Wisconsin gives us the following summary of a situation, which is quite applicable to the case here presented:

"Owen, J. The automobile is an instrumentality of recent creation which has rapidly established itself in the desires of the people. No other agency has so effectively appealed to their favor. Nothing contributes so much to the comfort and pleasure, the welfare and happiness of the family. It has given a new idea to distances and materially enlarged the orbit of individual existence. It affords recreation which appeals to every member of the family and pleasures which may be indulged by the family unit. It is a minister of health as well as pleasure. It makes the fresh air of the country available to the citizen of the congested city and brings the pleasures of the city within the reach of the rural inhabitants. There are many who cannot afford to own an automobile. There are few who do not covet the comfort, pleasure, and recreation afforded thereby. It is an act of kindness and consideration for the owner of a car to lend its comfort and pleasure through an invitation extended to his less fortunate neighbor for a ride in the country, to join a picnic party, or to enjoy an evening at the theater in the near-by city. This is a

species of hospitality which should be encouraged rather than discouraged, and the law should not couple with this friendly act a duty which makes its exercise an unreasonable hazard. On the other hand, he who takes his friends and neighbors into his automobile places them in a high-powered, swiftly-moving vehicle attended with great danger unless handled and operated with a requisite degree of care. He must realize that he has voluntarily received into his keeping the lives and safety of his passengers, and he should not be permitted to trifle therewith or to renounce all responsibility in such respect."

On principle, it may be said that the relation between the parties in the instant case is analogous to that between licensor and licensee; and following the principle applicable to and controlling defective buildings and premises, it may be said the licensee takes the vehicle as he finds it. 5-6 Huddy, Cyclopedia of Automobile Law (9th ed.) 221, sec. 131; *Patnode v. Foote,* 153 App. Div. 494, 138 N. Y. Supp. 221; *Pigeon v. Lane,* 80 Conn. 237, 67 Atl. 886; *Beard v. Klusmeier,* 158 Ky. 153, 164 S. W. 319; *Fitzjarrel v. Boyd,* 123 Md. 497, 91 Atl. 547.

In *Gifford v. Dice,* 269 Mich. 293, 257 N. W. 830, Wiest, J., in discussing the affirmative duties imposed on the owner of an automobile, says, in part:

"A guest in an automobile accepts the means of conveyance in the condition it is maintained by the owner, and cannot predicate an action for gross negligence or wilful and wanton misconduct upon failure of the owner to inspect the car and keep it in such repair as to avoid the possibility of an accident. So, in this case, defendant owed no duty to plaintiff as his guest to keep the car tire in such a condition of repair as to prevent a blow-out or to replace the worn tire by another. The owner of a car, under circumstances such as in the case at bar, is only required to provide his guest with the conveyance he provides for himself."

And, the Michigan supreme court, in the *Gifford* case, completed the opinion with the following conclusion, viz.:

"Defendant, for his own purposes, had a right to get all the use he could out of the tire, and his own purposes were not curtailed nor liability entailed by reason of plaintiff becoming his guest."

In discussing a claim of gross negligence founded upon the use of a defective tire, the supreme court of Washington in *Eubanks v. Kielsmeier*, 171 Wash. 484, 18 Pac. (2d) 48, say, in part:

"The first (ground) relates to a claim of negligence in the use of a defective tire. * * * It appears that, about two months before the accident, during a trip of the Kielsmeiers to California, a wire nail had caused a puncture of the tire; repair was made by having a boot cemented within the tire. There was no evidence that the tire was not otherwise in good condition at that time. On the other hand, there was evidence that the use of a boot is a matter of common practice. Accessories of this character are generally carried by dealers and service stations for just such purposes, and, according to the evidence, seventy-five per cent. of automobile drivers frequently use accessories of this kind. Certainly, the mere use of a boot in the repair of a tire otherwise in good condition cannot be said to constitute gross negligence."

See, also, *Newville v. Weller*, 217 Ia. 1144, 251 N. W. 21; *Fleming v. Thornton*, 217 Ia. 183, 251 N. W. 158; *Stanbery v. Johnson*, 218 Ia. 160, 254 N. W. 303.

Kelley v. Gagnon, 121 Neb. 113, 236 N. W. 160, was determined by this court in a transaction that occurred in South Dakota, prior to the enactment of the guest statute, and the deciding question here could not have been presented in that case. Yet, Paine, J., closes a discussion on the condition of the tires of the automobile, charged with causing the accident in that case, with the words: "It is clear that these tires were in fair, second-hand condition, not all of the tread being worn smooth."

A careful consideration of all the evidence, in connection with that quoted and otherwise referred to, is convincing that it furnishes no support whatever for a charge of even

ordinary negligence so far as based on the fact of the use of the borrowed tire.

In reference to the charge that immediately prior to and at the time of the accident, in attempting to pass a truck proceeding in the same direction, the defendant was driving his automobile at a dangerous and unlawful rate of speed, and thereby caused the accident, it may be said that chapter 105, Laws 1933 (Comp. St. Supp. 1933, sec. 39-1193), passed and approved with an emergency clause on March 14, 1933, was in force and effect. Its provisions applicable to the facts in the instant case, were: "No person shall operate a motor vehicle on any highway outside of a city or village at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person." The former limitation, viz., "nor in any case at a rate of speed exceeding forty-five miles per hour" (Comp. St. 1929, sec. 39-1102), had been repealed and no definite limitation was reenacted. This statute must be applied to the facts in the instant case in strict conformity with the principle, viz.: "The running of a motor vehicle at an excessive speed renders the wrong-doer liable only for those injuries which proximately result from the unlawful speed." 3-4 Huddy, Cyclopedia of Automobile Law (9th ed.) 330, sec. 173. See *Johnson v. City of Omaha*, 108 Neb. 481, 188 N. W. 122.

The road at the immediate scene of the accident was practically a level, straightaway, graded one, with a paved roadway some 20 feet in width thereon. There was no obstructing traffic which in any manner affected defendant's automobile or the movements of the truck sought to be passed by him, at or near the scene of the accident. It was broad daylight; the roadway was dry; visibility was in no manner impaired. Immediately preceding the accident there is no evidence of loss of control of his car by defendant until the moment of the blow-out, and such loss of control which then ensued was plainly due to

the condition created by that accident as the proximate cause thereof. There was no collision with the truck or any other object, and no lack of care on part of defendant, except as may be evidenced by the rate of speed at which his automobile was then traveling, which was between 50 and 60 miles an hour. The proximate cause was clearly the "blow-out," and not the speed. Even if speed be regarded as a contributing cause, and thereby negligence of defendant is established, still it fails to rise to the condition of "gross negligence" as that term is employed in the controlling statute.

In view of all the facts and circumstances disclosed in the record, the members of this court are unanimous of the opinion that the evidence is insufficient to support the judgment.

The judgment of the district court is, therefore, reversed and the action dismissed.

REVERSED AND DISMISSED.

IN RE ESTATE OF FRANK L. MOONEY.
JAMES B. MCDONALD, ADMINISTRATOR, ET AL., APPELLANTS, V. WILLIAM HORTON MUNGER, GUARDIAN, APPELLEE.

FILED MAY 19, 1936. No. 29664.

1. Wills: CONSTRUCTION. The court in construing a will must ascertain the intent and purpose of the testator as disclosed by the language of the will.
2. ———: ———. When the intention of the testator is ascertained, it must be given effect, if not contrary to law or public policy.
3. ———: ———. The testator's intention must be determined from the language of the will in connection with attendant circumstances.
4. ———: ———: TRUSTS. A will which devises property to trustee, providing for the maintenance of a person and the payment of an annuity under certain conditions, creates a testamentary trust.
5. ———: ———: ———. Whether a trust has been created

in a will is largely a question of intention to be determined from the will in connection with surrounding circumstances.

6. Trusts. "Where the owner of property gratuitously transfers it and properly manifests an intention that the transferee should hold the property in trust but the trust fails, the transferee holds the trust estate upon a resulting trust for the transferor or his estate, unless the transferor properly manifested an intention that no resulting trust should arise or the intended trust fails for illegality." Restatement, Trusts, sec. 411.

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

Beeler, Crosby & Baskins, for appellants.

Halligan, Beatty & Halligan, E. H. Evans and *Urban Simon, contra.*

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

DAY, J.

This court is asked to construe the will of Frank L. Mooney, deceased. The application was originally made in the county court to vacate the final decree entered in 1932 and to construe the will. The decree was vacated, and a new final decree was entered construing the will. Upon appeal, the district court held that it was unnecessary to vacate the decree to construe the will and proceeded in its decree to place a construction on the will which was different from that of the county court. The grounds alleged for the vacation of the decree were that it was procured by fraud and unavoidable casualty.

The first question for the determination of this court is the proper construction of the will of Frank L. Mooney, deceased. Frank L. Mooney was for many years a prominent banker of North Platte. His wife, Callie McDonald Mooney, had died many years before. He had an only son, Frank A. Mooney, who had been an incompetent for several years before his father's death. Frank A. Mooney had inherited over $100,000 from his maternal grandfather's estate. The appellants in this case are his

two uncles and an aunt, brothers and sister of his mother. Grace Elizabeth Mooney and Brenton David Mooney are his aunt and uncle, the sister and brother of his father. These uncles and aunts are the heirs of Frank A. Mooney, deceased. This was substantially the situation as to family relationships that existed in 1928 when Frank L. Mooney, deceased, executed his will.

This will, after making several specific bequests, which are not material to the issues here, provided in the sixth and seventh paragraphs as follows:

"Sixth: I hereby appoint my sister, Grace Elizabeth Mooney, and my friend, William Horton Munger, executors and trustees of this my last will and testament, with powers and duties hereinafter set forth.

"Seventh: My beloved son, Frank Alfred Mooney, is at this time afflicted with a mental disorder which makes it necessary to have a guardian appointed for him and I am now his legally appointed and acting guardian. He has a considerable estate of his own inherited from his grandfather, Charles McDonald, the income from which is sufficient to maintain him in comfort. I sincerely hope that he will recover from his mental ailment in the near future and prior to my death, but in the event that he does not so recover, I desire that my friend, in whom I impose special trust and confidence, William Horton Munger, be appointed guardian for him and I direct that no part of my estate be delivered to him for ten years after my death, unless for some reason, now unforeseen, his own estate should be insufficient to maintain him, and in the event that he recovers I desire that Two Thousand ($2,000) Dollars, per year, be paid him from my estate each and every year after the said period of ten years from and after my death. In the event that my beloved son, Frank Alfred Mooney, should depart this life before myself, then and in that event I devise and bequeath all the rest and residue of my property to my beloved sister, Grace Elizabeth Mooney, and my beloved brother, Brenton David Mooney."

It is the construction of paragraph seven of Frank L. Mooney's will which concerns us here. Upon the death of Frank L. Mooney, his will was offered for and admitted to probate in the probate court of Lincoln county, Nebraska. All of the usual, regular and necessary procedure in the probating of this will was carried out, and on August 6, 1932, William Horton Munger and Grace Elizabeth Mooney, executors under the will of Frank L. Mooney, filed their final account, petition for final settlement of the estate, and decree of distribution, in which petition it was set forth that it was necessary that the court, upon final settlement of the estate, interpret and construe said will.

Thereafter an order was entered by the court fixing the time of hearing on the petition for final account and the application for the construction of the will. Legal notice of said hearing was given. Upon the hearing, the county court entered a final decree and construed the will. This decree was vacated in this proceeding and another and different decree entered. Upon appeal, the district court entered a decree construing the will. These various decrees are too long to incorporate in this opinion. It will be sufficient to state that the decree of the district court construed the will substantially as did the first decree of the county court.

By the process of elimination, the matter of construing the will can be simplified. The last provision, "In the event that my beloved son, Frank Alfred Mooney, should depart this life before myself," etc., never became operative because that eventuality never occurred. Likewise, the incompetent son never recovered from his mental ailment, so that the provision for the payment of $2,000 per year can never become operative. The income from Frank A. Mooney's estate was never insufficient to maintain the son. So that none of the situations provided for by the will ever arose. But the circumstance which did occur, that is, the death of Frank A. Mooney, was not specifically contemplated and directly provided for by the will.

There are certain fundamental rules for the construction

of wills, which are so well established that they are no longer debatable in this state. One is that the court in construing a will must ascertain the intent and purpose of the testator as disclosed by the language of the will. Comp. St. 1929, sec. 76-109; *Nebraska Nat. Bank v. Bayer*, 123 Neb. 391, 243 N. W. 115. When the intention of the testator is ascertained, it must be given effect, if not contrary to law or public policy. *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, 84 N. W. 273; *Heywood v. Heywood*, 92 Neb. 72, 137 N. W. 984; *Luenenborg v. Luenenborg*, 128 Neb. 624, 259 N. W. 649.

The testator's intention must be determined from the language of the will in connection with attendant circumstances. *Lesiur v. Sipherd*, 84 Neb. 296, 121 N. W. 104. With these well-established elementary rules of construction in mind, a consideration of the language of this will, in connection with the surrounding circumstances, will enable us to determine the real intent and purpose of the testator. When the will was executed, and there was no substantial change in the situation of testator and his family relationships prior to his death, Frank L. Mooney had been for many years a widower with one son, who had become an incompetent. His sister lived with him, kept his house, and took the place of a mother to his incompetent son. The son had a substantial estate, apparently sufficient to care for him, which he had inherited from his maternal grandfather. The testator obviously did not intend to vest the title to any part of his estate in his incompetent son. The language of paragraph seven negatives any such purpose. There is, for instance, the provision that no part of the estate is to be delivered to him for ten years, "unless for some reason, now unforeseen, his own estate should be insufficient to maintain him." But in case the boy recovered, he was not to get the estate, but after ten years was to be paid $2,000 per year. From the language of the will, in connection with the circumstances of the son's incompetence, it is evident that Frank L. Mooney did not intend to bequeath to the son the title

to his estate while that son lived. It is equally clear that, in case the son did not recover from his mental ailment, the testator's intention was that he should never get any part of the estate except maintenance, in case the son's personal estate was insufficient to care for him.

It does not appear reasonable, therefore, that Frank L. Mooney intended that his son should under no circumstances come into possession of the property during his life, but that upon his death the title should vest in him for the purpose of distribution to his heirs at law. The language of the will does not support any such fantastic construction.

It is argued that, since the will did not provide for the disposition of the property in the event of the son's death, Frank L. Mooney died intestate as to the residue of his estate which he left for the benefit of his son. In support of this contention, several cases are cited to the effect that, where a will leaves a part of the property undisposed of, such property passes to legal heirs by virtue of the law of inheritance. *McCollum v. McCollum,* 108 Neb. 82, 187 N. W. 783; *Metzger v. Metzger,* 108 Neb. 613, 188 N. W. 229; *In re Estate of Koller,* 116 Neb. 764, 219 N. W. 4; *Heilman v. Reitz,* 89 Neb. 422, 131 N. W. 909. But the circumstances in none of these cases is similar or analogous to the situation here. These cases undoubtedly state the rule of law in this state applicable where a part of the estate is not disposed of by will, as in the *McCollum* case, where the widow's election was such as to leave a half of the estate undisposed of; or as in *In re Estate of Koller,* where the undue influence exercised by the residuary legatee left the residue undisposed of. But it is not applicable to the instant case because Frank L. Mooney did not die intestate as to any of his estate. His will made a complete disposition of all his estate.

The fee title to the residue of the estate after the payment of specific bequests was intended to vest in the trustees named in the will, William Horton Munger and Grace Elizabeth Mooney. A will which devises property

to trustee, providing for the maintenance of a person and the payment of an annuity under certain conditions, creates a testamentary trust. *Schick v. Whitcomb,* 68 Neb. 784, 94 N. W. 1023; *Will of Smith,* 176 Wis. 494, 186 N. W. 180. Whether a trust has been created in a will is largely a question of intention to be determined from the will in connection with surrounding circumstances. 69 C. J. 709; *Sears v. Cunningham,* 122 Mass. 538; *Pollock's Estate,* 306 Pa. St. 301, 159 Atl. 555.

In *Weller v. Noffsinger,* 57 Neb. 455, 77 N. W. 1075, it was held: "A devise, subject to a condition that the executor shall hold the property in trust for a number of years and collect rents, pay taxes, charges, and expenses incident to the proper care of the estate, and account annually to the beneficiary for the balance, vests the legal title to the property in the executor." See, also, *Clark v. Fleischmann,* 81 Neb. 445, 116 N. W. 290, in which it was held: "Where by the terms of a will the executor and trustee is invested with the management and direction of the real property of the testator, and is required to devote sufficient of the rents and profits to the support of his widow and daughter during their life, and to furnish aid to his father and mother, if their financial condition requires it, retaining any surplus not required for such purposes until sufficient is accumulated to discharge a mortgage on the home of the widow, the legal title to such real estate vests in the executor and trustee until the trust created by the will is discharged."

Here the language of the will created a testamentary trust, which imposed certain duties and conferred certain powers upon the trustees as to the property, which could not be performed except that the estate vested in them. They were required to provide for the maintenance of the incompetent son, if necessary, during his entire life. If he recovered, they were to pay him the sum of $2,000 per year, not from the income, but from the estate. These duties imposed upon them by the will could not be effectively performed unless they were vested with the legal title.

This necessity is an attendant circumstance to be considered in connection with the express language of the will.

About two years after the creation of this testamentary trust the incompetent son of the testator died. It was then that this controversy arose for the practical purpose of determining if this property were a part of the estate of Frank A. Mooney to be distributed to his heirs at law. The will expresses no intention of the testator as to what shall be done with the trust estate in the event of the death of Frank A. Mooney. Upon his death the trust was terminated.

This question has been considered and discussed frequently. A recognized work states the rules applicable as follows: "Where property is conveyed upon an express trust which fails, in whole or in part, a resulting trust arises as against the trustee in favor of the grantor and those claiming under him in the property conveyed or in the residue of the property remaining at the time of the failure or extinguishment of the trust, if the property is not otherwise disposed of. * * * The rule * * * applies in a case where the trust fails by reason of the fact that the beneficiary dies or becomes non-existent or does not come into existence. * * * The rule * * * applies where the purposes of the trust fail, as where the objects and purposes of the trust have ceased, or it no longer can be executed pursuant to its provisions." 65 C. J. 376.

Restatement, Trusts, sec. 411, states the rule in the following language: "Where the owner of property gratuitously transfers it and properly manifests an intention that the transferee should hold the property in trust but the trust fails, the transferee holds the trust estate upon a resulting trust for the transferor or his estate, unless the transferor properly manifested an intention that no resulting trust should arise or the intended trust fails for illegality."

Again, in comment c, sec. 411, it is said: "If real property is devised upon a trust which fails and there is

no provision in the will effectively disposing of the residue of the testator's real property, the devisee holds it upon a resulting trust for the heir of the testator."

Section 430 of the same work also says: "Where the owner of property gratuitously transfers it upon a trust which is properly declared but which is fully performed without exhausting the trust estate, the trustee holds the surplus upon a resulting trust for the transferor or his estate, unless the transferor properly manifested an intention that no resulting trust of the surplus should arise."

In section 430, comment c, it is said: "Where the owner of property devises or bequeaths it upon a trust which is fully performed without exhausting the entire property so devised or bequeathed, the devisee or legatee holds the surplus upon a resulting trust for the estate of the settlor."

These statements of the law are supported by numerous cases. See *Blount v. Walker*, 31 S. Car. 13, 9 S. E. 804; *Chater v. Carter*, 238 U. S. 572, 59 L. Ed. 1462; *Leech's Estate*, 274 Pa. St. 369, 118 Atl. 354; *Bancroft v. Maine State Sanatorium Ass'n*, 119 Me. 56, 109 Atl. 585.

The great weight of authority supports the view that, upon the failure of an express trust as in this case, the trustee holds the trust estate upon a resulting trust for the heirs of the testator as of the date of the failure of the trust. This conclusion is substantially the same as the county court in the first decree and as the trial court upon appeal. For this reason it is unnecessary for this court to determine the necessity of vacating the decree or the powers of the county court to vacate and enter a new decree under the circumstances. The judgment of the trial court is

AFFIRMED.

IN RE ESTATE OF ANDREW FRAZIER. JOHN FRAZIER ET AL., APPELLANTS, V. ALEXANDER JAMES FRAZIER, APPELLEE.

FILED MAY 19, 1936. No. 29537.

1. **Appeal.** Prejudicial error will not occur in overruling a challenge of a juror for cause unless an abuse of the discretion lodged in the court is shown.
2. **Wills: TESTAMENTARY CAPACITY.** If the deceased, at the time he executed the will, knew enough to understand and appreciate the nature and extent of his property, his relation to the persons who were, or might have been, the natural objects of his bounty, and if he understood what he was doing when he made the will, he possessed testamentary capacity.
3. ———: ———. It is not medical soundness of mind that governs, but testamentary capacity as defined in law. A high degree of mentality is not required to make a valid will, in case it is found to be free from undue influence.
4. ———: ———. A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives, nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will.
5. ———: ———: DIRECTION OF VERDICT. If a verdict against a will on the ground of incapacity would have to be set aside as against the weight of the evidence, then the issue of mental capacity should not be submitted to the jury.
6. ———: ———: ———. To justify the direction of a verdict on competency of the testator, it is not necessary that there should be literally no evidence thereon, but it is sufficient if there is none which ought reasonably to satisfy the jury that the incompetency alleged has been established.

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

Hoagland, Carr & Hoagland, for appellants.

Shuman & Overcash, contra.

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

PAINE, J.

This is an appeal from the district court for Lincoln county, Nebraska, to reverse a judgment rendered on a

verdict of a jury admitting to probate a will executed on May 8, 1933, by Andrew Frazier.

The will gives the northwest quarter of section 17, township 13 north, range 30 west, lying near North Platte, in Lincoln county, Nebraska, to the brother of the testator, Alexander James Frazier, whom he names as executor. The will was witnessed by Dr. John S. Twinem, Claude R. Mercer, and Leroy E. Mehlmann. This will is contested by John Frazier, a brother, and Mrs. Anna Freiberg, a sister of testator.

Fifteen errors are relied upon for reversal; the ones argued at greatest length being that the court erred in withdrawing from the consideration of the jury the question of the mental competency of the testator, and that the court erred in overruling the challenge of the contestants to the jurors George Ledroyt and P. G. Buchanan.

At the same time that the will was executed, an agreement was entered into between the testator and Alexander James Frazier, the beneficiary under the will, who was usually called Jim, and his wife, Mary Rose Frazier, usually called Rose, with whom the testator had been making his home for some time, setting out that he desired to remain in their home and be cared for by them during the remainder of his life, and that he had that day executed a deed to this brother, Jim, in consideration of their caring for him and supporting him during the remainder of his life.

We will first consider the question arising in the selection of the jury. The contestants challenged the ruling upon the *voir dire* examination of the juror George Ledroyt, who testified that he knew Andrew Frazier, the testator, referred to as Andy, and his brothers, that is, the contestant and the brother who is the proponent, and had known them both for many years. He testified that he had never had any business transactions with Andy, or visited him at his home, but had just casually met him, but that it had been two or three years since he had talked to Andy; that he had no impression, one way or the

other, as to whether he was capable of making a will on May 8, 1933. After the court had reexamined the juror in detail in regard to some of these points, he overruled the challenge made to the juror. P. G. Buchanan, another juror, said that he had known Andy for 20 or 25 years, had met him on the street, chatted with him, and as far as he could see there was nothing wrong with Andy, but he had not talked with him for two or three years before the date the will was made, and that if he was selected as a juror he would not start out with any impression as to whether the will was valid or invalid, and would determine the case entirely from the evidence and the court's instructions. The challenge was resisted, and after examination by the court the challenge was overruled.

The question of the acceptance of a juror is one that is submitted to the discretion of the trial court. The appearance of the juror, his manner of answering, his attitude toward counsel as well as litigants, were all disclosed before the trial court, and a single statement which would, by itself, tend to disqualify him may be considered as a careless statement by the court, who, in going over the whole matter more carefully, elicited positive statements showing that the juror was not prejudiced, had no preconceived idea of how the issue should be decided, and that, if retained as a juror, he would arrive at his decision solely from the testimony of the witnesses and the instructions of the court. We do not find that the court in this instance abused his discretion, for the court is given a wide latitude in passing on objections to individual jurors. *Hinton v. Atchison & N. R. Co.*, 83 Neb. 835, 120 N. W. 431; *Taylor v. State*, 86 Neb. 795, 126 N. W. 752; *Ward v. State*, 58 Neb. 719, 79 N. W. 725; *State v. Bartley*, 56 Neb. 810, 77 N. W. 438; *Whitcomb v. State*, 102 Neb. 236, 166 N. W. 553; *Kadner v. Omaha & C. B. Street R. Co.*, 97 Neb. 678, 151 N. W. 169; *Jahnke v. State*, 68 Neb. 154, 94 N. W. 158.

The principal attack is made by the contestants in the case at bar upon the mental competency of the testator.

To pass upon this question, it is necessary to review the evidence presented in a bill of exceptions of 600 pages. This bill of exceptions lacks the certificate of the clerk of the district court, and this court is not required to consider it. *State Bank v. Bradstreet,* 89 Neb. 186, 130 N. W. 1038, 38 L. R. A. n. s. 747; *In re Estate of Abts,* 122 Neb. 714, 241 N. W. 270. But, waiving this for the present, we learn from the bill of exceptions that this testator, known by every one as Andy, was born in 1876, and was 58 years old at the time of his death. He was the youngest member of the family of six children, which included William F. Stack, a half-brother. When Andy was 18 months old he had a severe attack of spinal meningitis, from which he made a slow recovery, and which left him somewhat crippled in the feet, especially on the right side, and his affliction is referred to by some witnesses as infantile paralysis. By the time he was five years of age he was able to begin walking again, with the help of some vehicle, and by the time he was seven years of age he could walk fairly well. He attended both public and parochial schools, but never reached the eighth grade. He could not run and play as other children did, and had a slight impediment in his speech.

Andy stayed with his oldest sister, Mrs. Freiberg, a contestant, for many years. She testified that he was not strong, paid little attention to anything around the home, but she had not seen him but once or twice during the last five years of his life. In 1907 this sister, Mrs. Freiberg, moved to Denver, and Andy went to live with his sister Margaret, who had never married, and he lived continuously with her for 20 years in her home which her father had deeded to her in North Platte. When Andy became a man he was engaged in several jobs. He delivered ice for his brother for over ten years, and was a gatekeeper or ticket-taker at the Lincoln county fair for a number of years. Before 1912 Andy's father deeded him a 160-acre improved farm, worth perhaps $8,000 at one time, but worth about $5,000 when he died.

Margaret took very good care of Andy and he was greatly attached to her. She would go out to his farm with him, help him do business with his tenants, and would help measure up the hay, and assisted him in collecting his rents. There is evidence to the effect that Andy, when not otherwise busy, stayed around the yard, and that he enjoyed talking with the boys and girls of the neighborhood, and at times would carry trinkets and toys in his pockets. Exhibit No. 7, introduced in evidence, shows a picture of Andy and the proponent of the will and a brother-in-law returning from a prairie-chicken hunt, and the evidence shows that Andy did his part of the shooting and enjoyed this sport. He was all broken up by Margaret's death, and insisted that the doctor had killed her, as she had died suddenly following an operation. For a short time after the death of his sister Margaret he lived with a Mrs. Boyer, and he then stayed out on his own farm for a while, and his tenant did the cooking. Andy would drive a team, ran a mower, and at times did other work on his farm.

Several years after Margaret died, Andy's brother, Jim Frazier, the proponent of the will, who had been for many years a Union Pacific conductor, was transferred back to North Platte from Gering by the company. At that time Andy was living out on his farm with his renter, and one day they called up and said that Andy was very sick. Jim being out on his run, Rose went out immediately, and found Andy vomiting and lying on a cot out in the yard. She brought him to North Platte and called a doctor, who said he had ptomaine poisoning, and from that time on until he died he lived in their family. They looked after his every need and were very kind to him, and he told several how good they were to him.

At the time Andy was so sick, Rose did not know the address of Andy's oldest sister, Mrs. Freiberg, one of the contestants herein, as they had not corresponded, and Rose sent an air mail letter to the chief of police in Denver, asking him to locate Mrs. Freiberg and tell her

that Andy was ill. In response to a telephone message, Rose at once wired Mrs. Freiberg money to buy a ticket to come to North Platte to visit Andy.

Exhibits in the record show that Andy kept a checking account at the McDonald State Bank, and made deposits, and drew checks in settlement of his business deals.

The evidence for the contestants on the question of his competency to make a will may be summed up briefly, as follows: The brother Jack, the principal contestant, testified that Andy was not competent, and his sister Anna, the other contestant, said he was "not fit" for a number of years. A lady with whom Andy boarded after his sister Margaret died testified that he "was very incompetent." Another lady met Andy on the street near the depot one day and he gave her "a blank look," and answered that he knew her, but she is positive that he did not know her at first. She testified that, while they carried on a conversation on this occasion, he did not ask about her welfare, or about the children, or anything like he usually did.

Two osteopathic doctors, father and son, gave Andy some nine or ten osteopathic treatments to stimulate the nerves in the lower part of the spinal cord with various lights, etc. One of these doctors testified that he had formed an opinion as to whether any paresis had set in, and said: "His mental condition was a subsequent affair and that was one of general paresis in addition to what he had already suffered from;" and added that he was not competent. The son testified he had given three of the ten treatments. In answer to the question whether he noticed anything unusual in his actions or conversations, he said that Andy seemed to make unnecessary motions in adjusting his affected legs on the table, and that, while he carried on an ordinary conversation, there was at times an interruption in the continuity of his thought.

In a spirited discussion of this testimony, the attorney for the proponent uses somewhat the following language: Now, what right did either of these osteopaths have to

express any opinion? They are not alienists, or even physicians as we understand such. One testified that they do not pretend to practice medicine; that their treatments were to tone Andy up; that he followed directions; carried on ordinary conversation; that he was not insane; that no "subjective examination" was made. The other osteopath did not know which disease Andy had, and said that it was a "fixed affair" and "remained somewhat stationary, a lifelong affliction." He said he did not think "there are any particular stages" of paresis, and that Andy possessed the same disease he had when he was an infant. The counsel adds in his brief: "In view of this testimony and the complete omission of any foundation, expressions of opinion by this witness were clearly improper."

Now, in an examination of the proponent's testimony, the testimony of those present when the will is executed is entitled to the greatest consideration. *Forehand v. Sawyer*, 147 Va. 105, 136 S. E. 683. One of the witnesses of the will was Dr. John S. Twinem, who has been a practicing physician and surgeon in North Platte for 31 years, and who testified he had been acquainted with Andy during all that time, and that they always visited every time they met "like two Irishmen." He treated Andy in his last illness for kidney trouble, some prostate trouble and also high blood pressure. Andy died on January 23, 1934. The will was executed May 8, 1933. Dr. Twinem testified that he was asked to come up and witness the will that evening, and saw Andy sign it, and stated that he observed Andy at the time the will was signed and could not find any deviation from the normal mental status, and that he was capable of transacting business; that he did not see anything about his appearance or condition or conversation that would indicate that he was at all unbalanced mentally, or unsound in any respect.

The testimony of the other two men who witnessed the will was very positive to the effect that they noticed nothing that would indicate that Andy was mentally unsound when the will was executed, although he was not quite as strong physically as he had been.

William F. Stack, a half-brother of Andy, and a joint heir if the will is broken and the recipient of nothing if the will is admitted to probate, stated that he had known Andy all his life, as his mother married Andy's father and they were stepbrothers; that he had never seen anything to indicate that Andy's mind was abnormal until his last sickness, when his mind wandered at times.

Katherine Frazier testified that she was a divorced wife of the contestant John Frazier; that she had known Andy ever since she came to North Platte in 1883; that years ago Andy worked in the ice business for her husband for years. She said that he delivered ice, made out tickets, and collected cash when any one paid cash, and that he would always settle up on Saturdays. Mrs. Frazier testified that, just before Christmas, about a month prior to Andy's death, she stayed at the home of Mr. and Mrs. Jim Frazier while they were away and took care of Andy; that she got his meals for him, stayed with him all the time; that she did not see anything wrong with him mentally, and that they had a very nice time; that he was not in bed all of the time, but would be up and around, but did not go down-town; that her little grandson, Jerry, also stayed there with her the entire week that she was there, and that Andy and Jerry visited and talked every evening; that Andy said that Jim and Rose were taking care of him nicely, and that what property he had he was going to leave to Jim, and said, "Kate, I am sure a lucky dog."

Mildred Spillner, a registered nurse, who at the time of the trial was nurse in the public schools of North Platte, testified that during May, June, and July, 1933, she saw Andy twice a day, as she called to give feedings with a stomach tube to Rose Frazier's sister. She told of her visits with him, that she found him to be crippled in the feet, but otherwise to be a man of ordinary intelligence, and never saw anything to indicate he was abnormal or of unsound mind. Her visits covered the day the will was written.

It is clear from the evidence that the testator had a severe attack of infantile paralysis when he was a year and a half old, and that he lost the use of his legs, but gradually after several years regained the use of his legs, but as a boy did not have such use of them that he could play games and run and romp with the other boys, but as he reached manhood he could, and did, get about and work at several things, such as delivering ice and doing work on his farm.

During 20 years he lived with his sister Margaret in a very happy relationship. It is asserted that during these years she handled all his business matters for him. The evidence does show that she was a clever business woman and perhaps took charge of the renting and managing of the farm, although he was always along with her. This evidence does not indicate that he was not able to handle these farm matters, but that he had entire confidence in his sister Margaret, who talked all these matters over with him, and she was quick and capable, and Andy was glad to have her handle his matters. She doubtless knew Andy better than any one else ever did, and it is important to note that she not only willed her home to Andy, which would be expected, but that she made him the executor of her estate, which duties he carried out, and settled her estate. In Margaret's opinion he was able to handle business affairs.

Complaint is made that he did not get a job and hold it after he stopped working with his brother in the ice business. One answer to that is that he did not feel that he had to work, and was crippled in his feet. His wants were simple, he lived very economically. Our attention is called to the fact that after his sister Margaret's death he had trouble with his renters, and at times failed to collect all the rent due him from this farm. However, it can hardly be argued that the failure to collect farm rents since 1929 should be considered as a test of sanity.

It may be admitted that the proponents of the will took Andy into their home and treated him well, but there is

nothing to indicate that they would not have treated him as well if he had not possessed this farm. The verdict of the jury decided the question that there was no undue influence practiced by them.

On this evidence the trial court withdrew from the jury the question of mental competency. Let us examine some of the decisions in reference to this point. In *In re Estate of Gormly,* 188 Ia. 467, 176 N. W. 252, where a bachelor, aged 85, left the bulk of his estate to one nephew, and where the attending physician said that his mind was enfeebled to the same extent as his physical condition, but no abnormal derangement was shown, it was held that the evidence was wholly insufficient to have justified a verdict adverse to the will on the ground of mental incapacity, and that the evidence was insufficient to make that a question for the jury.

Another case in point is *Phelps v. Beard,* 209 Mich. 266, 176 N. W. 406, in which a doctor testified that the testator was 83 years of age, very feeble, and did not have control of his bladder or bowels, and was anxious to die, but his mind was clear outside of forgetfulness, but that he had sufficient memory and mental capacity to know the objects of his bounty and his property. The court instructed a verdict, and said there was no sufficient evidence to indicate that he was not competent to make a will.

Gay v. Gay, 183 Ky. 238, 209 S. W. 11, relates to a widow 68 years of age, owning valuable real estate and more than $30,000 of personal property. Her will was contested by three grandchildren. She placed great weight upon her dreams, and was influenced by them in some things. The court held that she made a rational survey of her property and disposed of it according to a fixed purpose, and that although an alienist testified that she had a form of insanity, still the evidence was insufficient to go to the jury upon the question of testamentary capacity where such mental disorder was not of a kind to invalidate a will.

In *Green v. Isaacs,* 178 Ky. 258, 198 S. W. 714, a will

was contested on the ground of mental capacity. The court said the evidence did not amount to proof, but tended only to excite suspicion, and that it was proper to direct a verdict, as the jury should not have been permitted to guess away the right of the testatrix to dispose of her property as she saw fit, and that the trial court was right in directing a verdict in favor of the will.

Baker v. Lemon, 192 Ky. 473, 233 S. W. 1050, tells of a testator who made a will 12 days before he died. He devised his estate of $30,000 to the widow by his second marriage. Two married daughters of his first marriage contested the will. It was held that the unsupported expression of opinion by one of the daughters that her father was of unsound mind, and the fact that he disposed of two life insurance policies as if they were payable to his estate when they were payable to beneficiaries, was held to be insufficient to grant a submission to the jury upon the question of mental capacity.

Let us examine the case of *Frohman v. Lowenstein,* 303 Mo. 339, 260 S. W. 460, which involved the question of mental capacity. A verdict was returned in favor of the contestant. Testator lost $75,000 during the panic and took a dose of laudanum, but his life was saved. He was suffering from bulbar paralysis, which lasted nine years. It drew his mouth and lips so that he looked silly, and yet he was not insane. It was held that the evidence was insufficient to submit the question of mental incapacity to the jury, and the trial court erred in refusing a peremptory instruction in favor of the will.

In *Seamans v. Gallup,* 195 Ia. 540, 190 N. W. 395, the jury returned a verdict finding the testator incompetent. It was reversed on appeal. It was stated that the question is not whether some evidence of mental incapacity has been introduced, but it must appear that testator's mental weakness was so complete that he ceased to comprehend the nature and effect of the act of testamentary disposition. It is stated that the court should have sustained the defendant's motion for a directed verdict, as the verdict of the jury was not sustained by sufficient evidence.

Many other cases have been examined in which the court approves taking the question of competency from the jury: *In re Walz's Estate,* 215 Mich. 118, 183 N. W. 754; *Woodman v. Morgan,* 200 Ia. 500, 203 N. W. 298; *In re Morris' Estate,* 228 Mich. 555, 200 N. W. 135; *Kelley v. Stanton,* 141 Md. 380, 118 Atl. 863; *Estate of Campbell,* 46 Cal. App. 612, 189 Pac. 812; *Spencer v. Spencer,* 221 S. W. (Mo.) 58; 28 R. C. L. 405, sec. 417.

Now let us examine cases which were properly submitted to the jury on this question of incompetency. Where testator was 86 years old, and had suffered two paralytic strokes and was unable to remember or carry on a connected conversation, his competency was held to be a question for the jury. *In re Estate of Ross,* 173 Cal. 178, 159 Pac. 603. Where the testimony is hopelessly in conflict, it should be submitted to the jury (*Baddeley v. Watkins,* 293 Ill. 394, 127 N. E. 725), and where the evidence is of such substance and relative consequence relating to competency as to carry the quality of proof and induce a belief in its efficacy (*Humphrey v. Neal,* 199 Ky. 498, 251 S. W. 637), or where a testator had delusions and hallucinations, was profoundly melancholy, suffering from mania of persecution, imbued with suicidal intent, and his conversations and conduct were strange and abnormal, as in *Whittlesey v. Gerding,* 246 S. W. (Mo.) 308, the question of mental competency would be for the jury, for if the jury rejects a will under such evidence, then the court would have ample grounds upon which to sustain such a finding.

We find one case which covers so many of the features involved in the case at bar that we present it briefly. In *In re Tymeson's Will,* 187 N. Y. Supp. 330, the court says that the test is, was testator's mind capable of understanding the nature and disposition of his property and his relations with his relatives? If he has this upon the date he made the will, he is a person of sound mind and memory within the meaning and intent of the statute of wills. It is said that less mental faculty is required to

execute a will than to enter into any other legal instrument; that the testator's property was his own, he had the power to do with it as he chose, and while he may have had delusions, that does not of itself constitute incapacity, for a delusion affects testamentary capacity only when it enters into and controls its exercise. Gross eccentricity, slovenliness in dress, peculiarities of speech and manner, or ill health are not facts sufficient to disqualify a person from making a will. The fact that the will was executed under the supervision of a lawyer affords a strong presumption that it was executed in compliance with the formal requirements of the statute. A very high degree of mentality is not required to make a valid will in case it is free from undue influence. If in the opinion of the court a verdict against a will would have to be set aside as against the weight of the evidence, the issue of mental capacity should not be submitted to the jury. "To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury; it being sufficient that there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established." All of these findings are approved in the later case of *In re Whitmarsh's Estate* (1929), 234 N. Y. Supp. 505, in which it is held that it is not medical soundness that governs, but testamentary capacity as defined by law, and that the law does not put any obstacle in the way of the aged or infirm in making disposition of their property by will.

In the light of the law as set out in these decisions, let us consider the case at bar. It is clear that, even though there is a small amount of evidence to support the contestant's claim of incapacity, that is not alone sufficient to require the court to submit that issue to the jury, for there is a clear, decided, and overwhelming preponderance of evidence showing that the testator was of sound mind and disposing memory at the time he executed the will. He knew the amount and character of his property; he knew his other relatives, but had decided he wanted his

brother Jim to have his farm. He told several people of his desire, and the court is convinced that this was an intelligent disposition of his property. *In re Estate of Laflin,* 108 Neb. 298, 187 N. W. 885; *Carter v. Gahagan,* 102 Neb. 404, 167 N. W. 412; *Bishop v. Scharf,* 214 Ia. 644, 241 N. W. 3.

When the trial judge reached the same conclusion that this court has, it was his duty to withdraw that issue from the jury, which he did. *In re Estate of Bayer,* 119 Neb. 191, 227 N. W. 928; *In re Estate of Slattery,* 125 Neb. 194, 249 N. W. 597. We have examined all of the errors set out by the contestants, and while section 20-853, Comp. St. 1929, allows the court to disregard those errors which are not prejudicial, yet we cannot discuss others because of the length of this opinion, and can only state that we find no prejudicial errors in the record.

The judgment of the trial court, finding that the judgment of the county court in admitting said will to probate was right, is sustained by the record in this case, and said judgment is hereby

AFFIRMED.

ANSEL B. WATSON, APPELLEE, V. I. OTIS MILLER, APPELLANT.

FILED MAY 19, 1936. No. 29555.

1. Appeal: VERDICT: SETTING ASIDE. The power of setting aside a verdict on the ground that it is excessive is one that is to be used sparingly.
2. ———: ———: ———. A verdict will not be set aside simply because the appellate court might have decided differently on the same facts.
3. ———: ———: ———. A verdict should only be set aside on the ground that it is excessive where it is apparent that the jury have either misapplied the law, or have been influenced by their prejudice and passion, rather than by the real facts of the case as shown by the evidence.

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

N. P. McDonald and *George A. Munro,* for appellant.

Hamer & Tye, contra.

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

PAINE, J.

In an action for personal injuries following a collision between a load of logs and an automobile, the jury returned a verdict for $15,000. As a condition for overruling the motion for a new trial, a remittitur was filed for $9,000 and judgment entered for plaintiff for $6,000. Defendant appeals.

The bill of exceptions discloses that the plaintiff was about 58 years of age, and had lived for years some seven miles south of Kearney, but about the 1st of March, 1933, he had left his farm and had moved to Kearney. During the time that he had lived there, he had painted a couple of small houses, had put up a little hay, worked on the road with a team, and done other odd jobs.

On the day of the accident, the plaintiff with a neighbor was returning to Kearney with five large cottonwood logs, which they had cut that day and loaded on the trucks of the wagon. A paved state highway runs directly south from the city of Kearney to the Platte river bridge, which is located a mile and a half south of Kearney. Formerly this bridge was a mile long, but when the new bridge was constructed it was made much shorter by filling in high embankments at each end of the bridge. South of the bridge there is a road going west, at which point the paving stops. There is also a filling station at this point. About a mile farther south is what is known as Meyer's corner, from which point a road runs east to Lowell and then south to Minden. The plaintiff and his neighbor had cut these logs a short distance east of Meyer's corner and were hauling them to Kearney on a low-wheeled truck pulled

by a team. At Meyer's corner certain road implements are kept, and the plaintiff stopped to visit with the maintainer men and started on slowly to the city of Kearney, the plaintiff riding on the front end of the logs. It was nearly 6:00 p. m. on December 8, 1933, and dark, and all of the automobiles were running with their lights on. When they had reached a point about half way between the filling station and the south end of the bridge, the defendant overtook them, driving a Chevrolet coupé. He testified he did not see this load of logs until he was 30 or 40 feet from it on account of the bright lights of the string of cars coming towards him from the north. When the defendant saw the logs, he first swerved his car to the west side of the road, but as the paving was only 18 feet wide and there was a very sharp decline of about 15 feet down the high embankment to the sand of the river-bed, and as a car was approaching rapidly from the north and would strike him, he turned back towards the east side of the road and struck the rear wheel under the load of logs. The collision shoved the wagon over a little and broke one spoke in this wheel and bent in the right front fender of the automobile. However, the force of the collision caused the plaintiff to fall from the front end of the wagon to the pavement. The defendant took the plaintiff to his home in Kearney, and called Dr. Stearns and asked him to go over and examine the plaintiff and find out his condition. After a very careful examination, Dr. Stearns found no evidence of fractured bones, but found that plaintiff's teeth were in a very bad condition; that he had lost all of his lower teeth, had only 13 upper teeth, and that the processes had been absorbed and pus was oozing freely from his gums. He made an examination of his heart and found the plaintiff was suffering from a disease of the heart which prevented the valves from meeting and closing, and that his arteries were in a very advanced stage of arteriosclerosis. Three days later this Dr. Stearns went back, although he had not been called by the plaintiff, and found that the muscles over his back

were tense, and found a sore condition such as might result from an injury. He told plaintiff that he was employed and paid by the defendant to take care of him, and that it would not cost him a cent to call him back again, but he was never called by the plaintiff. He testifies that the condition in the muscles of plaintiff's back was such as you would expect soon to disappear. After a few days the plaintiff got up and went to see Dr. Bennett, who prescribed for his nervousness and to relieve his pain, and no further medical attention is disclosed by the evidence until after the plaintiff brought suit against the defendant for $35,000.

In the petition it was alleged that plaintiff was driving at a speed of 50 miles an hour, failed to keep a lookout, neglected to slacken his speed after he discovered the loaded wagon; that his automobile was out of control, and that, as a direct result of these acts of negligence, the plaintiff was thrown to the paved highway, where his head was cut and bruised and he sustained concussion of the brain; that the bones, muscles, and nerves of his back were crushed; that the injuries are of a permanent nature, and have caused him great pain and suffering; that as a result of the injury his spine has become permanently stiffened; that at the time of the injuries he was a strong, able-bodied man, capable of earning $3,500 a year, and that as a result of the negligence of the plaintiff he has been totally disabled and rendered physically and mentally unfit to engage in any occupation, and his earning capacity is entirely destroyed. Nine large X-ray pictures accompanied the bill of exceptions. The X-ray pictures introduced by the plaintiff were taken by Dr. Johnson, while those introduced by the defendant were taken under the direction of Dr. Stearns at the Good Samaritan Hospital in Kearney.

The defendant called Dr. A. F. Tyler, of Omaha, the attending radiologist of St. Joseph's Hospital, Omaha, since 1909, and who has specialized in X-ray work. From an examination of the X-ray pictures introduced in evidence,

he testified that the bony deposits on the edge of the spine had been going on from 15 to 20 years; that there was no indication of any fracture of a ligament which had become ossified, but that there was a lipping of some of the vertebræ, caused by the laying down of a bony deposit; that there was nothing shown in any of the pictures that indicated any fracture of the spine. In answer to a hypothetical question, he testified that in his opinion the result of the fall from the wagon to the paving was a muscular injury, and that the condition of the spine as shown by the X-rays was not the result of the injury in the fall to the pavement. There is no doubt that some of the tissues of the backbone had been replaced with calcium deposit. Dr. Stearns testified that it was utterly impossible for plaintiff's condition to have developed in the short time between the date of the injury and the date when the pictures were taken, and that the condition of his back was the result of a bacterial infection that got into his bloodstream from the bad conditions in his mouth, and that caused the arthritis in his backbone. When Dr. Stearns was asked whether plaintiff's condition at the time of the trial was the result of any injury he might have sustained December 8, 1933, he testified positively: "No; no. Absolutely not."

Dr. Tyler was asked the question, "Then because of the fact that this condition exists could you say whether or not that was the result of some injury?" and his answer was: "No; this condition is not in my opinion the result of injury."

The plaintiff testified that when the collision occurred he was thrown from the top of the load of logs down to the paved highway and was picked up unconscious. He says he was in a daze, and claims that blood came from his ear, and that he was not conscious of his surroundings until about the second time that Dr. Stearns called. From that time on, he testifies, he could not raise himself from his chair or get up from the floor until he could take hold of something with his hands to lift on, and he could not

lean over to pick up anything from the floor, as it would throw him out of balance and he would fall down. On the other hand, Dr. Stearns testifies positively that plaintiff was perfectly conscious the first time he called after the accident, and made no complaint of injury to his head, and that he had no skull injury. During the trial the plaintiff was in the courtroom and was helpless, and the jury saw him and heard his testimony, and his doctor testified that his condition was the result of this injury.

Defendant complains of errors in the instructions. We find the court gave 24 instructions, some of which were over two pages long. It is charged that instruction No. 5 is totally inapplicable to the issues in this case. A few paragraphs of this instruction read as follows:

"The driver of an overtaking motor vehicle not within a business or residence district as herein defined shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction.

"The driver of a vehicle shall not drive to the left side of the center line of a highway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety."

"The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard to the speed of such vehicles and the traffic upon and condition of the highway."

In the closing paragraph of the fifth instruction the court says to the jury: "These statutes are for your information as to the law in the case, but if you find from the evidence in the trial that these statutes or any of them have been violated, then you are instructed that it is a circumstance which you may take into consideration in determining whether or not the party so violating was guilty of negligence."

It is claimed that the petition did not allege any of these

acts as negligence, and the defendant's only defense was that he did not see the load of logs until he was within approximately 30 feet of them, by reason of the glaring headlights of approaching cars. It is insisted by the defendant that the giving of this instruction No. 5 was reversible error.

We find on examination that these instructions were given to the jury on December 14, 1934. These paragraphs were taken, with minor changes, from sections 39-1142 and 39-1143, Comp. St. Supp. 1931, and each of these sections was repealed by the 1935 legislature. The jury were not bound to accept either plaintiff's or defendant's explanation as entirely true, and must have found negligence in the manner in which defendant attempted to pass the load of logs.

It is a general rule that judgments are not set aside for errors in instructions unless there is, first, error, and, second, prejudice resulting from it, and we cannot see how the defendant was prejudiced by giving the statutory rules of the road as then in force.

The first error set out in the motion for a new trial is that the verdict is excessive, and in the brief of the defendant we find set out: The verdict and judgment are not sustained by sufficient evidence; (a) it is not shown by a preponderance of the evidence that the negligence of the defendant was the proximate cause of plaintiff's disability; (b) the damages allowed by the verdict and judgment are not supported by sufficient competent evidence; the damages awarded to the plaintiff are excessive, appearing to have been given under the influence of passion, mistake, or prejudice.

The verdict returned by the jury was for the sum of $15,000. After argument of the motion for new trial, the trial court ordered a new trial unless plaintiff should file a remittitur of $9,000 within five days. The remittitur was filed, and judgment was finally entered for $6,000.

The power of setting aside a verdict on the ground that it is excessive is one that is to be used very sparingly.

Southern Cotton Oil Co. v. Thomas, 155 Ga. 99, 117 S. E. 456. As the assessment of damages is peculiarly the province of the jury, this court has been very cautious in overthrowing verdicts on this ground. 20 R. C. L. 281, sec. 64.

A verdict will not be reversed simply because the appellate court might have decided differently on the same facts.

The first duty to pass upon the justness of the amount of this verdict rested with one of the oldest and most experienced trial judges in our state, and in the exercise of sound discretion, and in his best judgment, he found insufficient evidence to sustain the verdict awarded, and he did not hesitate to require remittitur of $9,000 to be filed.

While it is usually said that a verdict should only be set aside when it is apparent that the jury had either misapplied the law or had been influenced by their prejudices or passions rather than by an observance of the law and the facts of the case as shown by the evidence, it is also true that, while great latitude has been allowed to juries in estimating damages, yet to this power there must be some limit. *New Orleans, J. & G. N. R. Co. v. Statham,* 42 Miss. 607, 97 Am. Dec. 478; *Neeley v. Snyder,* 193 S. W. (Mo. App.) 610.

It appears possible that the jury may in the case at bar have been misled by some mistaken view of the merits of the case, or for some reason may have disregarded the testimony of the defendant's medical witnesses.

In an early case, tried in 1808, it was generally stated that, when the damages are so excessive that it may reasonably be presumed that the jury in assessing them did not exercise a sound discretion, but were influenced by passion, partiality, prejudice, or corruption, the court may set aside the verdict and send the cause back to another jury for revision. However, there must be satisfactory evidence in the record that the damages are excessive and that the jury acted intemperately. *Coffin v. Coffin,* 4 Mass. 1, 3 Am. Dec. 189.

It is not sufficient for a party who seeks a new trial on the ground of excessive damages merely to raise a doubt as to whether or not the verdict is large. It is incumbent on him to show affirmatively and satisfactorily that it is, and to what extent. *Clark v. Whitaker* (1848) 19 Conn. 319, 48 Am. Dec. 160; *Coffin v. Johnson,* 117 Me. 565, 104 Atl. 369.

In the case of *Schafer v. Missouri Valley Pipe Line Co.,* 123 Neb. 669, 243 N. W. 889, this court considered a case in which damages were asked for the construction of a pipe line across a strip of land 65 feet wide and 91 rods long, and injury to a gate. The plaintiff had cashed a voucher for $20 for the right of way. The jury returned a verdict for $2,556.45. It was held that the verdict was beyond all reasonable limits of compensation warranted by the evidence. The presumption was therefore raised that the verdict was not based upon sober judgment of the testimony given by witnesses upon the stand, but was based upon mistake or passion and prejudice. We were compelled to find that the amount of the verdict was not supported by sufficient competent evidence, and was so clearly wrong as to induce the belief that it could not have been reached without partiality.

In the fourth division of section 20-1142, Comp. St. 1929, it is provided, among the grounds for new trial, that excessive damages which appear to have been given under passion and prejudice is a good ground. The verdict in the case at bar clearly comes within such a provision. It was so excessive as to be entirely unjustified, and as there must be a new trial we will not discuss the evidence further.

The following are a few of the cases in point: *Sternberger v. Sanitary District,* 100 Neb. 449, 160 N. W. 740; *Wiles v. Department of Public Works,* 120 Neb. 689, 234 N. W. 918; *Trute v. Holden,* 118 Neb. 449, 225 N. W. 238; *Abrashkov v. Ryan,* 114 N. Y. Supp. 973; 46 C. J. 430.

It is also our opinion that the judgment remaining after the trial court fixed a remittitur of $9,000 is still excessive,

for there is no substantial basis in the evidence for damages in such an amount. Further, we find it impossible to discover a proper basis for reducing the amount. Therefore, the case is sent back for trial to another jury, and the judgment

REVERSED.

EDMUND T. JOY, APPELLANT, V. CHESTER R. BUCHANAN ET AL., APPELLEES.

FILED MAY 19, 1936. No. 29663.

1. **Bills and Notes:** PAYMENT. In the absence of evidence of an intent to sell on the part of the holder of interest coupons, or of circumstances indicating that a sale was intended, it will be presumed, when the amount due thereon is paid, that the coupons were discharged and not purchased.
2. ———: ———. The provisions of section 62-801, Comp. St. 1929, which enumerate the various ways in which negotiable instruments may be discharged, including (5) "when the principal debtor becomes the holder of the instrument at or after maturity in his own right," are construed, and the phrase "in his own right" is *held* to include a case where the maker of an interest coupon, past due, authorizes a third person as his agent to purchase the note from the holder thereof.

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

Mockett & Finkelstein, for appellant.

Boehmer & Boehmer, Perry Morton, Allen & Requartte, O. C. Wood and *Lewis C. Westwood, contra.*

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

CARTER, J.

This action was commenced to foreclose that part of a real estate mortgage given to secure three interest coupons of $100 each, subject to the balance due on the

original mortgage of $4,000. The trial court denied the plaintiff a decree of foreclosure thereon, and plaintiff appeals.

The record discloses that on June 11, 1928, Edmund T. Joy, the plaintiff herein, was the owner of certain lands in Lancaster county, and on that date he and his wife executed and delivered to the Federal Trust Company their promissory note and mortgage in the amount of $4,000, to which were attached ten coupon notes of $100 each, payable December 11 and June 11 of each year, commencing December 11, 1928. In addition to the mortgage, the Federal Trust Company took a supplemental agreement, made in contemplation of a sale of the mortgage by it, which provided that, in case the Federal Trust Company should be required to make any payments due under the note and mortgage, it should be subrogated to all the rights of the holder thereof, subject only to subsequently maturing payments. On June 28, 1928, the note and mortgage were assigned by the Federal Trust Company to the Union Fire Insurance Company and were, under the terms of a separate agreement, guaranteed by the Federal Trust Company.

On April 2, 1930, plaintiff conveyed the lands, subject to the mortgage, to Chester R. Buchanan who, as a part of the purchase price, assumed and agreed to pay the $4,000 note and mortgage and maturing interest. Chester R. Buchanan subsequently conveyed the lands to William W. Buchanan, guardian of John W. Buchanan, who failed to pay the three coupons involved in this suit. The Union Fire Insurance Company requested payment of the coupons as they became due from the Federal Trust Company, which in turn demanded payment from plaintiff.

The record shows that the first coupon involved herein became due on December 11, 1931, and it was paid by the Federal Trust Company with money provided by plaintiff's agent, R. S. Mockett. Mockett took a receipt for the money from the Federal Trust Company which stated that the money was for the payment of the coupon due December

11, 1931. On October 22, 1932, the Federal Trust Company assigned its interest in the coupon to plaintiff by a written assignment. On July 9, 1932, plaintiff took $100.78 to the Federal Trust Company which on the same day delivered the money to the Union Fire Insurance Company. On the same date, the coupon and a written assignment of the interest of the Federal Trust Company therein were delivered to plaintiff by the Federal Trust Company. On January 11, 1933, plaintiff took $100 to the Federal Trust Company which delivered it to the Union Fire Insurance Company on the same day and a receipt was taken for the interest payment due under the coupon maturing on December 11, 1932. The record does not show a written assignment of this coupon to the plaintiff. None of the three coupons was canceled or marked as paid. It is the contention of plaintiff that the Federal Trust Company was subrogated to the rights of the holder of the mortgage and that its rights inure to the benefit of plaintiff by virtue of the assignments.

The evidence shows that E. H. Wetencamp, one of the appellees, entered into a contract with Harding & Roe, real estate agents, for the purchase of this property. In making the purchase, Wetencamp made inquiry of the Union Fire Insurance Company as to the amount due on its mortgage and was informed that the principal note of $4,000 and two $100-coupons remained unpaid. Wetencamp testified that he had no actual knowledge that the three coupons upon which this suit was brought were not paid. It is not disputed, however, that the supplemental contract between plaintiff and the Federal Trust Company was recorded in the office of the register of deeds.

The evidence shows that the Federal Trust Company did not advance its own funds for the purchase of any of the interest coupons in question. All of the money paid by the Federal Trust Company to the Union Fire Insurance Company was the money of the plaintiff. The Federal Trust Company was therefore the agent of the plaintiff, and the payment of the money by it to the Union Fire Insurance

Company was equivalent to payment by the plaintiff. It cannot therefore be said that the Federal Trust Company, as agent for the plaintiff, could acquire any different interest in the coupons than could the plaintiff if he had personally paid the amount. We therefore conclude that any rights acquired by the Federal Trust Company were acquired by virtue of the agency rather than by virtue of its contract of guaranty with the Union Fire Insurance Company or the supplemental contract with plaintiff which has hereinbefore been described. This being true, the question is whether plaintiff, as maker of the notes and coupons, may purchase them, under the circumstances of this case, and be subrogated to the rights of the holder in the security.

The evidence in this case does not show an assignment of the coupons to the Federal Trust Company. The amount due on the coupons was paid, a receipt for payment taken and the uncanceled coupons delivered to the Federal Trust Company. In the absence of proof of an agreement to assign, payment of the coupons will be presumed. The rule applicable is well expressed in *Venner v. Farmers Loan & Trust Co.*, 90 Fed. 348, wherein the court said: "It is therefore a sound principle of law that the holder must intend a sale, and consent to a sale, and a mere transfer of title, when he parts with such preferred coupon, or the transaction will be treated as a cancelation and payment."

In *Ketchum v. Duncan*, 96 U. S. 659, the court, in a similar case, said: "It is undoubtedly true that it is essential to a sale that both parties should consent to it. We may admit, also, that 'where, as in this case, a sale, compared with payment, is prejudicial to the holder's interest, by continuing the burden of the coupons upon the common security, and lessening its value in reference to the principal debt, the intent to sell should be clearly proved.'"

To like effect is the holding in *First Trust Co. v. Ricketts*, 75 Fed. (2d) 309, and cases therein cited. We conclude therefore that the evidence fails to show an assignment of

the coupons but tends rather to show that they were extinguished and discharged by payment.

We are also of the opinion that the coupons in question were discharged within the meaning of the negotiable instruments law of Nebraska. It provides in part as follows: "A negotiable instrument is discharged: * * * Fifth. When the principal debtor becomes the holder of the instrument at or after maturity in his own right." Comp. St. 1929, sec. 62-801. Did not the plaintiff, as the principal debtor, become the holder of the instrument after maturity in his own right? We think he did.

In discussing this same section of the negotiable instruments law, the supreme court of Kansas said: "Whether we consider the transaction as one in which he furnished the money in the first instance to purchase the note through his agent, Wilson, or as one in which Wilson first purchased it with his own funds and subsequently, upon being reimbursed by defendant, transferred it to him, it would seem to be clear that the maker became the owner in his own right, unless there be some principle of law which forbids a debtor to purchase his own debt." *Sigler v. Sigler*, 98 Kan. 524, 158 Pac. 864, L. R. A. 1917A, 725.

In *Harding v. Hagler*, 176 Ark. 146, 3 S. W. (2d) 289, the court, in discussing the same section, said: "Relative to the first proposition, sec. 7885, C. & M. Digest, subdivision 5, provides: 'A negotiable instrument is discharged when the principal debtor becomes the holder of the instrument at or after maturity in his own right.' There are four other subdivisions to this same section, but subdivision 5 is the only one applicable to the facts in this case. Mrs. Schaer was a joint maker of these notes, and therefore a principal debtor, and when she became the holder of any one of the notes in controversy, at or after maturity, under this section such notes were discharged. It will be seen from the facts heretofore stated that, at the time she reacquired these notes, one of the $100 notes was past due. It will also be seen that three other of such $100 notes became due in her possession and before

she reissued them. As to these notes there can be no question but what they are discharged."

We therefore conclude that the trial court was right in denying the plaintiff a decree of foreclosure on the coupon notes in question and the judgment is therefore

AFFIRMED.

MARIE MILLER, APPELLANT, V. RAYMOND L. CROSSON, SHERIFF, ET AL., APPELLEES.

FILED MAY 19, 1936. No. 29602.

1. **Sheriffs**: EXECUTION: RELEASE OF LEVY: ACTION FOR DAMAGES: BURDEN OF PROOF. Automobile upon which sheriff was directed to levy was seized by him in execution. Being claimed by a third person, the sheriff released the levy. In damage suit by judgment creditor against sheriff for loss of such seized property, burden is on sheriff to establish ownership in third person.
2. **Evidence** examined and *held* not to establish *prima facie* proof of ownership in third person; no sale, or consideration for transfer, of automobile being shown.
3. **Execution**: LIEN. In this state no lien is created by issuance of an execution or delivery of same to sheriff. Goods and chattels of a debtor are bound only from the time they are "seized in execution."
4. ———: LEVY. In order to constitute a sufficient levy in this state, the levying officer should have the property under his control and openly and in express terms assert dominion over it by virtue of the writ.
5. **Sheriffs**: EXECUTION: RELEASE OF LEVY: ACTION FOR DAMAGES: BURDEN OF PROOF. Failure of sheriff to comply with sections 20-1521 *et seq.*, Comp. St. 1929, when property seized on execution is claimed by third person, does not fix liability on sheriff, but if property thus seized is released by him to third person, under conditions shown in evidence, in suit by judgment creditor for damages for such release, burden is then on sheriff to establish ownership in third person.

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

Carrico & Carrico, for appellant.

Edmund P. Nuss, contra.

Heard before GOOD, EBERLY and PAINE, JJ., and CLEMENTS and THOMSEN, District Judges.

THOMSEN, District Judge.

Plaintiff, a judgment creditor, caused an execution to be issued and delivered to the sheriff with directions to levy upon an automobile belonging to the judgment debtor. The levy was made, but the sheriff, finding possession and apparent legal title in another, released the levy and returned the property to the latter. Plaintiff contends ownership of the automobile to have been in the judgment debtor and brings this action for damages against the sheriff for the loss of the value of the property so levied upon. At the close of plaintiff's evidence, the court on motion of defendants dismissed the case. The plaintiff has appealed. The sheriff's return to the execution presents, in substance, his defense, so it is set out in full:

"State of Nebraska, }
"Adams county. } ss.

"Received this writ on the 10th day of March, 1934, at the hour of 2:00 p. m., and I hereby certify that after instructions from plaintiff's attorney to levy on an automobile owned by the within named defendant, Ralph J. Miller, I on the 10th day of March, 1934, made a diligent search to locate the within named Ralph J. Miller, but was unable to do so.

"March 11, 1934, being Sunday, no effort to locate the said Ralph J. Miller was made.

"On the 12th day of March, 1934, I located the said Ralph J. Miller, in Juniata, Adams county, Nebraska, but could not find his automobile, but was informed by the said Ralph J. Miller that said automobile was loaned to a friend, who would return it that night. Ralph J. Miller informed me that he would deliver said automobile to me at the courthouse, in Hastings, Adams county, Nebraska,

on the following morning. Upon his failure to do so, I made another attempt to locate the said Ralph J. Miller, and at 6:30 p. m. I located him at his home in Juniata, Adams county, Nebraska. At that time he informed me that the automobile had been sold on March 10, 1934, to Lester Willmes and that the automobile was then at the home of the said Lester Willmes.

"I took Miller with me and went to the home of Lester Willmes, where I levied on a Chevrolet Coach automobile, motor number 2960173, as the property of the said Ralph J. Miller. Willmes informed me that the automobile was his property, that it was registered as such with the Adams county, Nebraska, treasurer, and that the automobile bore license plates issued to him, Lester Willmes.

"With the consent of Lester Willmes, Ralph J. Miller drove the automobile to Juniata, Nebraska, where it was turned over to me, and I brought it to Hastings, Adams county, Nebraska.

"On March 14, 1934, I investigated records in the office of the Adams county treasurer and learned that the automobile on which I had levied was, at the time of levy, the property of said Lester Willmes, and duly registered as such. Also on the 14th day of March, 1934, I received from the said Lester Willmes the attached notice of ownership of said automobile and demand for its return to the said Lester Willmes.

"Being convinced that I had levied on property not owned by the said Ralph J. Miller, at the time of levy, I returned said automobile to the said Lester Willmes, and this writ is herewith returned unsatisfied, as after diligent search, I am unable to find any goods, chattels, lands or tenements of the said Ralph J. Miller on which to levy.

"All done in Adams county, Nebraska.

"Dated this 30th day of March, 1934.

"Raymond L. Crosson, sheriff,
"By J. Floyd Arnold, deputy."

The plaintiff, as part of her case, offered and had received in evidence the execution and return, copy of the

recorded certificate for transfer of license and the transfer record from the judgment debtor to Willmes. Were these facts sufficient to establish a *prima facie* case of ownership in Willmes, considering all other circumstances in evidence? If they were, the plaintiff went too far in her proof and the court was right in sustaining defendants' motion for dismissal at the close of plaintiff's case. If a *prima facie* defense was not so established, then the defendants should have been required to produce their proof. Defendants support the dismissal by asserting that lack of title in Willmes could be shown only by plaintiff's pleading and proving fraud. However, this postulate assumes a genuine sale and casts the burden of proving invalidity on plaintiff. Here a valid sale, a *bona fide* change of ownership, must be established. The action is not one brought to set aside a transfer.

Inferences of fraud do exist in the record and evidence of *bona fides* is lacking. In the cases cited by defendants, *Rein v. Kendall,* 55 Neb. 583, 75 N. W. 1104, and *Everitt v. Farmers & Merchants Bank,* 82 Neb. 191, 117 N. W. 401, a full explanation of the facts was presented in the evidence. Here the only evidence on the subject is execution by the judgment debtor of the statutory transfer papers required for issuance of a new automobile license to the transferee. No consideration is shown for the transfer. Consideration is not presumed; it must be proved even in contracts required to be in writing. See Comp. St. 1929, sec. 36-407; 1 Page, Contracts, sec. 654. No oral or written evidence of consideration is presented. Reasonable evidence shows that the transfer was made after the debtor had been informed of the execution held by the sheriff and after debtor's promise to deliver the car. The only reasonable inference from the facts is that the transfer was made to avoid a levy; that the transfer was for convenience only and fraudulent. Such conclusion does not arise to the dignity of a presumption; but such facts and inferences prevent the proof submitted in plaintiff's case from establishing a *prima facie* defense. The burden rests on the defendants

to establish the *bona fide* ownership of the automobile in the apparent purchaser. The sheriff must show a valid excuse for the release of his levy. *Wadsworth & Co. v. Walliker,* 51 Ia. 605, 2 N. W. 420; *Ansonia Brass & Copper Co. v. Babbitt,* 74 N. Y. 395; *Albany Belting & Supply Co. v. Grell,* 67 App. Div. (N. Y.) 81; *People v. Snow,* 250 Ill. App. 170. By his acts the sheriff has assumed the burden of proving those facts which in replevin against the sheriff the apparent buyer would be required to establish. If a preponderance of the evidence shows a valid sale, an exoneration follows; otherwise not. Thus, the foregoing inferences weigh in the scale of *bona fides.* Fraud, if any, is not the essential fact; it merely becomes an obstacle in the path which the sheriff must follow to establish *bona fide* ownership in Willmes. The sheriff should have submitted his evidence. The evidence submitted by plaintiff was insufficient to establish the sheriff's defense. The court was in error in dismissing the case at the close of plaintiff's evidence.

Plaintiff asserts that the court should, as a matter of law, have found for plaintiff in that, it is claimed, delivery of the execution to the sheriff fixed a lien on the property. This is true at common law (23 C. J. 490), but not in Nebraska, nor in those states which do not follow the common-law rule. Section 20-1504, Comp. St. 1929, provides in part: "Goods and chattels of the debtor shall be bound from the time they shall be seized in execution." See 23 C. J. 492.

Plaintiff further contends that, by the promise of the debtor to surrender the car for the purpose of a levy, the seizure of the property later was a sufficient levy as of the time of the promise, citing *Carlisle v. Wathen,* 78 Ky. 365. It is a sufficient answer that Kentucky follows the common-law rule, *Whitehead v. Woodruff,* 74 Ky. 209. Moreover, in order to constitute a sufficient levy in this state, the officer must have and exercise such control and dominion over the property as, without the writ, would make him a trespasser. *Battle Creek Valley Bank v. First*

Nat. Bank of Madison, 62 Neb. 825, 88 N. W. 145; *Boslow v. Shenberger,* 52 Neb. 164, 71 N. W. 1012; *Grand Island Banking Co. v. Costello,* 45 Neb. 119, 63 N. W. 376; *Pitkin v. Burnham,* 62 Neb. 385, 87 N. W. 160. The Kentucky case, *Carlisle v. Wathen, supra,* is an anomaly. Overwhelming weight of authority holds the contrary. See 21 Am. Dig. (Cent. ed.) Executions, secs. 290, 291, 293, 297, 299 and 301; 8 Dec. Dig. Executions, secs. 127, 129. Actual physical possession of property need not always be taken to constitute the levy. Practical considerations may make this impossible as in the case of growing crops (*Grand Island Banking Co. v. Costello, supra,*), but at least the officer should have the property under his control and "openly and in express terms assert dominion over it by virtue of the writ." 15 Standard Ency. of Procedure, 940; *Boslow v. Shenberger, supra.*

That the sheriff had made a prior return of the execution *nulla bona,* about which plaintiff complains, which return he took from the clerk's files and for which he substituted the one copied above, we consider as immaterial. He could by court order have been permitted to amend. Moreover, the suit is not brought for the sheriff's making a false return.

Plaintiff contends that the sheriff's failure to comply with sections 20-1521 *et seq.,* Comp. St. 1929, fixed liability and that the sheriff cannot escape payment of the value of the property lost by his release of the levy. These sections relate to trial before a justice of the peace and a jury of the right to seized property when claimed by a third person. The general futility of such proceedings are shown by cases cited below. It has some value, however. "A judgment rendered by a justice of the peace in those jurisdictions where the trial of the right of property is had before a justice is not binding upon any of the parties in any respect, except that it concludes the claimant from all right of redress against the officer making the levy." 16 Standard Ency. of Procedure, 157; that is, if the claimant proceeds with his part of the undertaking

and loses; otherwise not. *Storms v. Eaton*, 5 Neb. 453; *State v. Gillespie*, 9 Neb. 505, 4 N. W. 239; *Bray v. Saaman*, 13 Neb. 518, 14 N. W. 474; *McCormick Harvesting Machine Co. v. Scott*, 66 Neb. 481; *Fidler v. Adair*, 109 Neb. 404, 191 N. W. 683. Of course, if the property were owned by a third person, that fact must be a complete defense whether the sheriff complied with the foregoing sections of the statutes or not. No penalty for noncompliance is provided, but by such noncompliance the sheriff has now undertaken a burden of proof which such trial may have made unnecessary.

In view of the fact that the attorney for plaintiff directed upon what property the sheriff should levy, and such levy was made, at least as a matter of courtesy and to some extent as a measure of security, when presented with Willmes' claim he should have notified plaintiff or her attorney. Ann. 91 A. L. R. 922. Having levied and being confronted with an apparently legal claim, it would seem he might have required an indemnity bond in the event plaintiff insisted upon retention and sale of the property. *Comstock-Castle Stove Co. v. Caulfield*, 1 Neb. (Unof.) 542, 95 N. W. 783; *Mihalovitch, Fletcher & Co. v. Barlass*, 36 Neb. 491, 54 N. W. 826; *Omaha Nat. Bank v. Robinson*, 56 Neb. 590, 77 N. W. 73; Note, 16 Ann. Cas. 1045; *State v. Sharp*, 34 Tenn. 615; 57 C. J. 849. So the sheriff was not entirely helpless in the circumstances.

In view of our conclusion that the court erred in sustaining the motion for dismissal, the judgment is reversed and the cause is remanded for a new trial.

REVERSED.

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

FILED MAY 26, 1936. No. 29630.

1. **Negligence: CONTRIBUTORY NEGLIGENCE.** "Whether contributory negligence of the plaintiff precludes recovery in whole or in part in an action for negligent injury is determined by the

law of the place of wrong." Restatement, Conflict of Laws, sec. 385.

2. ———: ———: BURDEN OF PROOF. Under the laws of Iowa, the burden is upon a plaintiff suing for damages for injuries in a collision to plead and prove freedom from contributory negligence. This burden never shifts. *Schelldorf v. Cherry*, 220 Ia. 1101, 264 N. W. 54.

3. ———: ———: ———. "A, in state X, is injured by the alleged negligence of B. A sues B in state Y. By the law of X, a plaintiff has no cause of action until he has shown that his own negligence did not contribute to his injury. By the law of Y, contributory negligence is an affirmative defense to be pleaded and proved by the defendant. A must show his freedom from contributory negligence." Restatement, Conflict of Laws, sec. 595 (Illustration).

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

Kennedy, Holland & De Lacy, for appellant.

Gray & Brumbaugh and *Roy W. Smith, contra.*

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

GOSS, C. J.

Plaintiff, while riding a horse in Council Bluffs, Iowa, was injured in a collision with a street car of defendant. She sued in Douglas county, Nebraska, and had a verdict for $25,000. The district court ordered a remittitur of all in excess of $18,000, which was complied with. Judgment was entered for that sum. Defendant appealed. Plaintiff asks a restoration of the amount remitted. Comp. St. 1929, sec. 20-1929.

Plaintiff alleges that about 9:30 on the evening of July 16, 1932, while returning from a ride on a saddle horse, and in Council Bluffs, Iowa, a street car coming in the opposite direction and operated carelessly and negligently collided with her horse, as a result of which she was grievously injured.

Defendant's answer admits the collision, but denies that

its motorman was guilty of any negligence causing or tending to cause the accident. Then follows this paragraph:

"Defendant, further answering, alleges and says that this accident happened in the state of Iowa, under the laws of the state of Iowa, and plaintiff is required to prove that she was free from any negligence causing or contributing to cause said accident, and that she was free from contributory negligence, and under the laws of Iowa any contributory negligence upon the part of the plaintiff bars a recovery, and in this connection your defendant alleges and says that its street car was in full view, with the proper lights on, and that the accident in question was the direct and proximate result of plaintiff's own negligence which caused and contributed to cause said accident; that, at the time of the said accident, she was riding said horse at a careless and negligent rate of speed; that she did not have it under control; that she had plenty of space to pass said car, but carelessly and negligently allowed said horse to come over and collide with your defendant's car, and because thereof plaintiff is precluded from maintaining her action against this defendant."

Under this plea cases from the Iowa supreme court were admitted in evidence as follows: *Zellmer v. Hines*, 196 Ia. 428, 192 N. W. 281; *Middleton v. City of Cedar Falls*, 173 Ia. 619, 153 N. W. 1040; *Bird v. Hart-Parr Co.*, 165 Ia. 542, 146 N. W. 74; *Coleman v. Iowa R. & L. Co.*, 192 Ia. 1331, 186 N. W. 642; *In re Estate of Hill*, 202 Ia. 1038, 208 N. W. 334; *Sanderson v. Chicago, M. & St. P. R. Co.*, 167 Ia. 90, 149 N. W. 188; *Merchants Transfer & Storage Co. v. Chicago, R. I. & P. R. Co.*, 170 Ia. 378, 150 N. W. 720; *Dusold v. Chicago G. W. R. Co.*, 162 Ia. 441, 142 N. W. 213; *Dreier v. McDermott*, 157 Ia. 726, 141 N. W. 315; *Portman v. City of Decorah*, 89 Ia. 336, 56 N. W. 512; *Carlin v. Chicago, R. I. & P. R. Co.*, 37 Ia. 316. These cases show that, in such a case as involved here, plaintiff must be free from contributory negligence in order to recover. That is a substantive part of a plaintiff's cause of action whether he sue in Iowa or Nebraska.

In a recent case, decided December 17, 1935, and not cited in the foregoing list provided by defendant, the Iowa court said: "In action for injuries sustained in automobile collision, plaintiff must plead and prove freedom from contributory negligence, which burden never shifts to defendant." *Schelldorf v. Cherry,* 264 N. W. 54 (220 Ia. 1101).

The instructions, in four different paragraphs, gave force and effect to the Iowa law by stating, in various forms, that the verdict should be for defendant if the jury found from the evidence that plaintiff herself was guilty of negligence contributing in some degree to the happening of the collision. Two other instructions told the jury, if they found plaintiff was riding her horse on a run up to about the time of the accident and it then swerved so as to come in contact with the street car, the verdict must be for defendant. These instructions all recognized the Iowa law as controlling the substantive rights of the parties as declared by the law of that state where the injury occurred.

But, when the trial court came to the burden of proof, it instructed the jury as follows:

"The burden of proving negligence or contributory negligence rests upon the party charging it.

"The defendant having alleged in his (its) answer to the plaintiff's petition that the contributory negligence on the part of the plaintiff was the proximate cause of the accident complained of, the burden is upon the defendant to establish by a preponderance of the evidence such contributory negligence on the part of the plaintiff, and that such negligence was the proximate cause of the accident or a contributing cause thereof."

Defendant assigns as error this instruction on the burden of proof. It tendered instructions placing the burden on plaintiff to prove herself free from negligence causing or contributing to cause the injury sued for, but these instructions were refused.

It is true that generally the burden of proof is upon the party alleging a material fact, but here there was no

way for defendant to get the Iowa law before the court except by pleading it and its effect as applied to the facts. That was done. To penalize defendant by placing the burden of proof on it to prove the contributory negligence of plaintiff in the forum when the *lex delicti* clearly placed the burden upon plaintiff is unwarranted.

We shall not undertake to review the great mass of cases discussed by the parties, but shall content ourselves by references to Restatement, Conflict of Laws, by the American Law Institute, issued in 1934. Section 385 of that work says: "Whether contributory negligence of the plaintiff precludes recovery in whole or in part in an action for negligent injury, is determined by the law of the place of wrong."

Under section 595, Restatement, Conflict of Laws, the burden of proof is discussed. We copy the comment and the illustration therein contained:

"Comment: a. Proof in court covers all matters falling within the description 'burden of proof.' This includes what is sufficient evidence on an issue of fact to entitle the jury to consider it. It includes the burden of going forward with evidence; also the question of which party bears the risk of nonpersuasion of the trier of the fact. In some instances the proof of what is required by reference to the appropriate foreign law may make it unnecessary to apply the local procedural rule. Thus, if a requirement concerning proof of freedom from fault exists in the law of the place of injury and if such condition is there interpreted as a condition of the cause of action itself, or as affecting the nature or amount of recovery, the court at the forum will apply the rule of the foreign state (see sec. 385). In such a case, the remedial and substantive portions of the foreign law are so bound together that the application of the usual procedural rule of the forum would seriously alter the effect of the operative facts under the law of the appropriate foreign state. If there is no serious interference with the forum's legal processes involved, the court will apply the foreign rule as to freedom

from fault and the conditions attached by that law thereto. If too great local inconvenience is thereby occasioned, the court at the forum may refuse to hear the case (see introductory note to this chapter and compare sections 607 to 616.) If the foreign rule as to contributory fault is thus applied in its entirety, there will be no occasion for the application of the local procedural rule as to this question, for it will have been settled under the application of the foreign rule.

"Illustration: 1. A, in state X, is injured by the alleged negligence of B. A sues B in state Y. By the law of X, a plaintiff has no cause of action until he has shown that his own negligence did not contribute to his injury. By the law of Y, contributory negligence is an affirmative defense to be pleaded and proved by the defendant. A must show his freedom from contributory negligence."

That the court correctly instructed the jury on the general subject of contributory negligence as affecting the instant case is not enough. The burden of proving freedom from contributory negligence was placed by the Iowa law upon plaintiff. When the trial court informed the jury that such burden was upon defendant, it gave the jury a chance, if not an invitation, to decide that defendant had not sustained the burden thus wrongfully put upon it. We think this error was prejudicially erroneous and requires a reversal of the judgment.

Many other errors are assigned. Most of them go to the sufficiency of the evidence. As a reversal is already indicated, we will not discuss them.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

SALINE STATE BANK OF WILBER, APPELLEE, V. ANTON K. STIPEK ET AL., APPELLANTS.

FILED MAY 26, 1936. No. 29556.

1. **Fraudulent Conveyances:** INTENT: QUESTION OF FACT. In a creditor's bill, the intent with which a son transfers chattels to his mother, while indebted to others, is a question of fact.
2. ———: PRESUMPTION: REBUTTAL. Where an insolvent son mortgages chattels to secure a claim of his mother, the transaction is presumptively fraudulent as to other creditors, but the presumption may be overcome by clear and convincing evidence.
3. ———. Fraudulent intent of both parties to a transfer, where the consideration is adequate, is necessary in proving it void as to creditors.
4. ———. An insolvent debtor may in good faith secure one creditor to the exclusion of others.
5. ———. Chattel mortgage from son to mother to secure a preexisting debt *held* not fraudulent as to other creditors of son.
6. ———. Sale of chattels *held* not fraudulent as to creditors of seller.

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

Bartos, Bartos & Placek and *C. R. Stasenka,* for appellants.

J. J. Grimm and *G. E. Hager, contra.*

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

ROSE, J.

This is an action in the nature of a creditor's bill to cancel a chattel mortgage and a bill of sale and to subject the property described in those instruments to the satisfaction of a judgment in favor of plaintiff. From a decree granting the relief sought by plaintiff, defendants appealed.

Plaintiff is the Saline State Bank of Wilber, the judgment creditor. The defendants are Anton K. Stipek and Mabel Stipek, mortgagors, Anna Stipek, mortgagee, and

Felix Karpisek, purchaser from Anna Stipek. Mabel Stipek is the wife and Anna Stipek the mother of the judgment debtor, Anton K. Stipek.

Following is a summary of some of the facts alleged in the petition: March 14, 1933, Anton K. Stipek, while owning and conducting the Wilber Hatchery, Feed and Coal Company, presented to plaintiff, for the purpose of obtaining credit, a sworn property statement that he owned stock, merchandise, fixtures and bills receivable exceeding the net value of $8,000. August 21, 1933, plaintiff, relying on his statement, lent him $1,425, evidenced by his note. October 1, 1933, Anton K. Stipek and wife gave Anna Stipek a note for $4,221.50 and, as security, a chattel mortgage on all the stock, merchandise, fixtures and equipment of the Wilber Hatchery, Feed and Coal Company. October 14, 1933, mortgagee sold and transferred by bill of sale to Felix Karpisek part of the chattels described in the mortgage for the purported consideration of $2,700. May 9, 1934, plaintiff recovered a judgment against Anton K. Stipek on his note for a past-due, unpaid debt of $1,373.50, on which judgment execution was issued May 21, 1934, and returned *nulla bona* June 2, 1934. In the petition it was further alleged that both the chattel mortgage and the bill of sale were executed without consideration with the intent to hinder, delay and defraud creditors in the collection of their claims against Anton K. Stipek. Knowledge of the fraudulent intent pleaded was imputed to the grantee in each instrument.

The answer of each defendant contained a general denial. The fraud charged in the petition was denied. Consideration and good faith were pleaded in defense. Felix Karpisek answered in addition to his general denial that he made his purchase in good faith October 14, 1933, for a valuable consideration; that he took immediate possession of his property under his purchase and still retains it; that his purchase was without any intent on his part to hinder, delay or defraud creditors in the collection of debts. The reply to the answers was a general denial.

The question presented by the appeal is the sufficiency of the evidence to prove that the instruments assailed by plaintiff were fraudulent as to creditors. Want of consideration as defenses utterly failed. The mother of Anton K. Stipek owned the building in which he conducted his feed and coal business. She took no part in such business and did not meddle in it. She had no pecuniary interest in it. She mortgaged her building for $2,500 and lent the money to him. Part of that sum was applied on a note of his and the balance went into his business. She mortgaged her home for $3,700 and lent the money to him. It also went into his business. As evidence of a debt of $4,221.50 owing by him to his mother, he gave her a note and secured it by the chattel mortgage. In amount the claim of the mother far exceeded that of plaintiff and the character of the consideration with which she parted was not inferior to the debt for which plaintiff recovered judgment. The note and the mortgage were dated October 1, 1933, and the judgment against the son in favor of plaintiff was not recovered until May 9, 1934. Full consideration for the note and chattel mortgage was shown by uncontradicted evidence.

A valid consideration for the transfer from the mother to Karpisek was likewise shown. The purchase price was $2,700. She had previously borrowed from him $800 and evidenced the debt by a note. He applied that sum on the purchase price and paid the remainder to her.

Was the chattel mortgage fraudulent as to plaintiff? The intent with which a son transfers chattels to his mother, while indebted to others, is a question of fact, in a controversy like the present one. Where an insolvent son mortgages chattels to secure a claim of his mother, the transaction is presumptively fraudulent as to other creditors, but the presumption may be overcome by clear and convincing evidence. Fraudulent intent of both parties to a transfer is necessary in proving it void as to creditors. *Logie v. Snyder*, 129 Neb. 583, 262 N. W. 489. An insolvent debtor may in good faith secure one creditor to the

exclusion of others. *Luikart v. Tidrick*, 126 Neb. 398, 253 N. W. 414.

In the light of these rules of law and equity, the entire record in the case at bar has been examined from every standpoint in a trial *de novo*. There is no direct evidence of fraud on the part of any of the contracting parties in litigation. Plaintiff relies on the presumption of fraud arising from the relationship of mother and son and on inferences from circumstances. In acumen and business sagacity the persons charged with fraud did not have any advantage over plaintiff, a banking corporation. With the aid of capital furnished from time to time by both the bank and Anna Stipek to the latter's son, he made a failure of the business which he had owned and operated in the name of the Wilber Hatchery, Feed and Coal Company; lost his credit; became insolvent; gave his mother possession and left for Arizona in search of employment. She was not versed in business affairs. She had mortgaged a portion of her patrimony for her son. An interpreter was required while she testified as a witness. The transactions between her son and the bank had been conducted for the latter by its cashier who was familiar generally with the son's business, property and standing financially. The cashier had lent the son the bank's money to the extent of $4,000 and had made collections until the debt was reduced to $1,373.50. The cashier testified as a witness to the effect that the son furnished the bank a property statement which failed to disclose the nature and extent of the indebtedness of the son to his mother. There is convincing evidence, however, that the cashier knew the son was indebted to his mother and that the mother did not know her son was indebted to the bank. The son testified in substance that he did not mortgage his property with intent to defraud creditors or to hinder or delay them in the collection of their claims. His testimony, and that of the cashier show conclusively that he paid the bank at least $103.90 after the chattel mortgage was executed. The mother testified to her good faith and to absence of

any fraudulent intent. The son's connection with the hatchery after he returned from Arizona is pointed out as a badge of fraud, indicating that his mother held the incubator property in secret trust for him; but the better view of the evidence is that the possession was hers and that he was manager for her, after failing to find employment elsewhere. Even if the son's intent to defraud could fairly be inferred from any circumstance in evidence, there is nothing substantial to impute such an intent to his mother. When full consideration for the chattel mortgage is considered with the evidence of good faith and the proper inference from the established facts and circumstances, the presumption of fraud arising from the family relationship is completely overthrown. The evidence is wholly insufficient to justify the cancelation of the chattel mortgage for fraud.

Was the sale from Anna Stipek to Karpisek fraudulent? These parties were not related. Neither was indebted to the bank. Anna Stipek had borrowed from Karpisek $800 and evidenced the debt by an unsecured note. Karpisek bought this property and took immediate possession of it. There is a conflict of testimony between him and the cashier as to the former's knowledge that Anton K. Stipek was indebted to the bank prior to the sale, but this does not seem to be material in view of other evidence. The cashier himself testified in effect that Karpisek was in the bank a number of times before the sale; that he did not feel safe in making the purchase on account of the indebtedness to the bank; that he was making arrangements to buy the stock and asked if it would be safe to do so. The answer of the cashier, referring to the stock of merchandise and to the unpaid note of Anton K. Stipek to the bank, follows:

"I says, 'Go ahead, buy it, but just reserve enough money out of this consideration that this note be paid.'"

Plaintiff is bound by this testimony. It contains a direction by the cashier to Karpisek to make the very purchase that the bank seeks to cancel for fraud. The property was not encumbered. The owner had a right to sell it.

Karpisek had a right to buy it. The cashier, according to his own testimony, trusted the bank to retain enough of the purchase price to pay its claim. That did not create a lien on the property nor prove fraud in the sale itself. Mere knowledge of the debt, if properly shown, was not evidence of an intent to defraud creditors by a subsequent purchase. The bank did not prove a written obligation of the purchaser to answer for the debt of Anton K. Stipek. In any event there was no proof of fraud on the part of Anna Stipek. Fraud by both parties was essential to plaintiff's case.

In the argument on behalf of plaintiff it was asserted that defendants failed to comply with the bulk sales law. Comp. St. 1929, sec. 36-501. This was not pleaded in the petition and is not available on appeal.

For insufficiency of the evidence to prove the fraud alleged by plaintiff, the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

GEORGE A. HOAGLAND & COMPANY, APPELLEE, V. INSURANCE COMPANY OF NORTH AMERICA, APPELLANT.

FILED MAY 26, 1936. No. 29676.

1. **Insurance: "WINDSTORM."** The word "windstorm," as used in an insurance policy, insuring against loss or damage by cyclone, tornado or windstorm, signifies a wind of unusual violence or tumultuous force.
2. ———: ———: QUESTION OF FACT. Whether a wind has attained the proportions of a windstorm is a question of fact to be determined from the evidence.
3. ———: ———: ———. Whether a wind has attained the proportion of a windstorm is a question of fact for the jury, where the evidence in respect thereto is in conflict.
4. ———: ———: DAMAGES. The reasonable cost of assorting, removing and repiling of lumber is a recoverable element of damage in an action upon a policy, insuring lumbershed and lumber therein against loss or damage by windstorm, where

the shed was entirely destroyed by windstorm, some of the lumber damaged, and it was necessary to assort the lumber to ascertain the part damaged, and where it was essential to remove and repile the remaining lumber in another shed to preserve it from the elements.

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

Ziegler, Dunn & Becker, for appellant.

Johnsen, Gross & Crawford, contra.

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

GOOD, J.

Plaintiff brought this action against defendant on an insurance policy to recover for loss and damage by windstorm to a lumbershed and lumber stored therein. Plaintiff had judgment, and defendant has appealed.

It is conceded that the policy was issued by defendant, was in force, and covered the shed and lumber stored therein. Defendant denied that any loss or damage occurred by reason of windstorm. It is defendant's contention that the building was old, decayed, and collapsed by reason of age and decay, and not because of any windstorm. One element of recovery was for assorting, repiling and reconditioning the lumber that was stored in the shed. Defendant contends that this was not an item for which plaintiff was entitled to recover, even if the loss and damage were occasioned by windstorm.

Plaintiff was the owner of a lumberyard and a number of sheds in which lumber was stored, located at or near Sixth and Douglas streets in the city of Omaha. The shed in controversy was about 289 feet in length and approximately 60 feet wide at one end and 70 feet at the other. The length of the building was from north to south. The shed was constructed by setting in the ground large poles which extended from 18 to 22, or 24, feet above the ground. There were six rows of these poles running lengthwise

of the building. The poles were set from 15 to 16 feet apart. They were braced and cross-braced with 2 by 6 or 2 by 8 planks. The poles in the central part of the building reached higher than those at the outer edge, so there was some slant to the roof which was erected over the building. The roof was what is ordinarily denominated a tar and gravel roof. The sides of the shed were not inclosed. The ends were inclosed except a small portion used as a driveway through the center of the building.

Between midnight and 1 o'clock a. m. on August 13, 1934, this particular lumbershed collapsed. The entire structure was shifted to the north, all of the poles being broken off, some at the ground and others several feet above the ground. The bracing was broken and destroyed, and some of the lumber within the shed was broken and damaged. Apparently, the entire building moved to the north. The shed was a total loss. The lumber that was broken and destroyed amounted to only about $178. The remaining lumber had to be assorted, removed and repiled in another shed. The item of cost for this was something over $1,000. The policy in suit was for $5,000. There was $9,000 other concurrent insurance. Plaintiff sought to recover only five-fourteenths of the loss.

The principal controversy is as to the sufficiency of the evidence to sustain plaintiff's claim that the building was destroyed by windstorm. Defendant's evidence tended to prove that many of the posts were decayed at the ground; some of them entirely decayed and others partially decayed; that the braces were old, the building was not sufficiently braced, and that the proximate cause of the collapse of the shed was due to its weak condition from age and decay. The evidence does not disclose the exact age of the building, but it is inferable that it had been constructed 25 or 30 years ago. Evidence on the part of plaintiff tended to show that the shed had been kept in repair and was in good condition.

With respect to the windstorm, it appears that on the

night of August 12, 1934, there was a thunder and rainstorm, accompanied by high winds, but that this storm had subsided prior to midnight. Defendant offered evidence by the meteorologist in charge of the government weather bureau station in Omaha that at that station the velocity of the wind between 12 and 1 o'clock that night did not exceed 15 miles an hour; that the velocity of the wind, during an earlier hour, had been higher. It was shown that the weather bureau station was about three-fourths of a mile distant from the lumbershed, was on much higher ground and was about 200 feet above the ground at that point. The meteorologist testified that there might be considerable variation in the velocity of the wind at the elevation of the station and at the lower or ground elevation, and that there might be a very great difference in the velocity at different points no farther apart than the distance between the weather bureau station and the lumbershed. Defendant also produced evidence that none of the other buildings in the immediate vicinity was blown down or apparently damaged by the alleged windstorm. Defendant called other witnesses who were at some distance from the shed, two of whom were toll takers on the bridge over the Missouri river, and who were on duty that night. They testified that they observed no unusual windstorm or high wind. Plaintiff offered the evidence of a night watchman, who was on duty that night and made his rounds of the various buildings of plaintiff once each hour. He testified that immediately before the building collapsed he was in it, when the wind was blowing violently; that the building creaked to such an extent that he was fearful for his life and ran out of the building to the south; that very shortly thereafter the building crashed and collapsed. He gave an opinion that the wind was blowing at 30 miles an hour. However, he had no basis for such estimate and testified that it was only his judgment. He also testified that the building was moved several inches on its foundation or at the ground, and that the entire shed moved to the north and collapsed; that the wind

was blowing from the south or slightly southwest. His description of the noise, the creaking and cracking of the building, just before he ran out, and the moving of a structure of such dimensions would tend to indicate a wind of considerable violence. There were other witnesses on behalf of plaintiff who were at a greater distance, but we do not think their evidence is of any great weight. None of plaintiff's witnesses had any means by which they could measure the velocity of the wind.

Defendant earnestly contends that the evidence is insufficient to sustain a finding that the collapse of the building was caused by a windstorm. It argues that, because no other building in the vicinity of the lumbershed was blown over, or, so far as appears, was damaged, is an indication that the collapse of this particular building was not caused by a windstorm.

What constitutes a windstorm, as that term is used in the policy of insurance has been considered by the courts of other states. Just what violence the wind must attain to be termed a windstorm has not, so far as we are aware, been judicially determined. The courts that have dealt with the question say that, where the word "windstorm" is used in connection with "tornado" and "cyclone," these other terms are of significance, and that, while a windstorm need not attain the proportions and violence of a tornado or cyclone, it must be a wind of unusual violence.

In 14 R. C. L. 1272, sec. 447, it is said: "In the case of a policy against damage by tornado, hurricane, or windstorm, the words 'tornado' and 'hurricane' are synonymous and mean a violent storm distinguished by the vehemence of the wind and its sudden changes. The word 'windstorm' partially takes its meaning from 'tornado' and 'hurricane,' and indicates wind of unusual violence." To the same effect is 5 Couch on Insurance, p. 4505, sec. 1234. See, also, *Mulgrew Co. v. National Union Fire Ins. Co.*, 187 Ia. 1292, 175 N. W. 50; *Sabatier Bros. v. Scottish Union & Nat. Ins. Co.*, 152 So. (La. App.) 85; *Scottish Union & Nat. Ins. Co. v. B. E. Linkenhelt & Co.*, 70 Ind. App. 324,

121 N. E. 373; *Jordan v. Iowa Mutual Tornado Ins. Co.*, 151 Ia. 73, 130 N. W. 177; Cooley's Briefs on Insurance, pp. 4976, 4977. In some of the cases it has been said that to constitute a windstorm the wind must assume the aspects of a storm; that is, an outburst of tumultuous force. Webster defines a windstorm as a storm characterized by high wind, with little or no precipitation.

It must be conceded that none of these definitions affords an exact yardstick by which to determine when a wind becomes a windstorm. It is apparent that only a very general definition of the term can be given. It must be a wind of unusual violence or tumultuous force, and whether it attains that proportion is a question of fact.

Defendant contends that, since it is not shown that any other buildings in the vicinity were blown down or damaged by the wind, it tends to negative the thought that it was a windstorm and that plaintiff's building was demolished thereby. We think it is a matter of common knowledge that in this part of the country a wind may attain the proportions of a windstorm and blow with great violence for a few seconds; may lift and only cover a small space. It is a matter of common knowledge that one of a group of farm buildings may be destroyed by a windstorm, while other buildings, in close proximity, are uninjured. Likewise, in orchards and groups of shade trees, one or more trees may be broken and damaged by the wind, showing great violence, while trees in close proximity thereto may be uninjured. The freakish character of the wind and the way it shifts and rises in this particular part of the country are matters of common knowledge. Where the evidence as to whether a windstorm is of sufficient violence or so tumultuous as to constitute a windstorm is in conflict, the question is one for the determination of the jury. 5 Couch on Insurance, p. 4505, sec. 1234.

We are of the opinion that the evidence of plaintiff's night watchman, who was on duty at the time the shed collapsed, was sufficient to indicate, and to authorize the

jury, if they believed his evidence, to find, that there was, at the time, a wind of unusual violence and tumultuous force, and that it amounted to a windstorm, within the meaning of that term as used in the policy of insurance. It is a rule that the appellate court will not disturb the verdict of a jury, based on conflicting evidence, unless the court can say that it is clearly wrong.

Defendant complains of instruction No. 7 given by the court to the jury. In the instructions immediately preceding the court had defined "windstorm" substantially in accordance with the authorities hereinbefore discussed, and informed the jury that before they could find for the plaintiff it was necessary to find that the wind had reached proportions of a windstorm, which was the dominant and efficient cause of the damage to the building, and in another instruction informed the jury that, if plaintiff was entitled to recover, the measure of recovery as to the building was the cash value of the shed at the time of loss, and that they should take into consideration, in determining such cash value, the depreciation from age, decay or other causes. The seventh instruction informed the jury that, if the shed was destroyed by reason of a windstorm, they should take into consideration its age only in determining the actual value and loss to the plaintiff. Taking the instructions as a whole, we find that they properly stated the law, and that no error was committed.

Defendant complains of the refusal of the court to give instruction No. 3 requested by defendant. We think the instruction was properly refused, because it directed the jury not to take into consideration whether or not the sheds had been weakened by wind or storm at any time previous to their destruction. We are pointed to no evidence that would justify the giving of this instruction.

Complaint is made of the refusal to give instruction No. 4 requested by defendant. The effect of that instruction was to inform the jury that the expense of assorting, removing and repiling the lumber in another shed was not a proper element of damage. It was necessary to

assort the lumber to ascertain and separate the damaged from the undamaged portions. It was also essential that the lumber not damaged should be removed and repiled in another shed to preserve it from damage from the elements. This was made necessary as a direct result of the windstorm, and we think it was a recoverable element of damage. The instruction was properly refused.

Complaint is made of the refusal to give instruction No. 5 requested by defendant, but the principles of that instruction are fully set forth in the instructions given by the court.

No error prejudicial to defendant has been pointed out, or found by the court.

AFFIRMED.

GEORGE A. HOAGLAND & COMPANY, APPELLEE, V. SCOTTISH UNION & NATIONAL INSURANCE COMPANY OF EDINBURGH, APPELLANT.

FILED MAY 26, 1936. No. 29677.

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

Ziegler, Dunn & Becker, for appellant.

Johnsen, Gross & Crawford, contra.

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

GOOD, J.

This is a companion case to *Hoagland & Co. v. Insurance Co., ante,* p. 105.

This action involves three policies of insurance covering the same shed and lumber described in the former case. The aggregate of the policies was $9,000, which, together with the policy in the former case, constitutes $14,000 of concurrent insurance, and in this action plaintiff sought

to recover only nine-fourteenths of the loss sustained. Plaintiff had judgment, and defendant has appealed.

The action is based on the same windstorm as that described in the former case. The issues and the evidence in the instant case are practically the same as in the former. Reference is made to the opinion in that case for a statement of the issues and facts presented. For the reasons given in that opinion, the same rulings are made in this action.

In the instant case, further complaint is made that the court erred in permitting evidence to be given by a witness for plaintiff as to the violence of the storm a short time previously and at a distance of about four miles from the location of the lumbershed. We think this evidence was competent for the purpose of showing the general stormy condition of the weather in the general vicinity. The evidence was probably of little value, but its weight was for the jury. Defendant apparently overlooks the fact that it also introduced evidence as to the violence and velocity of the wind at a time earlier than when the shed collapsed and at a considerable distance therefrom. We think defendant may not complain of the introduction of evidence of a like character to that which it introduced. In any event, we think the evidence objected to was not harmful to defendant.

For the reasons given herein and in the opinion in *Hoagland & Co. v. Insurance Co., supra,* the judgment is

AFFIRMED.

CHARLES WOODWORTH, JR., APPELLANT, V. JEMIMA JOHNSTON ET AL., APPELLEES.

FILED MAY 26, 1936. No. 29561.

Evidence in the record examined, and *held* to justify action of trial court in peremptorily directing verdict for the defendants.

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

Johnsen, Gross & Crawford, for appellant.

Crofoot, Fraser, Connolly & Stryker and *Kennedy, Holland, De Lacy & Svoboda, contra.*

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

EBERLY, J.

This is a personal injury action brought by Charles Woodworth, Sr., for the benefit of his minor son, Charles Woodworth, Jr., age five years. At the time of the accident in suit, the injured boy was riding in a Ford automobile, then being driven by defendant Jemina Johnston, his grandmother. This car was then owned by the defendant Robert D. Johnston, his grandfather, and was being used as a family purpose car. The car driven by the grandmother was proceeding east on Burt street in Omaha, Douglas county, Nebraska, on its proper side of the highway, when, in passing over a portion of pavement shadowed by the Creighton Stadium, it encountered an icy depression which deflected the car and caused it to swerve and skid angularly to the north and eastward across Burt street where, on the wrong side thereof, it collided with a west-bound truck, owned and driven by defendant Lewis E. Stillman. The boy, Charles Woodworth, Jr., was injured in the collision. This suit is brought against Jemima Johnston and Robert D. Johnston, the grandmother and grandfather, charging the grandmother with gross negligence in driving the car at the time of the accident, and charging the grandfather with liability because of the family purposes to which the use of the car had been devoted by him, which, it was alleged, was sufficient to subject him to the results of the gross negligence of his wife, defendant Jemima Johnston. The defendant Lewis E. Stillman is charged with ordinary negligence which contributed to the accident. At the conclusion of all the evidence the court directed a verdict in favor of all the defendants. From the judgment of dismissal, and the

overruling of his motion for a new trial, the plaintiff appeals.

The testimony of three eyewitnesses details without material conflict the manner in which the accident occurred. It happened about 5 o'clock in the afternoon of February 28, 1934, near the intersection of Twenty-fifth avenue and Burt street. Burt street is an east and west street. It had been a warm winter day, and snow and ice remaining on the streets of Omaha had been melting. It appears that at the time of the accident Burt street was generally free from ice and snow. A structure, known as the Creighton Stadium, was situated immediately south of the scene of the collision, with a wall some 40 feet in height which extended along the south line of Burt street, and effectively shaded a portion of this street, and thus the melting of the snow and ice that had previously accumulated at this point was in a measure thereby prevented. While the evidence as to ice extending along the north half of Burt street may be said to be in conflict, it is not disputed that at about 5 o'clock the temperature fell below freezing, and ice was again formed adjacent to the Creighton Stadium where it had melted earlier in the day. The defendant Stillman was a trucker, and the owner of a new Reo truck which he had purchased in November, 1933. It was equipped with hydraulic brakes, and its general good condition is not questioned in the evidence. It weighed approximately 7,000 pounds and had a cargo on board which amounted to 4,000 pounds. On the day mentioned, it had secured its load and was proceeding westward on Burt street, and it is admitted that during the entire incident it was properly driven on the north half of this thoroughfare, its proper side of the street. Arriving at Twenty-fourth avenue the truck was brought to a full stop in obedience to a road sign located at that point. It then proceeded at a low rate of speed. Witnesses vary in their estimate of the maximum speed of the truck at from 10 to 20 miles an hour from this point to the place of collision. The evidence of the truck driver is that when first discovered by him the Ford

car, which was then driven by Jemima Johnston and in which the plaintiff was riding, was on the south side of the street, and coming east. He testifies: "Q. And tell us how that occurred as to whether it came gradually or whether it darted over, or went fast, or how it occurred? A. Well, she hit this hole, that is it started to skid. There is a little dip there, and after she hit it she lost control and it started to skid, and I think if she had a little heavier car it would not have skidded so much, but at the speed she was traveling and that light car, when she hit this hole, that it was what started her to skid. She skidded a little bit northeast to start with. That is when I slammed on the brakes and then after that she came with a jerk, came in right north. She never changed the speed any that she was traveling. She was traveling the same speed when she hit me as she was traveling when she went in that hole. * * * Q. Now, you think that as soon as you saw her start across the street, I suppose you started to stop? A. Yes, sir; absolutely. Just the minute I saw she hit that, I slammed my brakes."

The evidence indicates that the first swerve or skid of the Ford car occurred about 50 to 60 feet west of the west curb line of Twenty-fifth avenue. Witness Kidd, the only other witness who testifies as to the movements of the truck immediately preceding the impact, says he had stopped his car at the intersection of Twenty-fifth avenue and Burt street. From that point he saw the first swerve of the Ford to the northward, then he at once glanced to the east and saw the truck, with wheels already locked, sliding in the intersection of Twenty-fifth avenue and Burt street. This corroborates the testimony of the truck driver as to his immediate response on the first appearance of danger. The truck, before coming to a full stop, struck the right rear of the Ford at a point from 6 to 12 feet west of the west curb line of Twenty-fifth avenue, and at a place wholly on the north half of Burt street. It is true that the impact thus caused occasioned the damages sued for; but, in view of the few seconds that intervened between

the first signal of possible danger and the crash, the accident was clearly unavoidable. The cross-examination of witness Kidd, who testified as plaintiff's witness, closed with this statement: "It was evident to me that the truckman could not do anything other than what he did do."

It is uncontrovertible that defendant Stillman was at all times lawfully proceeding along Burt street, both as to speed and his position thereon; that an emergency, created by the skidding of the Ford and the accident occasioned thereby, was due to no act of his; and that he acted promptly and properly, and in no manner contributed to the regrettable results that followed. The action of the trial court in directing a verdict in his behalf is approved. *Johnson v. City of Omaha*, 108 Neb. 481, 188 N. W. 122.

So far as the action against Jemima Johnston and her husband, Robert D. Johnston, is concerned, the controlling legislation is our "guest statute." Comp. St. Supp. 1935, sec. 39-1129. It provides in part: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of said motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle." In construing the terms of this enactment, in connection with the action of the trial court in peremptorily dismissing plaintiff's action, we announced the principle that the court may determine whether an automobile host is guilty of gross negligence to a guest, where facts and circumstances are conceded or proved. *Thurston v. Carrigan*, 127 Neb. 625, 256 N. W. 39. See, also, *Heesacker v. Bosted, ante*, p. 42, 267 N. W. 177.

Mrs. Woodworth, mother of plaintiff, is Mrs. Johnston's daughter. Jemima Johnston, on the day in question, was taking her grandson, the plaintiff, down to see the new Union Pacific stream-line train. She was to meet her

husband at Fifteenth and Dodge streets, the Omaha headquarters. Taking her grandson in her car some blocks distant from the scene of the accident, she drove in traffic neither faster nor slower than the usual traffic on the streets over which she passed. There is no evidence of any snow or ice remaining on any of the intervening streets until she arrived on Burt street at a point north of the high walls of the Creighton Stadium. During this time she had been driving from 25 to 30 miles an hour. As she approached the stadium, the road appeared wet; she did not notice it was ice. When she was upon it her car started to skid north and slightly east. Other evidence fixes the place where the swerving or skidding began at from 50 to 60 feet west of the intersection of Burt street and Twenty-fifth avenue. She lost control of the car, and it skidded north and east and continued until the car hit the curb. At this point it was almost simultaneously struck by an approaching truck, and to this impact the injuries of plaintiff were due. It appears that she had not passed that way immediately prior to this accident, and her testimony is: "Q. Did you know that there was any ice ahead of you, did you know that there was any ice ahead of you before you started to skid? A. No, sir; I did not."

We are unable to find evidence of gross negligence, either as to speed, even if it be conceded that she attained 35 miles an hour, or, under the circumstances, as to her failure to discover an unknown icy depression. *Sheehy v. Aboud,* 126 Neb. 554, 253 N. W. 683. Indeed, from a careful examination of the record, we deem, at most, it may disclose a failure to exercise the care of a reasonably prudent person, but not as showing gross negligence such as gives the guest a right to recover under section 39-1129, Comp. St. Supp. 1935. *Thurston v. Carrigan,* 127 Neb. 625, 256 N. W. 39. See, also, *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96; *Gilbert v. Bryant,* 125 Neb. 731, 251 N. W. 823; *Swengil v. Martin,* 125 Neb. 745, 252 N. W. 207; *Belik v. Warsocki,* 126 Neb. 560, 253 N. W. 689; *L'Ecuyer*

v. Farnsworth, 106 Vt. 180, 170 Atl. 677; *Adamian v. Messerlian,* 198 N. E. (Mass.) 166; *Balcer v. Pere Marquette R. Co.,* 266 Mich. 538, 254 N. W. 198; *Shinville v. Hanscom,* 116 Conn. 672, 166 Atl. 398; *Sadinsky v. Coughlin,* 114 Conn. 585, 159 Atl. 492.

In view of all the facts and circumstances which together make up the present transaction, considered in the light most favorable to the plaintiff, we find no sufficient evidence to sustain the charge of "gross negligence" on the part of Jemima Johnston.

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

AFFIRMED.

FREMONT JOINT STOCK LAND BANK, APPELLEE, V. GEORGE ERNEST LEBO ET AL., APPELLANTS.

FILED MAY 26, 1936. No. 29646.

Appeal: CONTINUANCE. In the absence of evidence of abuse of discretion, the rulings of the trial court on request for continuance will not be disturbed.

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

Fisher & Fisher, for appellants.

Fred M. Deweese and *Nichols & Johnson, contra.*

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

FITZGERALD, District Judge.

This is an action to foreclose a mortgage, and from a decree for plaintiff, and order of sale and writ of assistance, defendants Lebo appeal to this court.

About March 23, 1927, defendant George Ernest Lebo and his wife, Eva May Lebo, executed their note in which they agreed to pay plaintiff $7,000, with interest at 5¾

per cent., payable semiannually, with a small payment on the principal. The interest and principal payable semiannually amounted to $224. The first semiannual payment was due September 1, 1927, and the last payment on March 1, 1967, would amount to a balance of $377.79. The note provided for interest at the rate of 8 per cent. on all items in default. At the same time the defendants Lebo executed a mortgage on the west half of section 13, township 33, range 48, in Dawes county, Nebraska, as security for said note. This mortgage was duly acknowledged by both George Ernest Lebo and Eva May Lebo, and delivered to plaintiff herein.

On March 25, 1927, defendants Lebo executed and delivered to defendant Charles F. Coffee a second mortgage in the sum of $5,000 on the same property. On January 17, 1933, defendant Atlas Lumber Company obtained a judgment in the sum of $362.88 against the defendant George Ernest Lebo, which judgment appears of record in the district court for Dawes county, Nebraska, and other parties are made defendant for the purpose of protecting the title.

Defendants Coffee and Atlas Lumber Company filed answers and cross-petitions.

It appears that payments were made on the Lebo note up to September 1, 1932, at which time default was made to the extent of $124, and that no payment has been made since that time, and the insurance and taxes have been allowed to go unpaid by defendants Lebo, and this action was started March 10, 1934, and the decree entered April 20, 1935.

The record is very brief in this case, and we find no prejudicial error in the rulings of the trial court. The chief complaint of defendants Lebo is the court's refusal to grant a continuance so that the mortgagors might refinance. This is a matter resting in the discretion of the trial court, and the record reveals no abuse of that discretion. The decree of the trial court is, therefore,

AFFIRMED.

LINCOLN JOINT STOCK LAND BANK, APPELLEE, V. GEORGE ERNEST LEBO ET AL., APPELLANTS.

FILED MAY 26, 1936. No. 29647.

Appeal: CONTINUANCE. In the absence of evidence of abuse of discretion, the rulings of the trial court on request for continuance will not be disturbed.

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

Fisher & Fisher, for appellants.

Fred M. Deweese and *Nichols & Johnson, contra.*

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

FITZGERALD, District Judge.

This is an action to foreclose a mortgage, and from a decree for plaintiff, and order of sale and writ of assistance, defendants Lebo appeal to this court.

About February 16, 1927, defendant George Ernest Lebo and his wife, Eva May Lebo, executed their note in which they agreed to pay plaintiff $2,000, with interest at 5¾ per cent., payable semiannually, with a small payment on the principal. The interest and principal payable semiannually amounted to $64. The first semiannual payment was due September 1, 1927, and the last payment on March 1, 1967, would amount to a balance of $107.94. The note provided for interest at the rate of 8 per cent. on all items in default. At the same time the defendants Lebo executed a mortgage on the north half of the northeast quarter of section 25, township 33, range 48, in Dawes county, Nebraska, as security for said note. This mortgage was duly acknowledged by both George Ernest Lebo and Eva May Lebo, and delivered to plaintiff herein.

On February 23, 1927, defendants Lebo executed and delivered to defendant Live Stock National Bank of Omaha, Nebraska, a second mortgage in the sum of $1,380 on the same property. On January 17, 1933, defendant Atlas

Lumber Company obtained a judgment in the sum of $362.88 against the defendant George Ernest Lebo, which judgment appears of record in the district court for Dawes county, Nebraska, and other parties are made defendant for the purpose of protecting the title.

Defendants Live Stock National Bank and Atlas Lumber Company filed answers and cross-petitions.

It appears that payments were made on the Lebo note up to March 1, 1933, at which time default was made to the extent of $64 and that no payment has been made since that time, and the insurance and taxes have been allowed to go unpaid by defendants Lebo, and this action was started March 10, 1934, and the decree entered April 20, 1935.

The record is very brief in this case, and we find no prejudicial error in the rulings of the trial court. The chief complaint of defendants Lebo is the court's refusal to grant a continuance so that the mortgagors might refinance. This is a matter resting in the discretion of the trial court, and the record reveals no abuse of that discretion.

Defendants contend, and plaintiff tacitly admits, that the amount in the decree is excessive in the sum of $103.74. This court is of the opinion that the decree is excessive to the extent of $103.74, and orders a remittitur within 20 days of that amount. If plaintiff files a remittitur within 20 days, the decree of the trial court will be affirmed. If plaintiff fails to file such remittitur, the decree will be reversed and remanded for further proceedings.

AFFIRMED ON CONDITION.

HYMAN ZELEN, APPELLANT, V. DOMESTIC INDUSTRIES, INC., APPELLEE.

FILED MAY 29, 1936. No. 29524.

1. **Pleading.** "By the phrase 'cause of action,' * * * is meant, not the formal statement of facts set forth in the petition, but the subject-matter upon which the plaintiff grounds his right of recovery." *Myers v. Moore*, 78 Neb. 448, 110 N. W. 989.
2. ———. Original petition and amended petition examined and construed in the light of sections 20-852 and 20-853, Comp. St. 1929, and *held* that such amended petition introduces no new cause of action.

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

Mockett & Finkelstein, for appellant.

Stewart, Stewart & Whitworth, contra.

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

EBERLY, J.

This was originally an action for damages for an alleged breach of contract, entered into about March 1, 1932, between the plaintiff, Hyman Zelen, then doing business under the trade-name of the Western Electric Supply Company of Lincoln, Nebraska, and the defendant, Domestic Industries, Inc., a nonresident manufacturing corporation.

As set forth in plaintiff's first petition, under the terms of this engagement the Western Electric Supply Company was employed by the Domestic Industries, Inc., to act as the latter's sole distributors of its manufactured products in a definite territory which included the state of Nebraska, and the former agreed to enter into and carry on the business of purchasing and selling such products in the manner and upon the express conditions as agreed upon between the parties. The plaintiff alleged the making of this agreement, and attached a written copy of it to his petition, identified as exhibit A, as a part thereof.

Then followed allegations setting forth the full performance thereof by plaintiff, the breach thereof by defendant, and the amount of plaintiff's damages thereby occasioned.

At the time of filing his petition, and in aid thereof, plaintiff also filed affidavits for attachment and garnishment, based upon the fact that the defendant was a nonresident of the state of Nebraska. Thereupon writs of attachment and garnishment were duly issued and served by levy upon certain property in Lancaster county, Nebraska. On July 14, 1932, defendant filed a forthcoming bond and the property levied upon, by virtue of the writs of attachment and garnishment, was released to the defendant.

Thereafter the defendant filed its answer, which, in addition to reserving to itself the benefit of certain challenges to the jurisdiction of the trial court made by virtue of certain special appearances on its behalf, expressly alleged that on March 1, 1932, plaintiff and defendant entered into a written contract, a copy of which is attached to plaintiff's petition as exhibit A; and further specifically alleged:

"3. That as provided in said contract, plaintiff on or about March 1, 1932, furnished defendant with a schedule for the shipment of refrigerators described in said contract, a copy of which schedule is attached hereto marked exhibit 1 and made a part hereof.

"4. That plaintiff failed and refused to accept sight drafts with bills of lading attached on shipments of refrigerators by defendant to plaintiff under said contract and shipping schedules, to pay said sight drafts with bills of lading attached, to pay for said refrigerators on the delivery of said refrigerators in Lincoln, Nebraska, by defendant, to carry a sufficient stock of refrigerators in plaintiff's warehouse at Lincoln, Nebraska, to keep his financial rating sufficiently high to assure performance by him of his part of the contract and to take and accept from defendant the number of refrigerators each month for the months of March, 1932, April, 1932, and May, 1932, which

he agreed to take and accept from defendant for said months under the terms and conditions of said contract and shipping schedules, all as required by the terms and conditions of said contract. That by reason of plaintiff's failure to comply with the terms and conditions of said contract and shipping schedules as aforesaid, defendant canceled said contract and shipping schedules on or about June 16, 1932."

Thereupon plaintiff sought by reply to allege facts disclosing a modification, by agreement of the parties, of the provisions in exhibit A referred to in the answer. The trial court sustained a motion to strike the reply from the files.

The plaintiff then filed his amended petition setting forth as his cause of action the substance of the allegations contained in his first petition, modified by certain oral agreements which, in effect, eliminated and waived the requirements of exhibit A pleaded in that part of defendant's answer already quoted herein. Thereupon the trial court, on the ground "that plaintiff's amended petition herein states and introduces a new and different alleged cause of action from the alleged cause of action stated in plaintiff's original petition in this cause," quashed the writs of attachment and canceled the forthcoming bond. From this order plaintiff appeals.

The question presented by this record necessitates a careful comparison of the original petition filed by plaintiff with the terms of the amended petition held by the trial court to state and introduce a new cause of action. It also invokes due consideration of sections 20-852 and 20-853, Comp. St. 1929, which read as follows:

Section 20-852. "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect or by inserting other allegations material to the case, or, when the amendment does not

change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this Code, the court may permit the same to be made conformable thereto by amendment."

Section 20-853. "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

In our consideration of the two pleadings, eliminating mere verbiage, looking to ultimate facts only, we find the parties to the transaction which is the subject of the action are identical; the same property is involved; the amount of the damages claimed is the same; the damages are alleged in both pleadings to have been caused by the identical acts of the defendant; the loss arises in the same manner. The only difference in the two pleadings is that in the first petition there is an omission to fully state the contract relations of the parties, which is supplied in the amended petition by allegations as to modification of a written obligation, exhibit A, which, in effect, if established by proper proof, will negative the defenses pleaded in defendant's answer.

Tested in the light of the ultimate facts alleged, the amended petition in the instant case introduced no new cause of action.

"By the phrase 'cause of action,' * * * is meant, not the formal statement of facts set forth in the petition, but the subject-matter upon which the plaintiff grounds his right of recovery." *Myers v. Moore*, 78 Neb. 448, 110 N. W. 989.

See, also, *Burke v. Northup*, 98 Neb. 849, 154 N. W. 715.

The amendments made were fully justified by section 20-852, Comp. St. 1929, especially as this section expressly authorizes an amendment "by inserting other allegations material to the case." Certainly it must be admitted that

the amendment made in the instant case in no manner affected the substantial rights of the defendant. Neither can it be said that the amendment made any substantial change of issues. Even as applied to questions requiring a more strict application than necessitated when the action is commenced and is pending in the district court, viz., when a case is retried in a higher court on appeal from a lower tribunal, we are committed to the rule that "A case must be tried in the district court upon appeal upon the issues tried in the lower court. This does not mean that no issuable fact can be pleaded in a petition in the district court that was not alleged in the bill of particulars in the lower court. If the identity of the cause of action is preserved in the petition it is sufficient." *Jacob North & Co. v. Angelo,* 75 Neb. 381, 110 N. W. 570. See, also, *Burke v. Northup,* 98 Neb. 849, 154 N. W. 715; *Richards v. Goldstein,* 124 Neb. 438, 246 N. W. 925; *Aronow v. Gold,* 274 Mass. 65, 174 N. E. 267; Annotation 74 A. L. R. beginning at page 912; *Morton v. Shaw,* 190 Mass. 554, 77 N. E. 633; *Doran v. Cohen,* 147 Mass. 342, 17 N. E. 647.

Plaintiff's amended petition being within the purview of our statutes on amendments, and not in fact introducing a new cause of action, the district court erred in its entry of the order of January 31, 1935, quashing the writs of attachment and canceling the forthcoming bond.

The judgment of the district court is therefore reversed and the cause remanded, with directions to reinstate the writs of attachment and also the forthcoming bond, and for further proceedings in harmony with this opinion.

REVERSED.

CLARICE PETERSEN, APPELLANT, V. OHIO CASUALTY INSURANCE COMPANY, APPELLEE.

FILED MAY 29, 1936. No. 29539.

1. **Trial**: DIRECTION OF VERDICT. "If there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him. In reviewing such action, this court will regard as conclusively established every fact which the evidence proves or tends to establish, and if, from the entire evidence thus construed, different minds might reasonably draw different conclusions, it will be deemed error on the part of the trial court to have directed a verdict thereon." *Bainter v. Appel*, 124 Neb. 40, 245 N. W. 16.
2. **Appeal**: PEREMPTORY INSTRUCTION. "In reviewing a peremptory instruction in favor of defendant, issuable facts, which the evidence in favor of plaintiff tends to prove, will be regarded as established." *Gilbert v. Bryant*, 125 Neb. 731, 251 N. W. 823.
3. **Evidence** examined, and *held* insufficient to authorize instructed verdict and judgment entered thereon.

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

Frost, Hammes & Nimtz, for appellant.

Gaines, McLaughlin & Gaines and *L. Q. Hills, contra.*

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

EBERLY, J.

This was an action at law by Clarice Petersen against the Ohio Casualty Insurance Company upon a policy of insurance issued by the latter. A trial was had to a jury, wherein, after introduction of evidence by all parties, the trial court sustained a motion for a directed verdict and judgment in behalf of defendant. From the judgment of that court overruling her motion for a new trial, the plaintiff appeals.

This policy was a "combined policy," and by its terms insured J. J. Nichols, as owner of an automobile described

as a Buick Master 6 roadster, motor number 1492923, six cylinder, to the actual value thereof, (1) as to damages thereto occasioned by fire, lightning and transportation; (2) for damages thereto occasioned by tornado, cyclone, windstorm, hail, earthquake, explosion and water damage; (3) as to damage from theft, robbery and pilferage; (4) also insured J. J. Nichols against direct loss or expense by reason of liability imposed upon the assured by law for damages by reason of the ownership, maintenance or use of the said automobile, as set forth in the policy, limited as to liability for personal injuries to $5,000 for a single person injured and $10,000 to a single accident; and (5) also damage to or destruction of property of others, limited as to liability to $5,000 for any one accident. The total policy premium was $18, and the stipulated term thereof was from August 25, 1932, to December 25, 1932. By an indorsement attached to the policy, it was agreed "that the company will extend the policy by indorsement for a second four-month period upon payment of $10.80 on or before December 25, 1932, and for a third four-month period upon payment of $7.20 on or before April 25, 1932." And it was further stipulated by the terms of the policy that, "in case an execution against the assured on a judgment secured after trial of the issue in any action brought by the injured person * * * is returned unsatisfied because of insolvency or bankruptcy (of assured), then an action may be maintained by such judgment creditor of the assured, against the company, under and subject to the terms and conditions of this policy, for the amount of such said judgment, not in excess of the proportionate part of the policy's remaining available limits of liability applicable thereto."

It also appears that by reason of the ownership, maintenance and use of the Buick Master 6 roadster automobile, the plaintiff, Clarice Petersen, accidentally suffered bodily injuries on December 13, 1932, when she was accidentally struck by the aforesaid automobile then negligently driven by the assured Joe J. Nichols, also known

as J. J. Nichols, and on August 11, 1933, a judgment was entered in a case then pending in the district court for Douglas county, Nebraska, in favor of plaintiff and against Joe J. Nichols, also known as J. J. Nichols, for the sum of $3,000 and costs of suit; that execution was duly issued thereon and returned wholly unsatisfied, and that said Nichols is insolvent, etc. Thereupon plaintiff commenced this action in the district court for Douglas county, Nebraska. To this petition the defendant filed its answer, and issues were joined on behalf of plaintiff by her reply. On trial, after the introduction of evidence by both parties, on motion made, verdict was returned and judgment entered in favor of defendant. This, in effect, sustained the defense of the insurance company, which is stated in its brief filed herein as: "The defense is that the policy contained a provision authorizing the Ohio Casualty Insurance Company to cancel at any time; that the policy had been so canceled before the date of the accident, upon which the judgment against Joe J. Nichols was based; and that at the time of said accident, said policy was not in effect, and was null and void."

The policy in suit is in evidence. It is signed by David D. Williams, agent for the company. Delivery thereof to the assured is not denied. The face of the policy discloses the first premium was $18, and its terms recite: "The Ohio Casualty Insurance Company, Hamilton, Ohio, in consideration of the premium * * * does hereby insure the assured named and described, and for the term specified, in said schedule of statements, under such of the following perils for which premium is shown in the schedule of statements." As already set forth, the "premium" is shown in the schedule of statements for liability for personal injury. But defendant insists that the premium of $18 was never paid upon this policy, and that it was regularly canceled because of nonpayment thereof, and, indeed, makes the further contention that it was rightly canceled in exercise of the powers reserved in the policy without reference to motive or reason.

As to evidence of payment of the premium, the following is disclosed by the bill of exceptions:

Witness J. J. Nichols testifies: "Q. Well then, in 1931, did you buy an insurance policy from anybody that expired—not effective in 1932? A. Yes. Q. And from whom did you purchase that policy? A. David D. Williams. Q. And in what company was that policy written? A. The Ohio Casualty Company. Q. And what was the premium on that policy, if you know? A. I don't remember. Q. How was it paid, if you know? A. Three instalments, first would be paid when the policy was delivered, and then two other instalments, they were paid each four months after. Q. And in what manner did you pay them? A. In three payments, one when the policy was delivered. Q. And when did you make all three of those payments on your 1931 policy? A. That is my first policy, yes. Q. Did you pay them by check? A. No, I paid them in cash. Q. And to whom did you make the payments? A. David D. Williams. Q. And where did you make the payments? A. At the shop. Q. And did he give you any receipts? A. Well, on the first payment he told me the policy was a receipt, and on the other two those little slips that is attached to the policy that he gave me at the time. Q. When did that policy expire? A. That expired August 25, I believe. Q. 1932? A. 1932. Q. And prior to August 25, 1932, did he deliver another policy to you? A. Yes. Q. And what was the premium on that, if you know? A. Well, the total premium was $36. Q. And how was that supposed to be paid? A. The same as the first policy, in three payments, the first payment when the policy was delivered, and the other two would be four months after the policy went into effect. Q. And then the third payment would be for the last four months of the year, is that right? A. Yes. Q. The first payment was supposed to be how much money? A. $18. Q. And what was the total premium for that year? A. $36. Q. What was the second payment supposed to amount to? A. $10.80. Q. And you say the policy was to expire on

August 25, 1932; when did he deliver this new policy to you, if you know? A. Well, I could not tell you exactly, I could tell you about. It was about a month, maybe a little more, before the first policy ran out that the second one was delivered. Q. Did you pay him the $18 that was due when he delivered you the second policy? A. No, sir. Q. And did you ever pay him the $18? A. Yes; I paid him the $18 along the first of September, the first few days in September. Q. 1932? A. 1932. Q. Did you get a receipt? A. He told me the policy was a receipt. Q. And did you make any payments subsequent to that time? A. What do you mean? Q. Did you make either one of the other two payments then after that? A. No; because they were not due. Q. Where was that $18 paid? A. Beg your pardon? Q. Where was that $18 paid? A. At the shop. Q. At the shop? A. Yes. Q. And how was it paid, by check? A. The same as the other one, cash. Q. And that policy was in effect on August 25, 1932, was it? A. Yes, sir. Q. And the $18 paid for how many months? A. Four months. Q. Then that would run it up to December 25, 1932, is that right? A. Yes. Q. Did you on or about October the 7th or 8th, 1932, receive any letter from the Bohman-Walt Company, signed by W. K. Cameron? A. Yes; I did. Q. And what did that letter say, if you know? A. It stated at the time that the payment, the first payment on that policy, of the second policy, had not been received up until that time by the Bohman-Walt Company. Q. That would be $18? A. Yes. Q. And did they say if it was not paid within five days they would cancel your policy? A. Yes, sir. Q. Without further notice to you? A. Yes, sir. Q. What did you do when you received that letter, if anything? A. I called Mr. Cameron, that is the man that signed the letter, of Bohman-Walt Company. Q. What did you say to him? A. I told him that I paid the premium, and I wanted the insurance, yet that there was a rider that differed from the first policy excluding (interrupted). A. I called Mr. Cameron of Bohman-Walt Company and told him that the

premium had been paid, and also that there was a rider on the policy that was typewritten in. The first policy I had said: 'For business and pleasure,' on the second one it says: 'Business and pleasure,' and then in parenthesis it said: 'Excluding commercial delivery.' I wanted that explained, and he said in the next day or so that he would have somebody up there to explain it to me. Q. Did anybody ever come up? A. No; they never did."

True, this evidence is denied by agent Williams. He says, in part: "Q. And on the second call do I understand that you delivered the policy to him which is involved in this action? A. I did. * * * Q. Mr. Williams, did Mr. Nichols pay you the premium, the first, the initial premium on the policy at the time you delivered it to him? A. He did not. Q. Did he ever pay you the initial premium on the policy? A. He did not. Q. Did he ever pay you any money as a premium, or part premium, or any money of any sort whatsoever in connection with the issuance or delivery, or in connection with the second policy at all? A. No, sir. Q. At any time? A. No, sir. Q. Did any one, on his behalf, ever pay you the original premium? A. No, sir. Q. Or any part of it? A. No. sir. Q. Now, Mr. Williams, Mr. Nichols has testified that you called at his office or his shop and that he paid you $18 partly in currency and partly in cash, is that true? A. The man swore to a damn lie."

The evidence discloses that Williams was given policies to deliver, and was authorized to make collections.

There seems to be some corroboration for plaintiff as to his claimed telephone talk with Mr. Cameron immediately after he received the cancelation notice, and that Mr. Cameron was to come up to see him about the policy in suit. But it would serve no purpose to set out at length the conflicting evidence contained in the bill of exceptions. At very best, we are faced with a disputed question of fact which the Constitution reserved for determination of a trial jury. We have approved the following as a correct statement of the principle here controlling:

"If there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him. In reviewing such action, this court will regard as conclusively established every fact which the evidence proves or tends to establish, and if, from the entire evidence thus construed, different minds might reasonably draw different conclusions, it will be deemed error on the part of the trial court to have directed a verdict thereon." *Bainter v. Appel,* 124 Neb. 40, 245 N. W. 16.

Also, "In reviewing a peremptory instruction in favor of defendant, issuable facts, which the evidence in favor of plaintiff tends to prove, will be regarded as established." *Gilbert v. Bryant,* 125 Neb. 731, 251 N. W. 823. Also, see *Howard v. Gerjevic,* 128 Neb. 795, 260 N. W. 273.

Defendant's motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiff and all proper inferences deducible therefrom. *Rhoads v. Columbia Fire Underwriters Agency,* 128 Neb. 710, 260 N. W. 174; *Pinches v. Village of Dickens,* 127 Neb. 239, 254 N. W. 877; *Melson v. Turner,* 125 Neb. 603, 251 N. W. 172; *LaFleur v. Poesch,* 126 Neb. 263, 252 N. W. 902.

In view of the provisions of our statutes, and the evidence of the course of business disclosed by the record, it is obvious that the payment of the premium of $18, if made to agent Williams for the defendant, binds the defendant though it in fact never received the money from its agent. It follows that, for the purpose of this appeal, in testing the correctness of a directed verdict, the payment of $18 premium in due course by Nichols must be taken as an unquestioned fact. It must also be conceded that this policy was in full force and effect when Joe J. Nichols received the following notice:

"October 7, 1932. Mr. J. J. Nichols, 4129 Erskine St., Omaha, Nebraska. Dear Sir: Payment has not been made at this office of the premium of $18 under policy No.

909026 issued to you written to cover actual cash value fire, theft, tornado and hail and liability and property damage on 1926 Buick master roadster No. 1492923 from August 25th, 1932, and you are hereby notified that unless said premium, namely $18 be paid on or before five days from the date of service of this notice, said policy, and the whole thereof, will stand canceled for nonpayment of premium without further notice, and thereafter be null and void, and no liability will exist thereunder. Yours very truly, Bohman-Walt Co., By———WKC:L"

But the situation before us must be viewed from the standpoint that the insurance company has actually received the $18. The policy under consideration, as a "combined policy," includes "insuring property against loss or damage from any cause." Comp. St. 1929, sec. 44-342. This section controls lawful cancelations of insurance policies both by the insurer and the insured. We have held that this statutory right of cancelation is by construction a part of insurance contracts. It is evident that the rights provided by this statute are reciprocal as between the parties to the insurance contract. It would seem that the statutory declaration, "any company or association also reserves the right to cancel any policy or any part thereof by tendering to the assured the paid unearned premium," renders obligatory the payment or tender back of the unearned premium as a prerequisite to an effective cancelation. *German Ins. Co. v. Rounds,* 35 Neb. 752, 53 N. W. 660.

On principle, it would seen that stipulations of the policy inconsistent therewith may not be deemed to render the statutory provision inoperative, or in any manner qualify the same. *German Ins. Co. v. Eddy,* 36 Neb. 461, 54 N. W. 856; *Home Fire Ins. Co. v. Weed,* 55 Neb. 146, 75 N. W. 539.

The appellee, however, contends that, under the terms of this policy, the insurance company may cancel absolutely and summarily at any time by giving five days' notice of cancelation; that there is nothing in the policy

requiring the insurance company to assign any reason for such cancelation; and that said policy can be canceled by serving a five days' notice upon assured, and if an erroneous reason for cancelation is stated in said notice, the cancelation is still effective. In this connection the cancelation clause of this policy is in the following terms:

"This policy shall be canceled at any time at the request of the named assured, in which case the company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rate premium for the expired term. This policy may be canceled at any time by the company by giving to the named assured a five (5) days' written notice of cancelation with or without tender of the excess of paid premium above the pro rata premium for the expired term, which excess if not tendered shall be refunded on demand. Notice of cancelation shall state that said excess premium (if not tendered) will be refunded on demand. Notice of cancelation mailed to the address of the named assured stated in this policy shall be a sufficient notice. If there are more persons than one named as assured in this policy, the sending of the notice, hereinabove referred to, to the assured first named in this policy shall be in full compliance with the requirement to give notice. The check of the company or its authorized agent similarly mailed shall be a sufficient tender of any unearned premium. Any such cancelation shall not prejudice the rights of the assured respecting any loss or accident occurring prior thereto."

For the purpose of this discussion, disregarding the statutory provisions on this subject referred to, but still treating the situation as involving a valid policy with premium fully paid, the rule is: "Where a valid contract of insurance has been effectuated, the company cannot cancel the policy without consent of insured, except where it may be permitted to do so by statute or by a reservation in the policy itself. Such a reservation is valid, but, under the general rule, it will be strictly construed against the company." 32 C. J. 1245.

The burden of establishing an effective cancelation before loss is on the insurer. Notice of cancelation must be in accord, and in substantial compliance, with the provisions of the policy relating thereto, and be peremptorily explicit and unconditional. In the instant case, the notice is expressly made conditional on the nonpayment of $18 on or before five days from the date of service. It does not comply with the requirements of the policy that the "notice of cancelation shall state that said excess premium (if not tendered) will be refunded on demand."

In construing the identical language here presented, the supreme court of Michigan held that "a tender of the excess premium or a promise to pay it on demand is a condition precedent to the cancelation;" and that a notice of cancelation failing to incorporate the promise to pay on demand was insufficient. *Molyneaux v. Royal Exchange Assurance of London,* 235 Mich. 678, 209 N. W. 803. See, also, *B. & B. Trucking, Inc., v. Home Fire & Marine Ins. Co.,* 209 N. Y. Supp. 511, affirmed, 243 N. Y. 558, 154 N. E. 604; *Artificial Ice Co. v. Reciprocal Exchange,* 192 Ia. 1133, 184 N. W. 756; *American Fire Ins. Co. v. Brooks,* 83 Md. 22, 34 Atl. 373; *Beaumont v. Commercial Casualty Ins. Co.,* 245 Mich. 104, 222 N. W. 100; *Savage v. Phoenix Ins. Co.,* 12 Mont. 458, 31 Pac. 66; *Pomerantz v. Mutual Fire Ins. Co.,* 279 Pa. St. 497, 124 Atl. 139.

The conclusion follows, on the basis upon which the present case is presented for review, as involving an attempt to cancel a policy of insurance, the premium of which we must deem to have been paid, that the notice of cancelation was manifestly insufficient, and the record before us wholly fails to justify the action of the trial court in peremptorily directing the return of a verdict for the defendant and the entry of a judgment in its behalf. The plaintiff was entitled to have the cause submitted to and determined by the jury, under proper instructions.

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

REVERSED.

WILLIAM J. HARRELL, APPELLEE, V. PEOPLE'S CITY MISSION HOME ET AL., APPELLEES: ELMER PELTON, APPELLANT.

FILED MAY 29, 1936. No. 29565.

1. **Appeal.** The verdict of a jury in a law action, based on conflicting evidence, will not be disturbed on appeal unless clearly wrong.
2. **Automobiles: USE BY EMPLOYEE: LIABILITY.** To hold the owner of an automobile liable for an accident which occurred when his car was being driven by an employee, it must ordinarily be shown that the employee was, at the time, engaged in his employer's business, with the employer's knowledge and consent.
3. ———: ———: **PRESUMPTION: REBUTTAL.** The presumption that an employee, driving employer's automobile when accident occurs, is acting within his employment is rebutted, where the evidence shows employee was engaged on his personal affairs.
4. ———: ———: **LIABILITY.** The owner of an automobile is not liable for injury or damage occasioned while his automobile is being operated by an employee on his own business or pleasure, without the employer's permission or consent.

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

Baylor & TouVelle, George A. Healey and *Casey & Corenman*, for appellant.

Chambers & Holland, C. L. Clark, George E. Hager, R. A. Locke and *Mockett & Finkelstein, contra.*

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

PAINE, J.

William J. Harrell sued for personal injuries received in an automobile accident, and the jury found no cause of action. Elmer Pelton, in his answer and cross-petition, brought action for personal injuries arising out of the same accident against Ben C. Finkelstein and William J. Harrell. The court dismissed the action as to Finkelstein and Claude Parker, defendants, and the jury returned a verdict for Elmer Pelton in the sum of $5,000 against

William J. Harrell only. Pelton appeals from the dismissal of Finkelstein by the court.

William J. Harrell brought suit against the People's City Mission Home, a corporation, Elmer Pelton, and Claude Parker, alleging that on November 22, 1933, at about 1:30 in the afternoon he was driving a 1929 Whippet sedan north on Twenty-first street, and that Elmer Pelton and Claude Parker were driving a truck belonging to said Mission in a careless and negligent manner, on the wrong side of the street, and suddenly without warning drove into his sedan, violating the ordinances of the city of Lincoln, and injuring him upon the knee, leg, wrist, abdomen, and chest, and shocking his nervous system, for which injuries he was required to incur large medical and hospital bills, and alleging that he was damaged in the sum of $25,000.

Various motions and demurrers were ruled upon; then defendant Claude Parker filed answer, admitting that a collision occurred at the time and place alleged, but denied all the other allegations of the petition, and alleged that if the plaintiff suffered any injuries they were caused by the plaintiff's own careless and negligent acts.

The People's City Mission Home, a corporation, filed answer and admitted that a collision occurred at the time and place stated, and charged that the plaintiff drove his Whippet sedan upon the left, west, or wrong side, of Twenty-first street; that he failed to turn before colliding with the truck operated by Pelton; that he failed to yield one-half of the roadway, or to have his automobile under reasonable and proper control, or to give any warning, and that he was driving at an unlawful rate of speed; denied that said Ford truck was being driven or operated under the direction of the said City Mission, or used on its business, or in its service for its benefit, at the time of the accident, and that Pelton, who was operating the said Ford truck, was never in the employ of the said Mission, and that he was operating the automobile for his personal use and benefit in moving certain household goods owned by

said Pelton from his former residence to one then being occupied by him, and that the business of moving said household goods by said Pelton was in no way connected with the business of the said Mission, and that Pelton was operating said Ford truck at the time and place without the knowledge or permission of said City Mission.

Elmer Pelton was given leave to file cross-petition against Ben C. Finkelstein, who was made party defendant, and said Elmer Pelton in his answer and cross-petition admitted the collision occurred, but denied all other allegations of plaintiff's petition, and further alleged that if plaintiff suffered any injuries the same were duly contributed to and proximately caused by the plaintiff's own careless and negligent acts; and further, by way of cross-petition, alleged that the plaintiff, William J. Harrell, was driving a Whippet sedan which was the property of Ben C. Finkelstein, with his permission and consent, and was the agent and servant of said Finkelstein, and was then upon the business of said Finkelstein, and within the scope and authority granted to him by said Finkelstein; alleged that the plaintiff, Harrell, was driving said Whippet sedan in a careless, reckless, and negligent manner on the wrong side of the street, and violating the law in many other respects too numerous to set out, and that such acts of said plaintiff Harrell caused the accident and collision, which the said Pelton could not avoid.

Elmer Pelton further alleges that he was an able-bodied man, 25 years of age, employed by Earl Coryell Company, was earning $150 a month, and that as a result of the accident he was confined in St. Elizabeth's Hospital for two weeks, his nervous system shocked, skull fractured, knee ligaments and tendons torn, bruised, and injured, he suffered a loss of blood, and that said injuries are permanent and lasting; that he continues to have severe headaches, excruciating pains over his entire body, is unable to stoop, and has expended for medical and hospital aid $600, and will be compelled to spend additional sums, and that his damage is in the sum of $10,000, which he prays

that he may recover from the plaintiff, William J. Harrell, and the defendant Ben C. Finkelstein.

A separate answer was filed by Ben C. Finkelstein to the cross-petition of Elmer Pelton, in which he alleges that Harrell was driving an automobile owned by Finkelstein at the time of the accident, but denies that he was operating the automobile as an employee, agent, or otherwise, or that he was on the business of said Finkelstein; alleges that the injuries, if any, suffered by Pelton were due to his own negligence, recklessness, and carelessness.

The People's City Mission Home, a corporation, filed a long additional and supplemental answer, containing a large number of new allegations, among others that on September 29, 1934, a judgment was rendered in the district court for Lancaster county in a case brought by Claude Parker against William J. Harrell, and that the aforementioned parties are the identical persons involved in the above entitled action, and that the verdict of the jury was for $5,000 and costs, and that said judgment arose from personal injuries received by Claude Parker, plaintiff, in said accident, and that the action now pending and the rights of the parties in this suit are now barred by reason of the determination in the aforesaid case, and the People's City Mission Home asks that it may go hence and recover its costs.

Thereafter Elmer Pelton also filed a supplemental answer and cross-petition. A supplemental answer was also filed by the defendant Claude Parker. Answer was filed by William J. Harrell.

On December 3, 1934, the court dismissed the action as against Claude Parker without prejudice to a new action. The case was tried to a jury on December 3, 4, 5 and 6, upon which last-named day, at the close of all the evidence, motion to dismiss the defendant's cross-petition against Ben C. Finkelstein was sustained, and Elmer Pelton's cross-petition as to Finkelstein was dismissed.

On December 7 the trial of the case was completed, and the jury were instructed by the court, and on December

10 the jury returned into court a verdict, finding for the defendant, People's City Mission Home, and against the plaintiff, William J. Harrell, upon his petition, and finding for the defendant Elmer Pelton on his cross-petition, and assessed his damages against the plaintiff, William J. Harrell, in the sum of $5,000, and judgment was entered accordingly.

A motion for new trial was filed by the defendant, Elmer Pelton, in which are set out 16 errors of the court, relating to the dismissal of the action against the impleaded defendant, Ben C. Finkelstein, and in failing to submit to the jury the question of the right of Pelton to recover a verdict and judgment against said Finkelstein. A motion for new trial was also filed by William J. Harrell, alleging 57 errors of the court in the trial of the case.

The evidence is impossible to reconcile. For plaintiff Harrell, the evidence tends to establish that he had just backed out from angle-parking on the south side of O street, from a position which would have been in the middle of Twenty-first street if that street had extended straight through south. He made a left turn and had started north, and was driving this old Whippet in second gear north along the east side of Twenty-first street, and his four witnesses all testify that the accident happened on the east side of the street, and that the Ford, in being driven south, came clear over on the east, or wrong, side of the street, making Pelton and Parker entirely at fault. Harrell had put the brake on his Whippet, and it only moved a short distance backward, while the Ford backed clear over the curb on the east side of the street. Both Pelton and Parker were entirely unconscious after the collision, and Pelton was lying in the street, perhaps jarred out as the rear wheels hit the curb, and neither of them regained consciousness until the next day. Harrell testified that, as the Ford angled over onto the wrong side of the road in front of him, he thought they were friends and trying to play a joke on him, and he put on his brake and ducked down his head and waited.

The evidence of Pelton and his witnesses is to the effect that the Ford was traveling 15 miles an hour, going south on the west side of the street, while Harrell was coming north in the Whippet at 25 to 30 miles an hour, and that Harrell was not looking where he was going, and was waiving to a friend over west, and that he angled clear over to the west side; that, just before the crash, Pelton, seeing no chance to get by Harrell on the west or his own side of the street, turned the steering wheel of the Ford sharply in a desperate endeavor to go past Harrell upon his east, or the wrong, side and avoid a collision; but the evidence of Pelton and his witnesses is that both cars were on the west side of the center when the crash took place. There is testimony that there were pieces of glass, oil and alcohol near the middle line of the street, the largest amount on the west side of the middle line, and none of it over six or seven inches on the east side of the middle line, implying that the Ford was about on the middle line and the Whippet farther to the west, as the collision occurred by the right front fenders of each car coming together. If the Whippet was farther to the west, then Harrell was driving where he should not have been. Pelton's witnesses say that the Ford was hit so hard a blow that it rebounded and made a quarter-circle backwards and came to rest over on the east side of the street, with rear wheels on the curb.

The cross-appellant, William J. Harrell, in his brief insists that, where the verdict of the jury is counter to the physical facts, it will be set aside on appeal, and cites us in support thereof: *Calnon v. Fidelity Phenix Fire Ins. Co.*, 114 Neb. 53, 205 N. W. 942; *Behr v. Duling*, 128 Neb. 860, 260 N. W. 281; *Elwood v. Schlank*, 126 Neb. 213, 252 N. W. 828.

It is necessary, when it is charged that the verdict is not supported by the physical facts, that the evidence be examined by this court, which has been done in this case. We have arrived at the conclusion that there is such a sharp conflict in the evidence that the jury could have

returned a verdict for either side upon the testimony introduced.

There is abundant authority that the verdict of a jury in a law action, based on conflicting evidence, will not be disturbed on appeal unless clearly wrong. *Tidd v. Stull,* 128 Neb. 506, 259 N. W. 369; *LaFleur v. Poesch,* 126 Neb. 263, 252 N. W. 902; *Anderson v. Lotman,* 124 Neb. 795, 248 N. W. 309.

Under our examination of the evidence, we find that the physical facts sustain the verdict reached by the jury.

We have examined the record on the other error argued by cross-appellant on the refusal to allow exhibit No. 9, a picture of the Ford truck, to be received in evidence. This picture was taken some time after the accident, in a garage, and the wheels are seen to be cramped sharply to the right. The witness was unable to testify whether the wheels had been changed after the accident. We find no prejudicial error in the ruling of the court rejecting exhibit No. 9.

We now come to the question, briefed at considerable length by the appellant and cross-petitioner, Elmer Pelton, as to whether the district court committed error in dismissing Pelton's cross-petition against Ben C. Finkelstein. It is insisted that the court should have submitted the question of Finkelstein's liability to Pelton to the jury for determination. It is claimed by Pelton that the evidence shows that the meter in the house on Finkelstein's Vine street property measured the electricity consumed in the house and also that used by an electric light which illuminated the work-yard at the back of the house, and the testimony also shows that the light bill was made out to Finkelstein by the Iowa-Nebraska Light & Power Company, and that the monthly statements were sent to Ben C. Finkelstein at 1901 Vine street. Harrell took Finkelstein's Whippet car to go down to pay this bill. When the company would not accept his money in payment for the month that he lived in the house unless the back bills were paid during the time that a former employee, Hazelton,

had lived in the house, Harrell started to find Hazelton, and found his car in front of Finkelstein's place of business on O street. Hazelton told Harrell he would pay the back bills, but did not have the money just then, and Finkelstein assured Harrell that Hazelton would pay up the back bills, and thereupon Harrell started on the most direct route back to the place where he worked on Vine street. After the accident Finkelstein paid Harrell his regular wages for 12 weeks.

The appellee, Ben C. Finkelstein, insists that the authorities cited do not sustain the contentions made, but that the law of Nebraska applicable to this case is that the plaintiff must show by preponderance of the evidence that the employee in charge of an automobile was, at the very time of the accident, engaged in the master's business, with the master's knowledge and consent.

In the case of *Wise v. Grainger Bros. Co.*, 124 Neb. 391, 246 N. W. 733, an employee was driving a truck home to get his dinner at the time of the accident. while in *Ebers v. Whitmore,* 122 Neb. 653, 241 N. W. 126, employee likewise used a truck to go home for dinner, but after dinner drove to a jewelry store some 22 blocks north of his place of employment to get his watch which he had left to be repaired, on which trip the collision occurred.

The presumption that an employee, driving employer's automobile when accident occurs, is acting within his employment is rebutted, where the evidence shows employee was engaged on his personal affairs. *Hanchett v. Wiseley,* 107 Cal. App. 230, 290 Pac. 311.

The case of *Keebler v. Harris,* 120 Neb. 739, 235 N. W. 328, has been cited in several of the briefs filed in the case at bar. It was there held: "Where an employee in charge of his employer's automobile temporarily abandons his duties and uses it for his own pleasure, the employer may be liable for the subsequent negligence of the employee while the latter is driving the automobile in performing the duties of his employment after resuming them." It is said that the judgment would only be

reversed if the evidence was insufficient to sustain the finding that Harris was engaged in the duties of his employment at the time of the collision. Harris was on an errand with a dual purpose—he was returning from a personal visit to a fraternity house, but he was likewise engaged in returning a repossessed car to a storage garage for his employer. In the case at bar there was no dual purpose. The collision occurred while the employee was returning from a trip to pay his own light bill. His employment for his master would not begin until he reached his place of employment.

A servant may on the same trip combine both his own and his master's business. *Lytle v. Union Gas & Electric Co.*, 24 Ohio App. 314, 157 N. E. 804; *McCormack Bros. Motor Car Co. v. Holland*, 218 Ala. 200, 118 So. 387. In the long note covering owner's liability for injury by automobile while used for servant's own pleasure, found in 68 A. L. R. 1051, it is announced as the general rule that the owner of an automobile is not liable for injury or damage occasioned while the automobile is being operated by a servant on his own business or pleasure without the master's permission or consent. The continuation of the above note, with additional authorities, is found in 80 A. L. R. 725. *Johnson v. Holmen Canning Co.*, 191 Wis. 457, 211 N. W. 157; *Brown v. Montgomery Ward & Co.*, 104 Cal. App. 679, 286 Pac. 474; *McNaught v. Standard Oil Co.*, 128 Neb. 517, 259 N. W. 517; *Bainter v. Appel*, 124 Neb. 40, 245 N. W. 16; *Neff v. Brandeis*, 91 Neb. 11, 135 N. W. 232; *Gray v. Sawatzki*, 272 Mich. 140, 261 N. W. 276; *Wenell v. Shapiro*, 194 Minn. 368, 260 N. W. 503.

The evidence discloses that Harrell required electricity in his home for family use, and that by the terms of his employment he was given the use of the house but was required to pay the electric light bill, and that the payment of this bill was not a service he was rendering to his employer. The evidence discloses that Harrell during the noon hour, which might well be considered his own time, got into one of the second-hand cars of his employer

standing there and expected to go down to the electric light company and pay that bill and return very shortly after one o'clock and resume his work. It occurs to us that Finkelstein had nothing to do with the lights, and the payment of this light bill was no different from the payment of a dry goods bill, or a grocery bill, or a coal bill for merchandise used in Harrell's home, and he was not at the time of the accident engaged in the master's business, with the master's knowledge and by the master's direction, and that the court committed no prejudicial error in relieving Finkelstein of liability in this case.

We have examined all of the errors presented in the briefs, and hereby affirm the several judgments as entered by the trial court.

AFFIRMED.

CLAUDE PARKER, APPELLANT, V. WILLIAM J. HARRELL ET AL., APPELLEES.

FILED MAY 29, 1936. No. 29566.

Automobiles: USE BY EMPLOYEE: LIABILITY. To hold employer liable for employee's negligent operation of automobile, it must appear that use thereof was within the scope of his employment.

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

Baylor & TouVelle, George A. Healey and *Casey & Corenman*, for appellant.

Chambers & Holland, Mockett & Finkelstein, Hall, Cline & Williams and *R. A. Locke, contra.*

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

PAINE, J.

Claude Parker brought action against William J. Harrell and Ben C. Finkelstein, defendants, to recover personal

damages for physical injuries suffered by him in an automobile collision in the city of Lincoln on the afternoon of November 22, 1933.

At the close of all the evidence, the court directed a verdict for Ben C. Finkelstein on the ground of insufficient evidence to establish the agency of Harrell at the time of the accident. The jury returned a verdict of $5,000 for Parker against Harrell.

This is a companion case to *Harrell v. People's City Mission Home, ante,* p. 138, and both concern the same accident. That case was tried in the district court several months after this one, and the bill of exceptions therein is much longer; still, many of the same facts applicable to this case will be found set out in that opinion.

The appeal in the case at bar is by Parker, the plaintiff and appellant, to reverse the ruling of the trial court dismissing the action as to Ben C. Finkelstein. The principal error relied upon for reversal is in not submitting to the jury the question of Finkelstein's liability. In this appeal the question of negligence is not involved, but only the question of the liability of Ben C. Finkelstein.

So much of the facts as are necessary will be briefly summarized. The plaintiff was 27 years of age, and an employee of the People's City Mission Home, and was riding in the model A Ford truck of the said Mission, but was permitting Elmer Pelton, who was his guest in the truck, to drive it for him when the collision occurred.

The defendant William J. Harrell was employed by Ben C. Finkelstein as a wrecker to tear automobiles apart and as a salesman for second-hand cars. He was driving a 1929 Whippet sedan, which belonged to his employer, whose principal place of business was at 2053 O street. The employer also had a place of business at 1901 Vine street, where some cars were junked and the parts were sold, and Mr. Harrell was in charge of this small branch business on Vine street, which was about two blocks west and eight blocks north of Finkelstein's main place of business near the corner of Twenty-first and O streets.

There was a small dwelling in connection with the Vine street place of business, and Harrell, who was 34 years old, lived there with his wife and boy. Finkelstein paid him $14 a week and gave him the use of the house. Having lived there a month, the electric light bill was due; he took an old Whippet sedan, 1929 model, belonging to his employer, during the noon hour, and drove to the Iowa-Nebraska Light & Power Company to pay his light bill. They refused to accept his money because Hazelton, the former employee, owed several months' back bills. Harrell started out to find Hazelton, and seeing his car parked in front of Finkelstein's on O street, Harrell went in, and there had a discussion with Hazelton and Finkelstein with reference to the arrears in the light bill. Hazelton agreed that he would pay all the back bills as soon as he had money, and Harrell started to return to his place of employment at the Vine street property, taking the most direct route, and when he had gone about half a block the accident occurred, at about 1:30 p. m., near the alley on Twenty-first street. The light bill was made out in Finkelstein's name, as he owned the house. There was a line ran out in the yard and an electric light out there that Harrell said he could turn on if he went out to look for some parts at night, or if he ever heard any prowlers out there.

The question to be determined is whether the relationship of master and servant existed between Finkelstein and Harrell at the exact time of the accident; that is, was the employee acting within the scope of his employment? Was he under the direction of his employer and performing any duties for him when the accident occurred?

Mr. Finkelstein was not called as a witness by either side. From the testimony we are satisfied that Harrell started out during the noon hour to pay his own light bill and was engaged in that business on this trip, and none other. We find that Harrell was using his employer's car but was not in the service of such employer. We have held that an employer is not liable for damage resulting

from the negligence of an employee in the operation of a motor vehicle when not engaged in the performance of any duty for his employer. *Wise v. Grainger Bros. Co.*, 124 Neb. 391, 246 N. W. 733. The fact that the employer may have continued to pay his employee a few weeks' wages while he was hurt does not change the rule announced.

To hold employer liable for employee's negligent operation of automobile, it must appear that use thereof was within the scope of his employment.

In our opinion the evidence entirely supports the trial court in directing a verdict for Finkelstein. The evidence would not have supported a verdict against Finkelstein.

We have examined all the errors discussed in the briefs, and find no prejudicial error therein, and the judgment is hereby

AFFIRMED.

HARTLEY K. ANDERSON, APPELLANT, V. LINCOLN JOINT STOCK LAND BANK, APPELLEE.

FILED MAY 29, 1936. No. 29598.

1. **Pleading.** "It is not allowable to plead new matter in a reply for the purpose of bringing forward a new cause of action not charged in the petition or to aid the averments of the petition." *Kliment v. Torpin Grain Co.*, 5 Neb. (Unof.) 159, 97 N. W. 587.
2. **Mortgages: DEED AS MORTGAGE: EVIDENCE.** Where it is sought to vary the effect of a deed absolute on its face by parol testimony, so as to declare it to be a mortgage, the evidence must be clear, convincing, and satisfactory before a court is warranted in adjudging it to be a mortgage. *O'Hanlon v. Barry*, 87 Neb. 522, 127 N. W. 860.
3. **Estates: MERGER.** Ordinarily, when two unequal estates vest in the same person at the same time without an intervening estate, the smaller is thereupon merged in the greater, but this result does not necessarily follow. Whether the two estates have coalesced will depend upon the facts and circumstances in the particular case, the intention of the parties acquiring the two

estates, and the equities of the parties affected. *Peterborough Savings Bank v. Pierce*, 54 Neb. 712, 75 N. W. 20.

4. **Affirmance.** *Held*, the evidence in this case supports the finding and judgment of the trial court.

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

Charles E. Matson, for appellant.

Good, Good & Kirkpatrick and *Mark Simons, contra.*

Heard before GOOD, EBERLY and CARTER, JJ., and CLEMENTS and THOMSEN, District Judges.

CLEMENTS, District Judge.

This action was brought by Hartley K. Anderson, a widower, and his children, plaintiffs, to enforce specific performance of an alleged verbal agreement for reconveyance to them of the southeast quarter of section 24, township 9, range 6, Lancaster county, Nebraska. Trial was had before Honorable J. H. Broady, district judge, resulting in a general finding for defendant and a dismissal of the action. Plaintiff brings the cause here on appeal.

On February 5, 1923, the plaintiff, Hartley K. Anderson, and his wife, then living, Kathryne Anderson, executed and delivered to the defendant a mortgage in the principal sum of $14,800 on the above described land. At the time of the execution of the mortgage, Hartley K. Anderson and his wife Kathryne were the owners of the real estate, each owning an undivided half interest in the same. On February 5, 1931, Kathryne Anderson died intestate leaving as her sole and only heirs Hartley K. Anderson, her husband, Lyle Francis Anderson, a son, Margaret Agnes Anderson, a daughter, Milton Hartley Anderson, a son, Geralyn Etta Anderson, a daughter, and Reese Lee Anderson, a son.

The interest on the mortgage indebtedness was not paid in accordance with the terms of the mortgage and April 19, 1933, the amount due and unpaid on the mortgage was approximately $16,000. For about $900 of this sum, being

delinquent interest on the mortgage, defendant had taken plaintiff Hartley K. Anderson's chattel mortgage on 2,000 bushels of corn.

On said 19th day of April, 1933, negotiations were commenced between Hartley K. Anderson and the defendant which resulted in the execution and delivery by the plaintiff to the defendant of a warranty deed conveying to the defendant his interest in said premises, the execution of a lease of the premises to the plaintiff, the release of the above mentioned chattel mortgage by the defendant, and an agreement between the parties for an option by the terms of which the defendant was to reconvey said premises to the plaintiff under certain terms and conditions. What the nature and conditions of this option were is the only matter in dispute in this action.

After the delivery of deed by plaintiff, Hartley K. Anderson, to it, the defendant commenced a foreclosure action on said mortgage against the children, heirs at law of Kathryne Anderson, deceased, which action resulted in a sale of the premises to the defendant. The plaintiffs allege in their petition that, under the terms of the option entered into April 19, 1933, Hartley K. Anderson was to have a reconveyance of said premises if he paid to the defendant on or before March 1, 1934, the sum of $9,500; that on December 23, 1933, he advised the defendant that he had secured the approval of a $12,000 loan from the Federal Land Bank, and when the money from this source was available $9,500 would be paid to the defendant pursuant to said option agreement; that the defendant refused to reconvey said premises on receipt of said sum. The plaintiff, Hartley K. Anderson, offers to pay said sum of $9,500 into court for the defendant, and asks that the defendant be decreed by the court to reconvey said premises to said Hartley K. Anderson, free and clear of all encumbrance, except the taxes for 1933 and 1934.

The defendant answers that, under the agreement of April 19, 1933, it was to reconvey said premises only on condition that said Hartley K. Anderson on or before

January 1, 1934, pay all delinquencies on said mortgage, including taxes and insurance premiums, and that said reconveyance was to be made subject to the lien of the principal sum of said mortgage; that such delinquencies were never paid.

As there is no dispute as to any facts in this case, save as to the terms and conditions of the alleged agreement to reconvey, we will examine and comment only on such evidence as bears upon such facts.

The evidence of plaintiff in support of his contention consists of the testimony of himself and of his son Lyle Francis Anderson, and a cousin of the plaintiff Hartley K. Anderson, by the name of George M. Christian. The plaintiff, Hartley K. Anderson, testified that on or about April 19, 1933, the defendant was pressing him for payment of the mortgage; that on that day, a Mr. Thomas, who was a collector for the defendant, came to the Hartley K. Anderson farm and told said plaintiff that the loan had run a long time and something had to be done; that Thomas advised plaintiff, Hartley K. Anderson, to make out a deed to defendant, that it would be the easiest way out. He offered to give me an option that I could redeem my place for $9,500 any time up to March 1, 1934. The reason he gave why they would take $9,500 was that their bonds were low and they could go out and buy bonds with that money. I agreed that I would come in that afternoon. When I got to defendant's place of business, they had the papers fixed out and I signed the deed and lease. They gave me no written option, but said they would send me one. I never got a written option, but Mr. Thomas, as I was leaving, said, any time I could get hold of $9,500 they would turn the deed back to me. In this testimony he was corroborated by his son Lyle who was present at the conversation held at the farm and went with his father to the defendant's place of business when the papers were signed.

George M. Christian testified that he had several conversations with William E. Barkley, the president and

general manager of the defendant bank. In one of these conversations, had in January, 1934, he told Mr. Barkley that he, the witness, understood that Mr. Anderson had an option to repurchase the land for $9,500, that Anderson could secure a loan from the Federal Land Bank for $12,000 and was prepared to pay $9,500 for reconveyance of his land. Mr. Barkley said they would not accept $9,500, that bonds had gone up so much higher than they were at that time. In another conversation with Mr. Barkley, held on or about the 24th day of January, 1934, the witness testified that Mr. Barkley again said he would not accept $9,500 in settlement, that bonds had gone up to such an extent that $12,000 would not be as much as $9,500 when they talked settlement the first time. The witness then said he told Barkley he, Mr. Anderson, cannot afford to hire attorneys and go to law. He will give you the entire proceeds of the $12,000 loan. Mr. Barkley said, I believe you can get a better loan than that. I told him I thought not. He said: "Well, you go back there and write them and see what you can do. No hurry about this, we will let this thing ride and will try to work it out." The witness then testified that Mr. Barkley suggested what he should write to the finance corporation, and that at Barkley's suggestion he wrote the letter—plaintiff's exhibit No. 2. We will comment on this letter later. It was shown by the witness that in April, 1933, the bonds of the Lincoln Joint Stock Land Bank were valued at 50 cents on the dollar.

On the part of the defendant, the following witnesses were called and testified: William E. Barkley, president of defendant bank; Harry N. Thomas and R. F. Reynolds, collectors for defendant; Fred M. Deweese, attorney for defendant; J. C. Price, in charge of defendant's real estate department; Mrs. Eunice Dingman Gleason, formerly Eunice Dingman, stenographer for defendant, and Miss Klara Hanneman, secretary for the defendant.

William E. Barkley testified that he had never agreed to accept $9,500 in payment of the Anderson loan, nor had

he ever authorized any other person to compromise said loan for that amount; that on March 21, 1933, he authorized Mr. Reynolds to settle the Anderson loan for $11,000, if all cash was paid by April 1, 1933. He admits having a talk with Mr. Christian in which he told Christian that the bank would not reconvey the Anderson land upon payment of $9,500 and that he urged Christian to write the Federal Land Bank in an endeavor to procure a larger loan than $12,000. He denies he made any suggestions as to the language to be used in said letter. He admits the bonds of the bank were low in 1933 and increased in value during that year, and that the bank could have given Anderson a larger discount on his loan in April, 1933, than in January, 1934. That part of exhibit No. 2 which is material to the issues in this case is as follows:

"The Lincoln Joint Stock Land Bank of Lincoln, Nebraska, holds the present loan on my farm. Their loan plus taxes amounts to approximately $16,000 and although I can get a small discount on the same, I cannot get the discount that some others are getting for the reason that my farm is so well situated and in a high state of cultivation that others are trying to purchase the same, consequently the land bank will not consider much of a loss. The land bank has already foreclosed on this land, but are giving me a reasonable amount of time to get it financed so that anything that is done will have to be done at once."

Harry N. Thomas and R. F. Reynolds were both present at the conversations held with Anderson at his farm April 19, 1933. They both testified that no option was offered or given Anderson to redeem his land for payment of $9,500 by March 1, 1934. They both testified that the transaction had that day was as follows:

In consideration of the giving by Anderson of a deed to the premises, the bank would release its chattel mortgage on 2,000 bushels of plaintiff's corn, lease the plaintiff, Hartley K. Anderson, the land for 1933, and give him an option to repurchase the land by payment, on or before January 1, 1934, of all delinquent interest and taxes, any

insurance paid by the bank, and any amount necessary to perfect the title; that Anderson said he would be in that afternoon and fix up the papers to complete the transaction; that Anderson came to the office of the defendant that afternoon; that both Thomas and Reynolds were present and took part in what transpired there; that prior to the arrival of Mr. Anderson there had been prepared a deed of the Anderson land to the bank, a lease of said land to Anderson, an option agreement, and a release of the chattel mortgage on the corn, all in accordance with the agreement of the parties in the conversation on the farm.

On Mr. Anderson's arrival at the office, these papers were handed to him for inspection, he inspected and read them and signed the deed, lease and option. These papers were then sent to Mr. Deweese, and Anderson was told that, after the abstract had been brought down to date and examined, if the title was found good, the option and lease would be forwarded to him and the release filed. That in the conversation at this time nothing was mentioned about $9,500 being sufficient to take the land free from the mortgage. The letter transmitting these papers to Mr. Deweese, defendant's exhibit No. 10, is as follows:

"Report

"April 19, 1933.

"N-1282-C Anderson

"Attention Mr. Deweese:

"Mr. Thomas and myself called at the home of Hartley K. Anderson, who is delinquent three instalments of $444 each, and three years taxes.

"We formally arranged with him to give us a deed for the farm, and as part of the consideration we returned to him a note and mortgage on 2,000 bushels of corn. We are to give him an option to purchase this farm, expiring January 1, 1934, and have rented to him for the year 1933 for two-fifths of all grain delivered and $4 per acre for all land not cultivated, cash rent payable January 1, 1934.

"I am inclosing lease, deed, and the option which will

be delivered to him when the title has been found satisfactory. I forgot to have an assignment of insurance, but will procure the same at an early date.

"Yours very truly,
"R. F. Reynolds."

Fred M. Deweese testified as follows: That he received the instrument mentioned in the letter, exhibit No. 10; that he had prepared the deed and option contract, the option contract being prepared in duplicate; that on examination of the title he found the land had been held jointly by Hartley K. Anderson and his wife, Kathryne Anderson; that Kathryne Anderson had died leaving heirs, and that the deed from Anderson would convey but a one-half interest in the land; that he advised that a foreclosure of the Anderson mortgage would have to be had to cut out the interest of the heirs of Kathryne Anderson; that on June 2, 1933, he wrote Anderson the letter introduced as defendant's exhibit No. 11. This letter is as follows:

"June 2, 1933.

"Mr. Hartley K. Anderson,
"Route No. 3, Lincoln, Nebraska.

"In re: Lincoln v. Anderson N-1282-C

"Dear Sir:

"The deed given by you to the land bank has been recorded and the abstract extended to show title in the land bank subject to its mortgage.

"Because your wife had an undivided one-half interest it will be necessary for the land bank to foreclose its mortgage in order to secure title to the land described in the mortgage and such a proceeding is being started. We will probably also have to have a short form of administration to establish the heirship of the children whose names you gave to Mr. Reynolds yesterday.

"You were to be released from obligation on notes given to the land bank and secured by a chattel mortgage, and I inclose your two notes dated August 3, 1932, each in the sum of $444.44 which have been canceled. These were secured by a chattel mortgage which is inclosed. A release

of this chattel mortgage is being mailed to the county clerk in Lincoln.

"You were also to have an option to purchase the land described in the mortgage at any time up to January 1, 1934, and such an option is inclosed. If you are able to take advantage of the rights given by this option you should notify the land bank a few days in advance of January 1, 1934, so that the sale may be completed by that time.

"You are also to receive a lease giving you the right to occupy the premises to March 1, 1934, and a copy of such a lease is inclosed.

"Yours very truly,

"ENC. Notes, Ch. Mtge., Option, Lease."

This letter was typed by my stenographer Miss Dingman. After signing the letter I handed it and the original option contract to Miss Dingman. Digressing here for the evidence as to the mailing of the letter, Mrs. Eunice Dingman Gleason testified, she typed the letter, exhibit No. 11; that after the original had been signed by Mr. Deweese, she folded it and put it in the envelope; that she inclosed with it, the inclosures listed at the bottom of the letter, namely, the notes, chattel mortgage, option and lease; that she was familiar with the form of option which the land bank used at that time; that the option inclosed was on a form similar to exhibit No. 12, that the option was signed; that the letter was directed to Mr. Anderson to the address on the head of the letter; that Mr. Deweese's return card was on the letter; that the letter bore three cents postage; that she put the letter in the wire mail box kept in the office for all mail going out; that was the usual routine for correspondence in the Joint Stock Land Bank.

Klara Hanneman testified that she had entire charge of the mail in the Joint Stock Land Bank; that after every one got their mail in the basket, I collected it and bound it together with a rubber band and took it to the post office; that she did this on June 2, 1933. I checked each letter

to see if it was sealed and properly stamped. If they were not properly stamped, I stamped them.

Now resuming testimony of Fred M. Deweese. He testified further that, when he prepared the letter, exhibit No. 11, on June 2, in which the original option contract was inclosed, he had the duplicate of this option contract on his desk; that it afterwards disappeared; that he had made a thorough search for it and was entirely unable to find it; that it was prepared on the blank form, exhibit No. 12, and the blanks were filled in as follows:

The third line contained the name of Hartley K. Anderson, the fourth line contained the word Lancaster, the fifth line contained the date of January 1, 1934, the seventh line was a description of the Anderson land. The second paragraph contained the amount of $14,800, the next line contained the date of February 5, 1923, followed by the words, Hartley K. Anderson. The fourth paragraph and the fourth line contained the date, January 1, 1934. The second line of the fifth paragraph contained the words. Hartley K. Anderson. The instrument was dated April 19, 1934, and was signed by W. E. Barkley.

As thus described by the witness the option reads as follows:

"Option to Purchase Real Estate.

"In consideration of One Dollar, the receipt of which is acknowledged, the undersigned grants to Hartley K. Anderson of Lancaster county, his heirs or assigns an option to purchase on or before January 1, 1934, the following described real estate:

"Southeast quarter, except one acre for school, of section 24, township 9, range 6, Lancaster county, Nebraska.

"If this option is exercised by payment as herein provided, the above described land will be conveyed by special warranty deed, subject to the unpaid balance on a mortgage of $14,800 to the undersigned, dated February 5, 1923, given by Hartley K. Anderson and wife, recorded in book 267, page 15, of the mortgage records of Lancaster county, Nebraska, which unpaid balance any assignee

of this option will assume and agree to pay if the option is exercised.

"The amount to be paid to the undersigned at the time this option is exercised shall be an amount of money equal to that which the undersigned has paid for taxes, insurance and all sums which are due to it on instalments of principal and interest on the mortgage described above, also any sum paid by the undersigned to perfect title in itself and to discharge subsequent liens plus all sums paid by the undersigned in the necessary care and maintenance of said premises, with eight per cent. interest on all amounts referred to above.

"Time is the essence of this option to buy and if the payments herein required are not made at the office of the undersigned, 200 Barkley Building, Lincoln, Nebraska, on or before January 1, 1934, all the rights herein given will end and this option will thereafter be of no force or effect.

"This option is not intended and shall not be construed to give the said Hartley K. Anderson any title or interest in the lands described herein and the title of the undersigned shall not be encumbered by the recording of this option.

"Signed this 19th day of April, 1934, at Lincoln, Nebraska.

"The Lincoln Joint Stock Land Bank
of Lincoln, Nebraska.
"W. E. Barkley, President."

The plaintiff, Hartley K. Anderson, never exercised this option and refused to pay any rental. The defendant foreclosed the mortgage as to the heirs, bought the land at the foreclosure sale and now claims title thereto free and clear of any interest of the plaintiffs.

We must now notice a claim of the plaintiffs which appears for the first time in the reply to defendant's answer. The plaintiffs plead in their petition an option to repurchase the premises by payment of $9,500 on or before March 1, 1934. In their reply they plead that the

deed was given for the purpose of furnishing the defendant with additional security, and pray in the alternative that the deed be adjudged as given as additional security for the payment of the mortgage debt. The defendant filed a motion to strike the last paragraph and alternative prayer from the reply on the ground that it was a departure and set up a new cause of action. This motion was argued and submitted but does not seem to have been passed upon by the court.

We think this motion should have been sustained. The allegation in the petition that the deed was given upon consideration to reconvey for a certain sum and the allegation of the reply that the deed was given as additional security are inconsistent and contradictory. The one presupposes the passing of the legal title by the grantor; the other, that the legal title is retained by the grantor.

"It is not allowable to plead new matter in a reply for the purpose of bringing forward a new cause of action not charged in the petition or to aid the averments of the petition." *Kliment v. Torpin Grain Co.*, 5 Neb. (Unof.) 159, 97 N. W. 587.

However, a ruling by the court was not insisted upon and the cause was tried upon both theories presented by the petition and reply.

The only facts additional to the evidence summarized above is a clause in the deed which provides, "Subject to the unpaid balance on a mortgage of $14,800 to the grantee herein, dated February 5, 1923, recorded in book 267 on page 15, the lien of which is retained and is not merged in the title," and proof that the Anderson land at the time of the transfer was of greater value than the mortgage indebtedness. We think the clause for nonmerger of the lien of the mortgage with the title is sufficiently explained by the necessity of perfecting the title by foreclosure proceedings against the heirs.

Ordinarily, when two unequal estates vest in the same person at the same time without an intervening estate, the smaller is thereupon merged in the greater, but this

result does not necessarily follow. Whether the two estates have coalesced will depend upon the facts and circumstances in the particular case, the intention of the parties acquiring the two estates, and the equities of the parties affected. *Peterborough Savings Bank v. Pierce,* 54 Neb. 712, 75 N. W. 20.

The fact that the value of the Anderson farm was in excess of the mortgage indebtedness is a circumstance of some probative force in support of plaintiffs' theory that the deed was given as additional security, but in view of the weight of the evidence and the inherent improbability of this theory, it must be disregarded. That the land bank, holding a mortgage on land worth $20,000 on which mortgage there was due in excess of $14,800 and for a part of which it held additional security in a chattel mortgage on 2,000 bushels of corn, would release this additional security and agree to accept $9,500 for the entire debt if paid within approximately a year, leaving the debtor in possession during that time, in consideration for a deed of a half interest in said land, and knowing that a foreclosure of the mortgage would be necessary to clear the title to the land from outstanding interest of heirs, cannot be believed, except upon evidence that is clear, convincing and satisfactory.

Where it is sought to vary the effect of a deed absolute on its face by parol testimony, so as to declare it to be a mortgage, the evidence must be clear, convincing, and satisfactory before a court is warranted in adjudging it to be a mortgage. *O'Hanlon v. Barry,* 87 Neb. 522, 127 N. W. 860.

The evidence in this case on the part of both plaintiffs and defendant is very voluminous. We have abstracted it as fairly as possible. The only question raised by the plaintiffs is that this evidence does not support the finding and judgment of the trial court. We think his finding and judgment is amply supported and should be sustained.

AFFIRMED.

JANET HENDREN, APPELLEE, V. CHARLES A. HILL, APPELLANT.

FILED MAY 29, 1936. No. 29635.

1. **Automobiles:** DUTY OF OPERATOR. It is the duty of an automobile driver, in driving a car in the night-time, to keep such an outlook ahead that he will see an obstruction as soon as it is illuminated by his lights, and it is his duty to have his car under such control that he can stop to avoid a collision with an object within the area lighted by his lamps.
2. ———: OPERATION: NEGLIGENCE. The driving of an automobile equipped with proper lights on a clear moonlight night and over a level, paved road, unobstructed, except for a disabled car standing at the right of the middle line thereof, without lights, against such car and with sufficient force to carry it a distance of 100 feet, in the absence of any explanation why the car was not seen or no attempt was made to avoid a collision, is sufficient to require the question of the driver's gross negligence to be submitted to a jury and will support a finding that the driver was not exercising even slight care in operating his automobile at the time of the collision.
3. **Negligence:** QUESTION FOR JURY. The evidence in this case would not require the court to find as a matter of law that the plaintiff was guilty of negligence more than slight in comparison with the negligence of the defendant, and the question of whether she was negligent and the degree thereof was properly submitted to the jury.
4. ———: LIABILITY. "If one suffers injury and damage as the proximate result of the negligence of two others, and the damage would not have occurred but for the negligence of each of such parties, both are liable to the person so injured." *Koehn v. City of Hastings*, 114 Neb. 106, 206 N. W. 19.

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

Neighbors & Coulter, for appellant.

Clarke & Patterson, contra.

Heard before GOOD, EBERLY and CARTER, JJ., and CLEMENTS and THOMSEN, District Judges.

CLEMENTS, District Judge.

This is an action brought by Janet Hendren, plaintiff, against Charles A. Hill, defendant, to recover for damages which she says she sustained while riding as a guest in his car.

The plaintiff alleges that she was injured in a collision of the defendant's automobile with the car of a third party; that the defendant was guilty of gross negligence in driving his car at the time of and immediately prior to the accident, and that such negligence was the proximate cause of the accident and her injury.

The defendant denies negligence on his part; alleges that plaintiff was negligent, that her negligence contributed to her injury, alleges that she assumed all risk of injury which might occur from his manner of driving, and that the proximate cause of the accident and plaintiff's injury was the gross negligence of the third party. The plaintiff denies the defendant's allegation.

Upon these issues the cause was submitted to a jury and a verdict was rendered for the plaintiff in the sum of $1,500. The case comes here on appeal.

There is very little dispute as to the material facts in the case. They are, as established by the admissions of the parties, the evidence and special findings of the jury, as follows: On the evening of June 26, 1934, the plaintiff, a girl 22 years of age, residing at Morrill, Nebraska, at the invitation of the defendant, accompanied him in his automobile to Torrington, Wyoming, where they had dinner. After the meal they started to return. On reaching Morrill, they seemed to have decided to prolong their ride and proceeded towards Scottsbluff on the highway, passing through Mitchell, Nebraska. At about this time one Salvador Gonzales, accompanied by a Mrs. Lope Cortez and her two children, had left Mitchell, Nebraska, and were proceeding towards Scottsbluff on the same highway. Gonzales was driving a Chrysler automobile, on the rear part of which he had piled some household furniture which he was transporting for Mrs. Cortez. One

article of this household furnishing was a mattress tied to the back of the cab or driver's seat. This mattress was light in color and some of the witnesses said it seemed to blend with the pavement.

At a point about two or three miles southeast of Mitchell, a tire went flat on the Gonzales car and he stopped to repair it. There was a sharp conflict in the evidence as to where the car was standing while Gonzales was working on the tire and as to whether there were any lights on the car, but these questions are foreclosed by special findings of the jury to the effect that the Gonzales car was standing on the ordinarily traveled portion of the highway without lights.

On stopping his car, Gonzales sent Mrs. Cortez and her children back to a filling station to get a patch for the tire and he commenced to jack the wheel up. At this time he saw the defendant's car coming at a high speed from the direction of Mitchell. Seeing that the defendant was not turning to pass his car and that a collision was imminent, he jumped away from his car into the ditch. The defendant's car struck the Gonzales car squarely in the rear, carried it about 100 feet before stopping and practically demolished it. Both plaintiff and defendant were severely injured and both were rendered unconscious. At the time of the trial neither plaintiff nor defendant could remember anything immediately preceding the accident and could give no account of how it occurred.

At the time of the accident the defendant was driving a Ford V-8 automobile, nearly new, equipped with good brakes and very good lights which were burning. The night was clear, atmosphere in normal condition and the moon shining. He was driving on a level concrete highway 18 feet in width with which he was very familiar. He was meeting no car and that part of the roadway not occupied by the Gonzales car was not obstructed in any manner. The evidence as to the speed at which the defendant's car was being driven at the time of the accident is not very satisfactory, but the force of the

impact and the distance the Gonzales car was driven by the collision would indicate a speed of at least 40 or 50 miles an hour and this agrees very well with the oral evidence.

It is contended by the defendant that upon this statement of facts the court should have found as a matter of law that the defendant was not guilty of gross negligence and that question should not have been submitted to the jury. The theory of defendant is that the obstruction was of such a nature and so blended with the pavement that he could not see it in time to avoid it. This theory is contrary both to reason and to the evidence. It is not reasonable to believe that a person driving a car equipped with good lights which should throw a beam at least 100 feet in advance of his car could not see, if he was looking, an automobile piled high with household furniture in time to avoid it. The evidence shows conclusively that the car could be seen. Three cars passed the Gonzales car while it was standing on the pavement and before the accident. The occupants of all of these cars testified that they saw the Gonzales car in time to avoid it, and saw it distinctly enough to recognize the mattress tied on the back thereof. The driver of one of these cars testified that, with his dimmer lights on, he saw the car at a distance of 40 feet.

It is the duty of an automobile driver, in driving a car in the night-time to keep such a lookout ahead that he will see an obstruction as soon as it is illuminated by his lights, and it is his duty to have his car under such control that he can stop to avoid a collision with an object within the area lighted by his lamps. We think the evidence in this case is sufficient to justify the jury in finding that at the time of the accident the defendant was not exercising even slight care in the performance of this duty. In *LaFleur v. Poesch*, 126 Neb. 263, 252 N. W. 902, an action very much like the instant case, it was said, in substance (p. 269): Where one on a clear, moonlight night, on a level, paved highway, operates a car equipped with lighted, sufficient lights, at a high rate of speed, and

collides head-on with a disabled motor vehicle, parked on the pavement, partly on and partly off the pavement, and no explanation or reason appears in the evidence why he did not see such car, or, if he did see it, why he did not avoid the collision, there is such evidence of negligence on the part of the driver as would warrant a finding of gross negligence on his part. We think that the question of defendant's negligence was properly submitted to the jury and that the jury were justified in finding that he was guilty of gross negligence.

Should the question of contributory negligence of the plaintiff have been submitted to the jury, and were the jury justified in finding that her negligence, if any, was slight in comparison with the negligence of the defendant? No active negligence on the part of the plaintiff is charged, but it is argued that it was her duty to watch for danger and upon its appearance to warn the driver. This is qualifiedly true. The qualification is that the same degree of care is not required of the guest as of the driver. If the guest perceives danger, or if at certain times or places he should anticipate danger, such as at railway crossings, he should warn the driver, but ordinarily he need not watch the road or advise the driver in the management of the car.

It must be remembered that speed was not the only element of negligence in this case. Speed combined with failure to keep an outlook and so manage the car as to avoid an obstruction was responsible for the accident. Driving the car at a speed of 45 or 50 miles an hour, over a paved road, on a clear, moonlight night, was not in itself sufficient to require the plaintiff to interfere, and it is apparent that she could not know, until it was too late, that the driver was not watching the road and would fail to turn his car to avoid the obstruction.

Even if it is conceded that it was the plaintiff's duty to watch the road and warn the driver, there is no evidence that she did not perform this duty. Neither the plaintiff nor the defendant was able to give any account of what

preceded the accident. The burden is upon the defendant to prove the contributory negligence of the plaintiff. She is entitled, in the absence of evidence to the contrary, to a presumption of due care. We think the defendant cannot complain because the question of plaintiff's contributory negligence was submitted to the jury, and we think that the finding of the jury that, if she was negligent, her negligence was slight in comparison to the negligence of the defendant is amply sustained by the evidence.

Negligence of third party contributing to accident and injury. Much of the defendant's evidence and a large part of his brief is directed at an attempt to show that Salvador Gonzales was, as a matter of law, guilty of gross negligence in permitting his car, without lights, to stand on the traveled portion of the roadway while he was fixing a tire, and that this negligence contributed to plaintiff's injury. Even if this were true, all of which we do not concede, the defendant would not be relieved of responsibility if, as has been found, he was also guilty of gross negligence which contributed to plaintiff's injury.

"As a general rule, it may be said that negligence, to render a person liable, need not be the sole cause of an injury. It is sufficient that his negligence, concurring with one or more efficient causes, other than plaintiff's fault, is the proximate cause of the injury." 45 C. J. 920.

"Under the above rules the cause concurring with defendant's negligence may be the negligent act of a third person." 45 C. J. 923.

"If one suffers injury and damage as the proximate result of the negligence of two others, and the damage would not have occurred but for the negligence of each of such parties, both are liable to the person so injured." *Koehn v. City of Hastings*, 114 Neb. 106, 206 N. W. 19.

Under this universally accepted rule, the question of the negligence of Gonzales is immaterial in this case.

It is strenuously urged that plaintiff, by remaining in defendant's car after it had been driven at an excessive speed, assumed all risk of injury which might occur from

his manner of driving. We think this position is not well taken. If we concede that the doctrine of assumption of risk applies in this case, which we do not, still the evidence falls far short of disclosing a situation that would require the plaintiff to leave the defendant's car or interfere in its management. The only evidence we have as to how fast the car was being driven prior to the accident is the testimony of the plaintiff. She says that on the way to Torrington, the defendant drove the car very fast, at one time reaching a speed of 80 miles an hour, that she asked him to slow down and he did so. The defendant concedes this is true. On page 39 of his brief he says: "He did not continue his fast driving after he was cautioned by plaintiff and thereafter she was satisfied with the method and manner in which the car was being operated."

As we have pointed out, speed was not the only element of negligence which was the cause of this accident. A speed of 45 or 50 miles an hour on a moonlight night, over a level, paved road, was not in itself likely to cause an accident, but one driving at that speed without due care in keeping a proper outlook ahead, if not under the care of that providence which is said to protect children and fools, was reasonably sure to come to grief. There is no evidence that the plaintiff was acquainted with the habit of the defendant in relation to watching the road or with his skill in manipulating a car to avoid an obstruction. It is not shown that she knew that he did not see the obstruction or, if he did see it, why he did not at the proper time turn his car to avoid it.

"Ordinarily, the guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful driver; and the duty to warn him does not arise until some fact or situation out of the usual and ordinary is presented." *Lewis v. Rapid Transit Lines*, 126 Neb. 158, 252 N. W. 804.

We hold that the evidence in this case justifies its submission to the jury and is sufficient to sustain the verdict rendered. The judgment of the trial court is

AFFIRMED.

VILLAGE OF HAY SPRINGS ET AL., APPELLEES, V. HAY SPRINGS COMMERCIAL COMPANY ET AL., APPELLANTS. HORN & MORGAN, INC., APPELLANT, V. VILLAGE OF HAY SPRINGS ET AL., APPELLEES.

FILED MAY 29, 1936. No. 29499.

1. **Municipal Corporations**: VACATION OF PLAT. When proprietors, acting under the provisions of sections 17-418 and 17-419, Comp. St. 1929, seek to vacate a part of a village plat, the general rule is that only those property owners whose property abuts upon the vacated part of the street need join in the deeds of vacation; it is not required that such proprietors should own property back any particular distance from the street line. Owners of property in other portions of the plat whose right of ingress and egress to and from their property is not interfered with, and whose injuries, if any, are no other or different from those suffered by the community generally, are not in a position to complain of such vacation.
2. ———: HIGHWAYS. The phrase, "highways laid out according to law," as used in section 17-419, Comp. St. 1929, includes the doing of those things, by the proper authorities, which are essential in creating a public highway; or the opening, working and placing of a platted street in condition for vehicular travel; or the use by the general public of a platted street for a highway; and not a nominal street only, designated on a plat, but not used by the general public as a highway, and on which no work has been done by the authorities indicating an intention to open up and place the same in condition for vehicular travel.
3. ———: VACATION OF PLAT: STREETS: REVERSION. "When the recorded plat of an addition to a village, or some definite part thereof, has been duly vacated by a written instrument declaring the same to be vacated, duly executed, and recorded as the statute provides, and none of the streets laid out or described in such plat is a public highway laid out according to law, and no rights or privileges of other proprietors in said plat are abridged or destroyed, such vacation of the plat divests all public rights in the streets shown therein, and such vacated streets are the property of the proprietors of the adjoining lots." *Hart v. Village of Ainsworth*, 89 Neb. 418, 131 N. W. 816.
4. **Record** and evidence examined *de novo*, and *held* not to sustain the decrees of trial court.

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

A. C. Plantz, for appellants.

E. D. Crites and *F. A. Crites, contra.*

Heard before GOSS, C. J., ROSE and DAY, JJ., and ELDRED and TEWELL, District Judges.

ELDRED, District Judge.

These two cases were consolidated for trial and appeal. The first action was brought by the Village of Hay Springs and a number of individuals, taxpayers and freeholders residing within the village, against the Hay Springs Commercial Company and others, to cancel certain deeds of vacation made by the defendants as abutting landowners, purporting to vacate a portion of North Third street in said village, being a portion of the original town plat of Hay Springs; and plaintiffs, by this first action, also seek to vacate a certain plat and deed of dedication of Highway Addition to said village of Hay Springs.

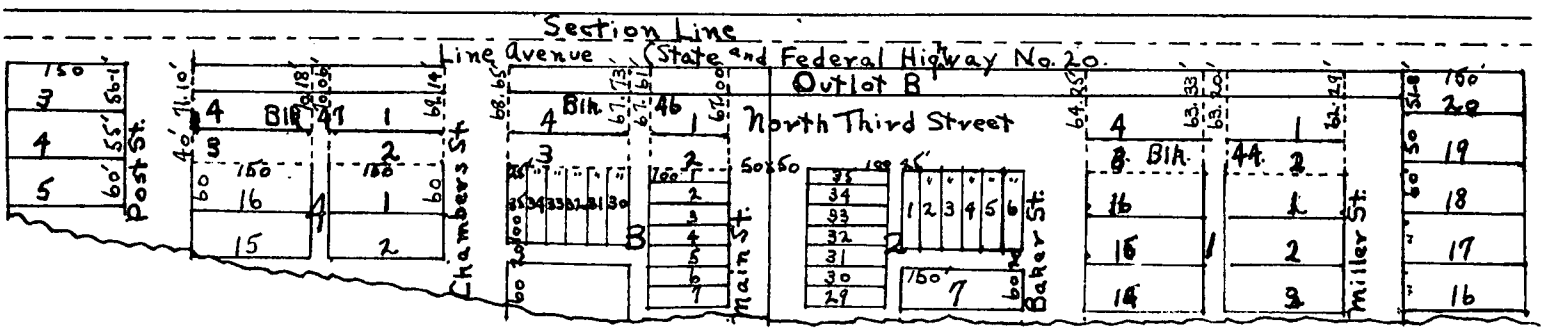
The second suit was brought by Horn & Morgan, Inc., formerly Hay Springs Commercial Company, to enjoin the village and the authorities thereof from shutting off the water supplied from the municipal water system to a gasoline filling station of Horn & Morgan, Inc., located on a portion of North Third street vacated by the vacation deeds involved in the first case.

The trial court granted a decree for the plaintiffs in the first case and in favor of the defendants in the second case. Defendants in first suit, and plaintiff in second suit, have appealed.

Blocks one, two, three and four of the original town, Hay Springs, are located along the north side of said original town as platted in 1885, being numbered from east to west. Said four blocks all abut on North Third street of said original town plat; which street is located immediately north of said four blocks; extending from Miller street on the east side of block one to Post street

on the west side of block four. North Third street never extended east of Miller street, nor west of Post street, although there are other platted grounds immediately east of Miller street and immediately west of Post street, in both instances extending north to Line avenue. Along the north side of North Third street was a tract of land, designated as "Outlot B;" said tract being about 31 feet wide on the west end and about 22 feet wide on the east end, 1,360 feet long, and extending from Miller street to Post street. Immediately north of Outlot B is Line avenue (the center line being a section line) a graveled highway, now a part of state and federal Highway No. 20. No streets or alleys were originally laid out or dedicated through Outlot B.

In June, 1927, all of the owners of lots and lands abutting on North Third street in blocks one, three and four, and also of Outlot B, executed, acknowledged and caused to be recorded deeds vacating that portion of North Third street lying north of said three blocks, but dedicating alleys 20 feet in width prolonging the alleys extending north and south through blocks one, three and four of the original town plat, over and across the property vacated, and through Outlot B to Highway No. 20. The situation may be more readily understood by reference to the following outline of that portion of the plats involved herein. The boundary to Highway Addition, later referred to, is indicated by the broken lines:


Section Line
Avenue
State and Federal Highway No. 20.
Outlot B
North Third Street
Post St.
Chambers St.
Main St.
Baker St.
Miller St.
Blk.
150
60
50x60
100

The vacation proceedings involved were had under sections 17-418 and 17-419, Comp. St. 1929:

Section 17-418. "Any such plat may be vacated by the proprietors thereof, at any time before the sale of any lots therein, by a written instrument declaring the same to be vacated, duly executed, acknowledged or proved and recorded in the same office with the plat to be vacated; and the execution and recording of such writing shall operate to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets, alleys, commons and public grounds laid out or described in such plat. In cases where any lots have been sold, the plat may be vacated, as herein provided, by all the owners of lots in such plat joining in the execution of the writing aforesaid."

Section 17-419. "Any part of a plat may be vacated under the provisions and subject to the conditions of this chapter: Provided, such vacating does not abridge or destroy any of the rights and privileges of other proprietors in said plat; and provided, further, nothing contained in this section shall authorize the closing or obstructing of any public highways laid out according to law."

No objection is made as to the sufficiency of the vacation deeds in substance or manner of execution; and it is contended by the appellants that, having proceeded in a manner clearly authorized by such statute, the deeds of vacation should be upheld.

It will be noted that said section 17-419 makes the right to vacate a part of a plat subject to two conditions: First, that "such vacating does not abridge or destroy any of the rights and privileges of other proprietors in said plat." The rights and privileges of any proprietor of the plat, in a position to complain, were not abridged or destroyed by the vacation deeds in this case. All owners of lands abutting on the vacated portion of North Third street joined in the execution of the deeds of vacation. The record does not disclose that the appellees herein, or any of them,

are the owners of any real estate abutting on that portion of North Third street vacated.

The village pumping station used in connection with its water system is located in North Third street between block two and Outlot B. While the record discloses that water mains have been laid in that portion of North Third street north of block two connecting the wells and pumps with the distributing system of the village, the record does not disclose any of the water distributing system to be located upon that portion of North Third street vacated by the deeds involved herein.

Appellees urge the insufficiency of the deeds of vacation on account of the owner of the south half of lots 30 to 35, inclusive, in block three, not having joined therein. It appears that, while the owners of the north half of said lots 30 to 35 inclusive, abutting on North Third street, signed the deeds of vacation, the owner of the south half of said lots did not do so. The south half of said lots is owned by a stranger to the record. These lots are 100 feet in length, extending from north to south. The south half thereof does not abut upon any part of the street vacated. Section 17-419, Comp. St. 1929, does not require that the parties executing vacation deeds should own the abutting lands extending any particular distance from the line of the street vacated; nor does it require that such signers should own the entire lot or tracts abutting on such streets. We have been cited to no authority supporting such contention, and conclude such holding would not be justified.

The vacation of that portion of North Third street involved in this action does not interfere with ingress or egress to and from the property owned by the appellees, or any of them, and no rights or privileges of any proprietor of land in such plat are abridged or destroyed by such vacation. *Chicago Anderson Pressed Brick Co. v. City of Chicago*, 138 Ill. 628, 28 N. E. 756; *Conner v. Iowa City*, 66 Ia. 419, 23 N. W. 904; *Lorenzen v. Preston*, 53 Ia. 580, 5 N. W. 764; *Hart v. Village of Ainsworth*, 89 Neb. 418, 131 N. W. 816.

By the second condition of said section 17-419 it is provided: "Nothing contained in this section shall authorize the closing or obstruction of any public highways laid out according to law."

This court has recognized the distinction between streets as such; that is, as public highways in the city or village, and those which are only nominal streets, designated on the plats but never used as public highways. *Hart v. Village of Ainsworth, supra.*

"The words 'laid out according to law' have a well-known meaning, under our statutes, and they plainly include the doing of those things by the proper local officers which are essential in creating a public highway, to authorize it to be worked and traveled, and especially the surveying, marking the course and boundaries, and ordering it established as a highway. The affirmative action of the public authorities is indispensable in such case." *Chicago Anderson Pressed Brick Co. v. City of Chicago,* 138 Ill. 628, 28 N. E. 756.

"The term 'highway,' in Code, section 919, providing that any part of a plat may be vacated by the proprietor thereof, but nothing therein contained shall authorize the closing or obstruction of the highways, means a traveled street, as distinguished from a mere space laid out between lots." *Chrisman v. Omaha & C. B. R. & B. Co.,* 100 N. W. 63 (125 Ia. 133).

It is not contended in this case that the street in question was ever laid out or established as a public highway under the general provisions of our statute relating to the establishment of highways. By stipulation in the record: "It is conceded that there never has been any vehicular travel from one end of North Third street to the other in a continuous line, and that said North Third street never has by the village authorities been placed in a proper condition for vehicular travel east and west." East and west travel in that locality has been over Line avenue, Highway No. 20. Sidewalks have been constructed north and south across North Third street on each side of the intersection of

that street with Main street, and on the east side of the intersection of that street with Baker street; sidewalks in said location have existed for many years.

In 1927 the village constructed concrete curbs and gutters extending north and south across North Third street on both east and west sides of intersection of that street with Baker, Main and Chambers streets, and on east side of the Post street intersection and the west side of the Miller street intersection with said North Third street. For many years a number of roadways made by vehicular travel and a number of footpaths have extended from the alleys through said blocks one, three and four diagonally across North Third street and across Outlot B to Line avenue. None of said roadways so made by vehicular travel extends in a general east and west direction through said North Third street, and said street has never been opened, worked, maintained or used by the general public as a highway.

It was stipulated that curbs and gutters were constructed across said North Third street about the year 1927. Whether any of them were constructed prior to the recording of the deeds of vacation on June 29 of that year does not appear. The sidewalks, curbs and gutters across North Third street at intersections of said street with Post, Chambers, Main, Baker and Miller streets were apparently not constructed as an improvement of North Third street for travel in an easterly and westerly direction, but rather as an improvement and in the maintaining of the other streets named, for travel in a northerly and southerly direction.

Neither the filing of the plat showing a street at the location designated as North Third street, nor the passing of an ordinance in 1886 accepting the plat and dedication, constituted such street "a public highway laid out according to law," where, as in this case, there was never any work performed by the public authorities opening, improving or maintaining it as a street, and said street was not opened up or used as a public way for vehicular travel.

It was a nominal street only. *Hart v. Village of Ainsworth*, 89 Neb. 418, 131 N. W. 816; *Johnson v. Buhman*, 98 Neb. 236, 152 N. W. 403.

As applicable to the provisions of the statute involved in the instant case, appellees contend: "Legislation granting to private persons authority to vacate highways, streets and alleys regardless of the rights and necessities of the public and of the individual owners of adjoining property amounts to an attempt to delegate legislative functions, and is unconstitutional and void." Such contention is apparently based on the assumption that the title to that portion of the platted grounds, as is on such plat set apart for streets, was at once vested in the village upon the plat being filed. Appellees, in their brief discuss the subject at considerable length, citing many authorities on nonuser, abandonment and adverse possession. But, in the light of the conclusions of this court already mentioned, that under the facts in this case the title to the vacated portion of North Third street was never vested in the village, the question of nonuser, abandonment and kindred questions are not involved; and counsel, in pursuing such discussion, assumes a wrong premise. The provisos of section 17-419, Comp. St. 1929, fully protect the public and adjoining proprietors in the constitutional rights urged by counsel in this case. The question of the constitutionality of sections 17-418, 17-419 and 17-420, Comp. St. 1929, is not involved herein.

This court having reached the conclusion that the deeds of vacation did not abridge or destroy any of the rights and privileges of other proprietors of said plat, and, further, that there was no closing or obstruction of any public highway laid out according to law, the rights protected by the provisions of section 17-419 were not violated.

Section 17-418, Comp. St. 1929, provides that the execution and recording of the instrument (deed of vacation) shall operate to divest all public rights in the streets, alleys, commons and public grounds laid out and described in

such plat. And section 17-420: "When any part of a plat shall be vacated as aforesaid, the proprietors of the lots so vacated may inclose the streets, alleys and public grounds adjoining said lots in equal proportions." The validity of these provisions of our statute has been recognized by this court in *Hart v. Village of Ainsworth, supra,* and *Johnson v. Buhman, supra.* Appellees cite a number of decisions of this court in support of their position. Space will not permit their discussion. Those cases did not involve the questions presented by these proceedings, and, after examination, we conclude they are not controlling.

In January, 1928, a certificate of survey, plat and a certificate of dedication of Highway Addition to the village of Hay Springs were duly filed for record in the office of the county clerk of Sheridan county. Said plat embodies that portion of what was North Third street located north of blocks one, three and four, which was vacated by said vacation deeds, and also that portion of Outlot B north of said three blocks, with streets and alleys prolonged north to conform with the streets and alleys in said original town plat.

Since the vacation of that portion of North Third street vacated by the vacation deeds and the platting and dedication of Highway Addition, the lots in said addition, including those located on what was North Third street, have been assessed and taxes levied and collected thereon the same as on other village property.

After the platting and dedication of Highway Addition, a gasoline service station was constructed by appellant, Horn & Morgan, Inc., the plaintiff in the second suit, on the east half of block 46 of said addition, being directly north of the east tier of lots in block three of original town plat, and at southwest corner of the intersection of Main street and Line avenue, Highway No. 20. Appellee, Lee H. Borron, one of the defendants in the injunction suit, that is, the second suit, and a member of the village board, owns a gasoline service station located at the

northwest corner of the intersection of Main street and Line avenue, Highway No. 20, just across the highway north from the gasoline service station constructed by Horn & Morgan, Inc. The right to water from the water system of the village of Hay Springs for said gasoline service station of Horn & Morgan, Inc., is the subject-matter of the second suit.

The deeds of vacation being valid, there is no sufficient reason suggested or apparent why the survey, plat and certificate of dedication of Highway Addition to the village of Hay Springs should not be sustained. It follows that the appellant, Horn & Morgan, Inc., is entitled to have water supplied to its gasoline service station described in these proceedings from the water system of the village of Hay Springs on the same terms and conditions as other consumers. Decree in both cases reversed and cases remanded for entry of decree in harmony herewith.

REVERSED.

M. B. MORFELD ET AL., APPELLEES, V. FRITZ HUDDIN ET AL., APPELLANTS.

FILED MAY 29, 1936. No. 29563.

Schools and School Districts: SCHOOL BOARDS: POWERS. Where a rural school district at annual school district meeting decided, by vote of those present, not to hire a bus and transport pupils residing in such district to an adjoining school district for school purposes during ensuing year, under the provisions of sections 79-2102 and 79-2103, Comp. St. 1929, such action was mandatory on the school board of said district; and such school board could not thereafter, during such year, lawfully enter into a contract for such purpose, where other lawful ways remained by which the pupils of said district could be provided with school privileges.

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

E. L. Hyde, for appellants.

Golden P. Kratz, contra.

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

ELDRED, District Judge.

This is an action in equity brought by the plaintiffs, appellees, taxpayers of School District No. 10, a rural school district of Cheyenne county, against defendants and appellants, Fritz Huddin, L. M. White and Jasper Jones, as acting officers of School District No. 10, and August Thies, who was employed by the school board of School District No. 10 to transport by bus pupils from School District No. 10 to School District No. 9, which joins School District No. 10 on the north. School District No. 10 had a school building within its boundary, but for three years prior to 1934 it had not used that school building, but had transported its pupils to the school in District No. 9. In June, 1934, and prior to the annual school meeting, the board of health of Cheyenne county issued an order purporting to condemn the schoolhouse in School District No. 10 for school purposes, and to order that a new school building be erected, or that such school building be abandoned and the pupils of said district be given school advantages elsewhere. At the annual school district meeting June 16, 1934, the question of the school district hiring a bus and transporting pupils to School District No. 9 was voted upon and defeated. A motion to erect a new school building was also voted upon and defeated. A motion to vote $1,400 for general school purposes was adopted. No action was taken at the annual school meeting with reference to repairing present building; nor on question of permitting parents to transport their own children to neighboring districts and be remunerated therefor by the school district.

Subsequent to such annual school meeting and prior to the commencement of the school term in September, 1934, notwithstanding that, at the annual school district meeting, the proposal to hire a bus and transport pupils

to School District No. 9 was defeated, the defendants, appellants, members of the school board, entered into a contract with the defendant, appellant, August Thies, whereby he agreed to supply a bus and transport the pupils of School District No. 10 to School District No. 9, at the stipulated price of $85 a month.

This action was brought to enjoin the defendants, appellants, the officers of the school board, from carrying out that contract, and from paying to the defendant Thies any of the funds of the school district under said contract. The trial court entered a decree substantially as prayed; but further provided that such decree should "not prevent such school board from paying the families of school children for transporting such children under the provisions of section 79-1902, Comp. St. 1929." Laws 1931, ch. 149, Comp. St. Supp. 1935, sec. 79-1902. From such decree all defendants have appealed.

Appellants in their brief state: "The only issue involved in this action * * * was the right of the school board to hire a bus to transport the pupils of school age to another district." Appellees in their brief agree that the only issue involved was as stated by appellants.

School district board has power to contract with a neighboring district for instruction of pupils and to make provision for transportation of pupils to neighboring district only when authorized by two-thirds vote of those present at any annual or special school district meeting. Comp. St. 1929, secs. 79-2102, 79-2103.

Appellants in their brief urge: "The contention of the appellants being that because the actions of the voters at the annual meeting created a condition that seriously threatened the schooling of the pupils of District No. 10 for the coming year, in that, they were without school facilities, transportation to District No. 9 had been denied them, and something had to be done, it was not only the right of the board to contract for transportation but its duty." That it is the duty of the school board in rural districts to provide ways and means for the schooling of

children of school age is not controverted; but it is asserted by appellees that while the voters of the district, at the annual school meeting, decided that the district should not hire a bus and transport the pupils to School District No. 9, other means of providing the pupils with schooling were left open to the district board; that the refusal of the voters to authorize the district to pursue that particular means of providing schooling did not "create a condition that seriously threatened the schooling of the pupils of District No. 10 for the coming year." One way suggested is that the school board might have proceeded to repair schoolhouse, employ a teacher and have had school in their own district. The duty of making necessary repairs to the school building is by law vested in the school board, without instructions or special authority of the voters of the district. Comp. St. 1929, sec. 79-413; *Leonard v. State*, 67 Neb. 635, 93 N. W. 988. The duty of employing the teacher is likewise vested in the school board. Comp. St. 1929, sec. 79-411. It can scarcely be said that the letter purporting to condemn the school building, if any warrant, would have the effect of preventing the repair of the building. Such right is recognized in the subsequent letter from the state superintendent's office, wherein it is stated: "Our judgment is that the board of education should take some steps either looking toward securing an adequate transportation to take the children to an adjoining district or they should undertake to put the old building in condition so that it can be occupied for a time, at least. Of course, we know nothing about the condition of the building." And the county superintendent, a member of county board of health, also recognizes that right in letter to school board under date of August 16, 1934, wherein it is stated, in substance, that directors of District No. 10 must provide either for the holding of school in that district, for the years 1934 and 1935, or make suitable arrangements for schooling of pupils of school age in some other school district and arrange for transportation for such purpose.

The school district board was also left free to pursue the method outlined in section 79-1902, Comp. St. 1929, as amended in 1931 (Laws 1931, ch. 149), in furnishing school privileges for the pupils of District No. 10, wherein it is provided:

"When no other means of transportation is provided and when the child or youth lives more than three miles from the public schoolhouse which he or she is authorized to attend by the nearest practicable traveled road where no free transportation is furnished such child or youth, a transportation rate of five cents per family for each day of actual attendance for each one-half of a mile or fraction thereof covering the distance of the residence from the schoolhouse in excess of the three mile limit shall be paid such family monthly by such district on the basis of the record of attendance of such child or youth to be reported monthly by the teacher to the school board of such public school district; and no pupil shall be exempt from school attendance on account of distance from the public schoolhouse: Provided, that any child or youth whose family is entitled to pay for transportation, as aforesaid, may attend another school, if more convenient."

The appellants, members of the school board, might have adopted either of the ways just mentioned to provide for the schooling of children of school age in their district without violating the specific instructions given by the voters at the annual school district meeting. After the voters of School District No. 10, at their annual meeting, had refused to authorize the hiring of a bus for transportation of the pupils of that district to School District No. 9, it was the duty of the school board to have followed the expressed wish of the voters; they had no discretion left them as to that particular matter; and in pursuing the course they adopted, they were exceeding their authority as such officers and acted in violation of law. *State v. Stoddard,* 108 Neb. 712, 189 N. W. 299. The appellant Thies, in dealing with the school board, was charged with notice of the power of such officers to make

contracts. Further, Thies was given actual notice by registered mail under date of August 28, 1934, that he had no valid contract with the district, and that the district would not pay him for furnishing transportation for pupils.

On retrial of the case in this court, we reached the same conclusion as did the trial court. The decree of the district court was right and is

AFFIRMED.

LIVE STOCK NATIONAL BANK OF SOUTH OMAHA, APPELLEE, V. FRANK J. MARSHALL ET AL., APPELLANTS: HENRY HEILIGER ET AL., APPELLEES.

FILED JUNE 5, 1936. No. 29570.

1. **Guaranty.** A contract regular on its face, guaranteeing prompt payment of a note when due, if delivered to and accepted by payee and guarantee in good faith, without knowledge of any defense of guarantors, may be binding upon them, though they signed the guaranty on the unperformed condition that others also sign it.
2. **Appeal.** Where a jury is waived in an action at law, a finding of the district court on an issue of fact is equivalent to the verdict of a jury and will not be set aside on appeal unless clearly wrong.
3. **Banks and Banking: CONVERSION: PARTIES.** All parties to a transaction in which an executive officer of a state bank pays his individual debt to a third person with funds of the bank may be held liable for the conversion.
4. **Election of Remedies.** A futile attempt to assert a nonexistent remedy does not, under the doctrine of election of remedies, preclude a resort to a legal remedy or operate as an estoppel to assert it.
5. **Counterclaim.** The statutory counterclaim is one in favor of defendant and against plaintiff and arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim or connected with the subject of the action. Comp. St. 1929, sec. 20-813.
6. ———. "If the counterclaim set up by defendant is not connected with the subject of the action and does not arise out of the contract or transaction set forth in the complaint as

the foundation of plaintiff's claim, it is not proper under statutory provisions authorizing it in such cases." 57 C. J. 414.

7. ———. The connection of a counterclaim with the subject of the action must not be casual or incidental, but immediate and direct.

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

Sanden & Anderson and *Arthur J. Nevins,* for appellants.

Dorsey, Baldrige & Chew, John J. Ledwith and *Loren H. Laughlin, contra.*

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

PER CURIAM.

This is an action to recover from the makers and the guarantors of a 4,000-dollar note the amount due payee thereon.

The note was dated June 26, 1929, and was payable 90 days after date, to the Live Stock National Bank, Omaha, plaintiff. The makers were H. P. Heiliger and Henry Heiliger. The guaranty, a separate instrument dated June 26, 1929, was signed by the makers of the note and also by O. F. Heiliger, C. E. Sanden, Frank J. Marshall, and Clarence Emerson. To the extent of $4,000, guarantors, according to the terms of the guaranty, guaranteed prompt payment of all notes and renewals thereof that may have been heretofore, or may be hereafter, discounted, purchased by or pledged to the Live Stock National Bank by the First State Bank or H. P. Heiliger. This guaranty included the note in controversy. September 24, 1929, there was a payment of $500 on the 4,000-dollar note and the unpaid debt of $3,500 was renewed by another note for the latter sum.

Defenses were interposed. The parties waived a jury and tried the cause to the district court. The findings below were in favor of plaintiff. Judgment for $4,370

was rendered against all defendants. Guarantors Marshall, Sanden and Emerson appealed.

The appellants named, who were stockholders of the First State Bank, did not sign any note payable to plaintiff, and they take the position they established a complete defense to the action by pleading and proving that they never signed a completed guaranty; that the instrument signed by them was never delivered as a guaranty; that they signed it with the distinct understanding, known to plaintiff, that it was not to be a binding obligation or to be used as a guaranty until also signed by all other stockholders of the First State Bank; that a majority of the stockholders never signed it.

The propositions outlined required an examination of the evidential facts. The First State Bank was moved from Bethany to Lincoln. As a result of the change in location, the capital of the bank was impaired to the estimated extent of $4,000. There was no surplus or profit to meet the impairment. The executive officers of the First State Bank were Henry Heiliger, president; H. P. Heiliger, vice-president; O. F. Heiliger, cashier. By means of correspondence between H. P. Heiliger, vice-president of the First State Bank, and Alvin E. Johnson, vice-president of the Live Stock National Bank, plaintiff, there was negotiated a loan of $4,000 from the former bank to the latter bank to restore the loss of capital. Upon receipt of the 4,000-dollar note signed by H. P. Heiliger and Henry Heiliger and of the 4,000-dollar guaranty signed by Marshall, Sanden, Emerson, appellants, and others, plaintiff discounted the note. The proceeds, or $3,940.67, were, in the form of deposits, credited to the First State Bank's account in plaintiff's bank, thus increasing the deposits or credit account from $9,179.84 to $13,120.51. Later, September 24, 1929, there was a payment of $500 on the 4,000-dollar note and the unpaid debt of $3,500 was renewed by the note for that sum.

There is convincing evidence of an understanding among the executive officers of the First State Bank and Marshall,

Sanden and Emerson, stockholders, that the guaranty was not to become effective or to be used unless also signed by the other stockholders—a disregarded condition. This, however, was not necessarily a defense, if plaintiff, without knowledge or notice of the understanding, made the loan in good faith relying upon the guaranty. The guaranty was in fact signed by appellants. They trusted possession of it to H. P. Heiliger, vice-president of the First State Bank, who gave credence to it and delivered it to plaintiff with the note evidencing the loan. The district court found that plaintiff did not have knowledge of the condition on which appellants signed the guaranty and that the loan was made in good faith in reliance upon it. If that finding is sustained by sufficient evidence, it is equivalent to the verdict of a jury and will not be set aside unless clearly wrong.

For evidence that plaintiff was charged with knowledge that others were to sign the guaranty, appellants rely in part on the correspondence relating to the loan. On behalf of plaintiff, negotiations were conducted by its vice-president, Johnson. It is a fact that he once requested a guaranty signed by all the stockholders of the First State Bank, but he subsequently accepted the instrument in its present form. Inferences from exchanged letters are drawn by appellants to imply notice. In addition H. P. Heiliger testified to a conversation in which he said he told Johnson in advance that all the stockholders, except one, were willing to, and would, sign the guaranty. The district court, however, drew different inferences from the circumstances and gave greater weight to other evidence. On its face the guaranty contained nothing to indicate it was incomplete or that others were to sign it. In the letter transmitting it to plaintiff, it was offered as sufficient security for the loan. The evidence is that Johnson would not make the loan on the note itself. He required security and rejected a previous guaranty as insufficient. His requirement was inconsistent with the acceptance of a worthless instrument, knowing it to be such. If he knew

the condition on which the signatures of appellants were procured, the guaranty would not protect the loan. In the correspondence between the banks, there is no direct evidence of plaintiff's knowledge of the condition on which appellants rely as a defense. If inferences sufficient to charge Johnson with notice or to put him on inquiry could be drawn from the correspondence or oral evidence, the contrary was stated in direct and positive testimony by Johnson himself that he was not at any time or from any source informed in advance that the guaranty was not to be binding unless signed by all the stockholders of the First State Bank. He testified further that no suggestion of such a condition was ever made to him by H. P. Heiliger. This testimony of Johnson is consistent with his duties as vice-president and with his established purpose to require security for the loan. It was believed by the trial court and the evidence as a whole sustains the findings below on this phase of the case.

Another defense presented by appellants is estoppel by action of the Live Stock National Bank, plaintiff, in accepting $500 as a payment by the First State Bank on the 4,000-dollar note; in charging the account of the First State Bank in the Live Stock National Bank with the amount due on the 3,500-dollar note as payment of the debt; in marking that note paid; in surrendering both notes and the guaranty to the First State Bank; in electing to pursue to judgment a different and inconsistent remedy in a former action.

The 4,000-dollar loan was in reality an obligation of H. P. Heiliger, who signed the note therefor, and not the debt of the First State Bank. As already stated, the guaranty included the note signed by H. P. Heiliger and the renewal thereof. This individual debt was ostensibly paid with the money or credit of the First State Bank. Plaintiff herein was a participant in the conversion and was answerable for the tort. Later, the First State Bank was closed for insolvency and the receiver sued the makers of the 4,000-dollar note and the Live Stock National Bank,

plaintiff herein, for the conversion. The latter interposed as a defense to the former action the plea that the loan was an obligation of the First State Bank, but the adjudication was to the contrary. In the former action the receiver recovered a judgment against the Live Stock National Bank for $4,370. *Bliss v. Live Stock Nat. Bank,* 122 Neb. 668, 241 N. W. 106; *id.* 124 Neb. 880, 248 N. W. 645. The Live Stock National Bank paid the former judgment, interest and costs, withdrew the two notes and the guaranty from the record thereof and introduced them as evidence in the case at bar. In the former action it was adjudicated in effect that the First State Bank did not owe the Live Stock National Bank $4,000; that the amount of money wrongfully taken from the First State Bank to pay the individual debt of its officers should be restored to the receiver. With the former judgment in full force, there was a failure of consideration for the acceptance of the $500, for charging the deposit account of the First State Bank with $3,500 as payment of the renewal note and for surrendering the two notes and the guaranty. As a result of the former adjudication, the original debt and the guaranty remained unsatisfied obligations of H. P. Heiliger and guarantors. The vice-president of the Live Stock National Bank had notice in writing that the purpose of the loan was to restore the impairment of capital and he had no authority to lend the Omaha bank's funds to accomplish the conversion of the First State Bank's money to pay individual debts of its officers. *Bliss v. Live Stock Nat. Bank,* 122 Neb. 668, 241 N. W. 106; *id.* 124 Neb. 880, 248 N. W. 645. The defensive plea that the loan was a guaranteed debt of the First State Bank to plaintiff was not a remedy. It was unavailing. It was a mere assertion of a defense having no legal existence. It was not, therefore, an election between remedies, amounting to an estoppel to demand relief from the signers of the valid unpaid note and their guarantors. The law has been stated as follows:

"One is not precluded from resorting to a remedy which the law gives him because he has attempted to avail him-

self of one to which he was not entitled." *State v. Bank of Commerce,* 61 Neb. 22, 84 N. W. 406. See, also, *Stone v. Snell,* 86 Neb. 581, 125 N. W. 1108, and *Henley v. Live Stock Nat. Bank,* 127 Neb. 857, 257 N. W. 244.

The findings of the district court in favor of plaintiff on the issues of estoppel and election of remedies conformed to the evidence and the law and are free from error.

The answers of appellants to the petition of plaintiff contain counterclaims for damages based on allegations that plaintiff by conversion of funds of the First State Bank caused its insolvency and thus destroyed the value of bank stock owned by them. Orders striking these counterclaims from the answers are challenged as erroneous. The statute authorizing a counterclaim provides that it "must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim, or connected with the subject of the action." Comp. St. 1929, sec. 20-813. A text on this subject states the law as follows:

"If the counterclaim set up by defendant is not connected with the subject of the action and does not arise out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, it is not proper under statutory provisions authorizing it in such cases." 57 C. J. 414.

"The connection must not be casual or incidental; it must be immediate and direct, such as may be assumed to have been contemplated by the parties in their dealings with each other." 57 C. J. 415.

As stated in the petition in the case at bar, the foundation of plaintiff's claim against the defendants who are appellants is an unperformed contract in which they guaranteed to plaintiff the prompt payment of discounted notes. Appellants and guarantors were not parties to the conversion nor to the note which they guaranteed. The guaranty was general, applying to all notes and renewals

thereof that may have been heretofore, or may be hereafter, discounted, purchased by, or pledged to, the Live Stock National Bank by the First State Bank and H. P. Heiliger. The conversion pleaded did not arise out of the contract of guaranty and was not immediately and directly connected with it. It follows that error does not affirmatively appear in the orders striking the counterclaims from the answers.

Assigned error prejudicial to appellants has not been found in the record.

AFFIRMED.

EARL H. CANTIN, APPELLEE, V. ALVIN HOWARD, APPELLANT.

FILED JUNE 5, 1936. No. 29584.

1. **Husband and Wife:** CRIMINAL CONVERSATION: EVIDENCE. It is not indispensable to a recovery, in an action for damages for criminal conversation, that the acts of sexual intercourse be established by the testimony of a disinterested eyewitness. The evidence on this subject may be wholly circumstantial.
2. ———: ———: QUESTION FOR JURY. In such an action, where the evidence submitted tends to prove improper conduct and undue familiarity between the wife and defendant, the questions of the weight of the testimony of witnesses, and the inferences to be drawn from the evidence, are for the determination of the jury.
3. **Evidence** examined, and *held* sufficient to sustain the judgment of the trial court.

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

McNeny & Sprague, Victor Westermark and *J. F. Ratcliff*, for appellant.

Charles E. McCarl, contra.

Heard before GOOD, EBERLY and PAINE, JJ., and CLEMENTS and THOMSEN, District Judges.

EBERLY, J.

This is an action to recover damages for criminal con-

versation. Earl H. Cantin is plaintiff, and Alvin Howard is defendant.

It is alleged, in substance, that about the fall of 1931, and on divers days between that date and the commencement of this action (November 28, 1934), defendant wrongfully cohabited with, had sexual intercourse with, and carnally knew, one Edith M. Cantin, then, and still being, the wife of plaintiff. The defendant pleaded a general denial. The case was tried to a jury and a verdict returned in favor of plaintiff for $1,250, and from the order of the trial court sustaining judgment thereon and overruling his motion for a new trial, defendant appeals.

None of the instructions given by the trial court is challenged, and appellant bases his entire contention on appeal upon the proposition of the insufficiency of the evidence to sustain the judgment.

The evidence is certainly conflicting and somewhat confusing. It includes evidence of a definite admission by plaintiff's wife of sexual intercourse with defendant. According to proof in the record, this statement was made in the presence of the defendant. There is also evidence of repeated visits, as many as from two to three a week, made by defendant in the fall of 1933 with the wife of plaintiff, at plaintiff's home, when the husband was absent. The proof also tends to establish that, though these visits were made sometimes in the forenoon, and sometimes in the afternoon, they were always so timed that the arrivals occurred after the husband had left, and the departures took place before his return.

This evidence, in connection with proof of attendant circumstances, including claimed gifts by defendant to plaintiff's wife, and together with the fact that there is no relationship by consanguinity between the defendant and the woman, certainly tends to substantiate the charge contained in the petition.

It must be conceded, however, that defendant's witnesses have quite largely contradicted the plaintiff's proof. Even the wife's admission of adultery, as well as the fact of

adultery, is expressly denied by both defendant and the wife herself. Facts are also testified to on behalf of defendant which certainly tend to contradict the case made by plaintiff and to support the defendant's theory of the case.

In the instant case, it is true that there was no direct proof of the commission of the crime of adultery between the defendant and plaintiff's wife, but, as said in *Smith v. Meyers,* 52 Neb. 70, 71 N. W. 1006: "It was not indispensable to a recovery that the acts of sexual intercourse should have been established by the testimony of a disinterested eyewitness. Adultery would be very difficult of proof if such were the rule, but it may, like any other fact, be established by circumstantial evidence."

It is also quite evident that the conflicting evidence in the record before us invokes the application of the principle that in a suit of this character, where the evidence submitted tended to prove improper conduct and undue familiarity between the wife and defendant, which is met by opposing proof, the questions of the weight of the testimony of the witnesses, and the inferences to be drawn from all the evidence presented, are for the determination of the jury. *Wheeler v. Abbott,* 89 Neb. 455, 131 N. W. 942.

This is a law action. Not a single exception is made to any of the instructions given by the court. The jurors heard the witnesses, and had opportunity to observe their demeanor while testifying. Under these conditions, a verdict based upon conflicting evidence will not be set aside on appeal, unless clearly wrong. *Reams v. Clopine,* 121 Neb. 86, 236 N. W. 158; *Scott v. New England Mutual Life Ins. Co.,* 128 Neb. 867, 260 N. W. 377.

It follows that, under the conditions presented by the record before us, the action of the trial court in overruling the defendant's motion for a new trial must be deemed correct, and its judgment is, therefore,

AFFIRMED.

MARIE MADSEN, APPELLEE, V. JEWETT POORE, APPELLANT.

FILED JUNE 5, 1936. No. 29601.

1. Bastards. The term "unmarried," as used in our present statute relating to bastardy proceedings, properly refers to the status of the mother at the time her child is begotten and born.
2. ———. Evidence examined, and *held* sufficient to establish the status of the appellee as an "unmarried woman" at the time her child was begotten and born, and to sustain the judgment of the trial court.

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

Carrico & Carrico, for appellant.

Carl T. Curtis, contra.

Heard before GOOD, EBERLY and PAINE, JJ., and CLEMENTS and THOMSEN, District Judges.

EBERLY, J.

Plaintiff brought this action against the defendant by filing her complaint in writing before the county court for Kearney county, Nebraska, in the following language:

"Marie Madsen on this 20th day of June, 1934, personally appeared before me, L. E. Robb, County Judge of Kearney county, Nebraska, and being by me first duly sworn, on oath says that she is an unmarried woman, a resident of Kearney county, Nebraska, and that she is pregnant with child which, if born alive, will be a bastard, and that Jewett Poore is the father of said unborn child."

On his plea of "not guilty" to this complaint, the accused was tried in the district court for Kearney county by a jury duly impaneled, and at the conclusion of the trial, a verdict was returned finding the defendant, Jewett Poore, guilty as charged, and from the order of the trial court overruling his motion for a new trial, defendant appeals.

Defendant makes two contentions at the bar of this court, viz.: (1) That the plaintiff failed to prove that the prosecutrix was an unmarried woman at the date of conception

and date of birth of the child; and (2) the insufficiency of the evidence generally to support the verdict.

In *Johnson v. State,* 55 Neb. 781, 76 N. W. 427, we announced the rule: "To sustain a finding of guilty in the trial of a bastardy case in the district court of the proper county, it is necessary to show by the evidence that the mother, at the time of the birth of the alleged bastard, was an unmarried person."

In *Parker v. Nothomb,* 65 Neb. 315, 93 N. W. 851, we held that the term "unmarried," as used in our present statute, "properly refers to the status of the mother at the time her child is begotten and born, and does not relate to her situation at the time of making the complaint." See, also, *Engstrom v. Engstrom,* 117 Neb. 167, 219 N. W. 837.

Even so, this jurisdiction is committed to the rule: "In a bastardy proceeding, only a preponderance of the evidence is necessary to a conviction, and a verdict rendered on conflicting evidence will be sustained unless it is clearly wrong." *Torske v. Johansen,* 104 Neb. 378, 177 N. W. 169. See, also, *Parrish v. Hodges,* 98 Neb. 403, 153 N. W. 493; *Davison v. Cruse,* 47 Neb. 829, 66 N. W. 823.

It also follows that, as a civil proceeding, competent and material evidence in bastardy proceedings may be either direct or circumstantial.

On the question first presented, we find ample evidence to establish that the complainant was an "unmarried woman" in the full sense of the statutory term. At her preliminary examination, the questions and answers were reduced to writing as provided by section 9-101, Comp. St. 1929. Section 9-105, Comp. St. 1929, provides: "When such accused person shall plead not guilty to such charge, * * * at the trial of such issue the examination before the justice shall be given in evidence." This court has confirmed the terms of the statute. *McDonald v. Brown,* 90 Neb. 676, 134 N. W. 263; *State v. O'Rourke,* 85 Neb. 639, 124 N. W. 138.

The questions and answers taken before the county judge

were read in evidence, without objection. They include the following, as testified to by the complainant in the county court on July 25, 1934: "Q. Are you married or unmarried? A. I am not married. * * * Q. How old are you? A. Thirty years old. Q. Never married? A. No." On February 12, 1935, in the district court for Kearney county, this witness testified: "Q. Are you married or unmarried? A. I am not married." In addition, the plaintiff is referred to as "Miss Madsen" by witnesses of both plaintiff and defendant. The doctor who delivered the illegitimate child testified, at the time of trial, in part, as follows: "Q. Did you attend one Marie Madsen at the Salvation Army Home in Omaha on the 29th day of August, 1934? A. Yes. Q. What was the nature of her sickness then at that time? A. Childbirth. Q. Did you deliver her at that time of a child? A. Yes."

As already appears, plaintiff, as Marie Madsen, had already testified that she was thirty years old, and never married.

Whatever may be said of the evidence, she was certainly treated by the defendant as a single woman during his relations with her, and she appears to have been so recognized by all parties in interest, and by the witnesses as well. There is not a syllable of evidence in the record which tends to support the opposite conclusion. The proof that plaintiff was unmarried at the time of the birth of the child is much stronger in the instant case than the evidence before the court on this point in *Labertew v. Weeks,* 111 Neb. 712, 197 N. W. 420, which we held was sufficient to sustain the verdict.

As to the general objection urged at the bar of this court that the proof was insufficient to establish the paternity of the child, the evidence contained in the bill of exceptions, read and considered as an entirety, does not sustain appellant's contention. It is conflicting, but not more so than is usually presented in this class of cases. There is fairly presented by it the question of paternity of the illegitimate child as a matter for a jury to deter-

mine. The credibility of witnesses, who were heard and seen by the jury, was necessarily involved. The jury have spoken by their verdict, after having heard this evidence, and having received instructions from the trial court, as to which no errors are charged. There is ample support in the evidence for the verdict so rendered, and it will not be set aside. *Hutchinson v. State*, 19 Neb. 262, 27 N. W. 113; *Cowan v. Ertel*, 95 Neb. 380, 145 N. W. 841; *Torske v. Johansen*, 104 Neb. 378, 177 N. W. 169.

The action of the trial court in overruling defendant's motion for a new trial was therefore correct, and its judgment is

AFFIRMED.

JAMES A. EDINGTON ET AL., APPELLEES, V. GLENN R. PAULSEN ET AL., APPELLANTS: W. A. C. JOHNSON ET AL., APPELLEES.

FILED JUNE 5, 1936. No. 29699.

Probate Courts. The probate court in the settlement of an estate has jurisdiction to determine the heirs of the decedent. When this fact is determined, the statute of descent passes the title to property.

APPEAL from the district court for Garden county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

F. A. Dutton, for appellants.

T. T. Bell, Prince & Prince, Taylor & Spiker and *E. E. Richards, contra.*

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

DAY, J.

This is a suit to foreclose a real estate mortgage in which the defendants filed a cross-petition for the rescission of the contract for the sale of land covered by the mortgage.

The trial court entered a decree of foreclosure finding against the defendants on their cross-petition.

Even though the pleadings are somewhat more voluminous than necessary, and the briefs discuss a number of questions, the only issue presented by the appeal is whether the abstract of title tendered to the defendants in accordance with the terms of the contract was sufficient to show a good title of record to the premises. During the trial of this case, it was stipulated that the objection of the defendants to the abstract was based upon the final decree of the county court in the estate of John H. Charles, deceased. The vendors, the plaintiffs in this case, were the heirs of John H. Charles, deceased, and secured their title as such. The title to this property formerly was in the name of John H. Charles and W. A. C. Johnson. The deeds which were delivered to the defendants were executed by W. A. C. Johnson and all the heirs at law of John H. Charles, deceased.

There were several final decrees entered in the proceedings for the probate of the estate of John H. Charles, deceased. It is apparent that there was an attempt to satisfy the objections of the attorney for the defendants. All of the final decrees were entered after proper notice to all parties interested, and determined who were the heirs of John H. Charles, deceased. The heirs of John H. Charles at the date of his death were determined in each instance to be the vendors of the land in controversy here.

The probate court in the settlement of an estate has jurisdiction to determine heirs of a decedent. When this fact is determined, the statute of descent passes the title to property. *Fischer v. Sklenar,* 101 Neb. 553, 163 N. W. 861; *Davis v. Davis,* 112 Neb. 178, 199 N. W. 113. "In a proceeding in such court to determine heirship, the title to real estate is not drawn in question. The court simply determines who are the heirs, and the law of descent passes the title." *In re Heirship of Robinson,* 119 Neb. 285, 228 N. W. 852.

After the execution of the deeds in this case, George

Hogg, one of the heirs of John H. Charles, died and left as his heirs, Charles Mitchell Hogg and Dorothy Hogg. In a later decree entered of record by the probate court in the John H. Charles estate case, the court found that Charles Mitchell Hogg and Dorothy Hogg were the heirs of George Hogg, deceased, and assigned George Hogg's share of the real estate to them. This, of course, did not affect the title in any way, since George Hogg in his lifetime had conveyed his interest in the real estate to the defendants in this case. The title to the property could not be affected by this superfluous finding of the probate court in the settlement of the estate of John H. Charles. Each of the final decrees entered in the settlement of the estate of John H. Charles, deceased, found that his heirs were the grantors in the deeds executed in favor of the defendants. There is no inconsistent finding in any of these decrees as to who were the heirs of the deceased, and these heirs, having divested themselves of title by the execution of a conveyance by warranty deed, had no interest in this real estate. The finding of the probate court relative to the heirs of George Hogg could have no possible effect upon the title to this real estate, since George Hogg had no interest at the time of his death.

Since it has been stipulated that the objection to the title is based solely upon the proceeding in the settlement of the estate of John H. Charles, deceased, this court adopts the finding of the trial court that the abstract tendered the defendants showed a good title of record as required by the contract of sale. An examination of the entire record does not reveal any error in the proceeding, and the judgment is

AFFIRMED.

ANSON H. BIGELOW, APPELLEE, V. HARRIET PEARL BIGELOW, APPELLANT.

FILED JUNE 5, 1936. No. 29574.

1. **Divorce.** Evidence in support of husband's petition for divorce found to be inadequate.
2. ———. Evidence sustains absolute divorce granted defendant wife upon her cross-petition.
3. ———: ALIMONY. Alimony of the wife increased $1,000, in view of total value of property acquired by the parties during coverture.
4. ———: ———. Upon the granting of an absolute divorce, the trial court may assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between them as the demands of equity may require.

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

R. B. Hasselquist and *D. S. Krause,* for appellant.

O'Sullivan & Southard and *O'Brien & Powers, contra.*

Heard before GOOD, PAINE and CARTER, JJ., and CLEMENTS and THOMSEN, District Judges.

PAINE, J.

Anson H. Bigelow, plaintiff and appellee, filed an amended and supplemental petition for divorce in the district court for Douglas county, charging that the defendant had been guilty of extreme cruelty and adultery, and asking that an accounting be had of the property interests of both parties and an equitable division made.

To this an amended answer and cross-petition was filed by Harriet Pearl Bigelow, his wife, the defendant and appellant, absolutely denying all of the charges made by him, and in her cross-petition alleging that the plaintiff had been guilty of extreme cruelty toward her, and charging him with committing acts of adultery in the state of Iowa and in the state of Nebraska; alleging that she had at all times been a dutiful, obedient, and chaste wife, and asking that an accounting be had of their property rights,

and that she be granted an absolute divorce, with attorney fees, together with support and maintenance for the remainder of her life.

A trial was had, lasting many days, and the bill of exceptions is contained in three large volumes. On April 1, 1935, an eight-page decree was entered by the trial court, finding that the parties have resided in Douglas county since their marriage, and that there are no children born of the marriage. The petition of the plaintiff is dismissed. A decree of absolute divorce is granted to the defendant on her cross-petition upon the ground of adultery. The decree found that the market value of the plaintiff's property was between $30,000 and $35,000, and awarded to the defendant $7,500, to be paid at the rate of $75 a month for the first two years, and thereafter at the rate of $100 a month until fully paid, and gave the defendant a lien on the plaintiff's share of the proceeds of the sale of certain interests in a mausoleum handled by a trustee; awarded to the defendant "the household furniture and contents, except the library, purely personal belongings, clothing and other paraphernalia of the plaintiff;" allowed the defendant $125 temporary alimony and $750 attorney fees, and made provision *in re* title to various pieces of property.

Each of the parties immediately filed motion for new trial, and on April 15, 1935, the trial judge filed a memorandum opinion, in which he exhaustively discussed the allegations, charges, complaints, the evidence in support of each, and the evidence in opposition thereto, and overruled each of the motions for a new trial, and upon the same day notice of appeal to this court was given by the defendant, and briefs were duly filed, and the case argued at length and submitted.

There is no question in the minds of the court but that the trial judge was right in finding that the charge of adultery made by plaintiff had not been proved. On the other hand, the charges of adultery made in the cross-petition of the wife were fully sustained by the evidence.

This appeal relates to the property rights of each party, alimony, and attorney fees.

The plaintiff, who was 67 years old at the time of the trial, had been a superintendent of public schools as a young man at several places, among them Greeley, Minden, and Falls City, Nebraska, Le Mars, Iowa, and seven years in Lead, South Dakota. He graduated from Creighton University Law School in 1912, since which time he has practiced his profession in Omaha. The defendant was a widow with three young children at the time of her marriage to the plaintiff, and was 54 years of age at the time of the trial.

The plaintiff testifies that he first met the defendant about 1909, and she testifies that they met in 1910 at Presho, South Dakota, where he was lecturing before a teachers' institute. She then took a stenographic course in Denver, and obtained stenographic work in Omaha through the assistance of the plaintiff. She obtained a divorce from her first husband, Mr. Agnew, but he was not paying the alimony and support money, and the plaintiff endeavored to assist, through an attorney in South Dakota, in collecting money from Mr. Agnew, who had remarried.

The plaintiff's second wife was killed in the Omaha tornado March 23, 1913, leaving him with two children; one, who had married, was by his first wife, and a daughter, Lucille, by his second wife, remained with her father and graduated that same year from the Omaha high school. The plaintiff and defendant were married on February 22, 1914, at Mankato, Minnesota, but it was not publicly announced until August of that year, when they began living together, at which time the defendant's three children were brought to Omaha; they having remained with her divorced husband on a farm in South Dakota up to that time. The three children were Portia, who was at that time eleven years of age, Ilma, nine, and Thomas, seven. At the time of the marriage the plaintiff had a small amount of equipment for a law office, and was in

debt around $5,000 to his brother-in-law, which debt was later forgiven. The defendant after her marriage worked as stenographer and clerk in the plaintiff's law office for something over a year, and at various times thereafter assisted in the clerical work of the office temporarily. The plaintiff rapidly built up a lucrative law business, and claims to have expended on his wife and her children from $5,000 to $7,000 a year for many years, and in some years, he claims, his personal and living expenses were as much as $9,000, which is denied by the defendant. Her oldest daughter graduated from the Central High School, then attended the University of Wisconsin, and then the Randolph Macon Women's College in Roanoke, Virginia, and then went to New York City and took special dancing lessons, and then was married and came to Omaha with her husband; lived in an apartment until a baby was born, and this grandchild lived with the plaintiff and defendant in their home until it was nearly six years of age. Portia got employment on the stage, was divorced from her husband, and then remarried. The second daughter, Ilma, and son, Tom, graduated from the Central High School and then were sent to various other schools, all at the expense of the plaintiff. The plaintiff treated the three children of the defendant as his own, and spent large sums of money on their support and education, treating them with the same liberality as he did his own children. Exhibit 123 is an itemized property statement, given by the plaintiff to the Omaha National Bank, showing his net worth to be $178,157.04 on May 21, 1930.

Something over ten years after their marriage, serious difficulties first began to arise over money matters, and the defendant complained that he was giving his younger daughter too much money. The defendant then began going to the plaintiff's office in his absence, examining the records and books in an endeavor to ascertain the sources of his income and the full amount thereof, and in going through his files discovered letters from women

clients and friends, some of which were couched in endearing terms, and which the defendant abstracted from his files, and a large number of such exhibits she introduced in evidence.

The principal contention of the defendant in this court is that the decree of the trial court deprived her of a one-tenth interest in the valuable mausoleum property, which had been hers for a period of approximately ten years, and required her to reconvey the Sioux county land, to which she had also held title for a number of years. It is insisted by defendant that the trial court was without jurisdiction to divest her of her fee simple title to her interest in this real estate. In addition, the defendant charges that during 14 months last past plaintiff has contributed but $3.84 a month to the support of the defendant, and it is asked that the court modify the decree so as to adequately support and maintain the appellant, and reinvest her with her title to her interest in the mausoleum property.

In regard to the Sioux county land, the plaintiff contends that this 160 acres was conveyed by plaintiff to Mrs. Bigelow on November 29, 1922 (exhibit No. 63), for the sole purpose of inducing her to sign an additional mortgage of $1,000 upon the home to raise $1,000 which was absolutely necessary in his business just at that time to complete the foreclosure of the mausoleum property, and plaintiff alleges that she had promised to reconvey it as soon as the mortgage on the home was reasonably reduced, and the decree required this to be done. This appears to be supported by the evidence.

The sharpest dispute in regard to the property rights is in reference to the West Lawn Mausoleum Association property. This was a tax-free, nonprofit organization, organized under the law now found in section 13-601 to section 13-605, inclusive, Comp. St. 1929, created to manage the property. The West Lawn Mausoleum was built in West Lawn Cemetery, Omaha, by the Colorado Yule Marble Company, with marble from its own quarries at

Yule, Colorado. The project was first promoted by the late Thomas H. Matters, and suit was brought for alleged secret profits, and the original project is discussed at length in the case of *Nebraska Mausoleum Co. v. Matters*, 108 Neb. 618, 188 N. W. 231. The plaintiff in the case at bar became attorney for the Nebraska Mausoleum Company in 1914 in litigation seeking to force the Colorado Yule Marble Company to complete the building, construction having stopped midway because of lack of capital. The Colorado Yule Marble Company went into receivership, and the federal court at Denver endeavored to commandeer funds due it, and threatened to take over the mausoleum. Litigation also arose over the bonds that had been issued by the Nebraska company, and the litigation continued for some eight years. Between 1919 and 1921 the plaintiff and Dr. John W. Koutsky on behalf of his wife, Julia, who had furnished funds to buy up the bonds and the land, foreclosed the property, and the title was taken in Mr. Bigelow's name, with Mrs. Koutsky and one other as undisclosed principals. In 1929 Mr. Bigelow succeeded in quieting his title against the Colorado Yule Marble Company in bankruptcy proceedings in Denver. The third owner was now bought out, leaving the title in Mr. Bigelow's name as record owner, but he only owned a one-half interest, and Julia Koutsky the other half. This West Lawn Mausoleum contained 650 tombs, some arranged to be sold singly, others in groups of several tombs, and others as memorial rooms for family use, containing five, ten, or fifteen tombs. There are also 60 niches, each with a capacity of five urns for the ashes of cremated bodies. Some of these tombs and niches are priced at from $450 to $1,200 each, with private rooms higher.

The bill of exceptions discloses that Carl K. Linge, of Cedar Rapids, Iowa, was called as an expert in mausoleums. He owns controlling interests in cemeteries at various places, and spends his time looking after cemetery investments in Council Bluffs, Omaha, Lincoln, and Cedar

Rapids, Iowa. He was the owner of a large mausoleum built at Topeka, Kansas, but had disposed of his interests. Mr. Linge is a director of the National Cemetery Owners' Association, and the year before, he testified, he had taken a trip of 10,000 miles through the east, visiting many cemeteries and mausoleums. He was asked the value of the remaining 506 tombs and some 56 niches, and said that he would be willing to pay $25,000 for the unsold space. On cross-examination he said that the unsold space at full regular listed prices for tombs, niches, and family memorial rooms would amount to $399,000.

It is shown by the evidence that the customary method of building such large marble mausoleums is to have the company organized and then sell in advance a sufficient number of the tombs and memorial rooms, lined with crypts for caskets, to pay the cost of the building, and then, as additional sales are made, money is set aside in an endowment fund to care for the building perpetually, and that, in the case of the West Lawn Mausoleum Association, because of the litigation, no such funds were set aside for endowment for permanent maintenance, and, therefore, it was more difficult to sell tombs therein. Therefore, a contract had been entered into between Anson H. Bigelow, West Lawn Mausoleum Association, and the Omaha National Bank, by Daniel J. Monen, its trust officer, together with a trust agreement and sales contract, the same being exhibits 19 and 20, consisting of 23 pages, to set aside certain sums out of each sale for a perpetual care fund for tombs, and the owners will receive but 28.75 per cent. of the proceeds until the back endowment funds are replaced, and thereafter will receive 33.5 per cent.; so it is claimed by plaintiff that in no event will plaintiff's share of the proceeds of the future sales amount to more than 16¾ per cent. of the sales, and the court found that the reasonable present value of Mr. Bigelow's property ownership in the mausoleum was between $30,000 and $35,000. The trial court found that the gross sales of tombs during the last 19 years have amounted to

about $3,500 a year. The plaintiff's attorneys insist that they do not dispute the value placed by the decree of the trial court upon any property listed in the final decree except the mausoleum property, and insist that their client's share of this mausoleum is actually worth $12,500, instead of the value fixed by the court. In our opinion, the value is, if anything, slightly greater than that placed upon it by the trial court.

Exhibit No. 39 is a warranty deed by the plaintiff to the defendant, "in consideration of one dollar and other goods and chattels," to a one-tenth interest in a tract of ground 100 feet by 150 feet, together with the building thereon known as the West Lawn Mausoleum. It was acknowledged before J. F. Micek, a notary public, on the same day, and was recorded in the office of the register of deeds on April 13, 1933. In this deed the defendant's first name is misspelled by writing it "Harriette" three times. The plaintiff insists that this warranty deed, so far as conveying title to a one-tenth interest in the mausoleum to the defendant, was fraudulent. The title of the mausoleum at that time was in the plaintiff, and he testified that he drew up and signed this deed, exhibit 39, but the name of the defendant as grantee was not written in, nor was the particular fractional portion of ownership of the mausoleum inserted, nor was any consideration written in, and that, while he signed it, he did not acknowledge it before a notary; that his purpose in preparing the deed was to transfer to Mrs. Julia Koutsky her undisclosed ownership in the mausoleum; that the deed so signed by him was lost, and he testified that both he and his stenographer hunted for it in the office for a couple of months, but never could find it; that he never heard of the lost deed, or that the defendant was claiming a one-tenth interest in the mausoleum property, until on May 23, 1933, when she so stated in a letter (exhibit No. 22) to the president, officers, trustees, and members at a meeting of the board of directors.

Now, in direct conflict therewith, the defendant testifies

that the plaintiff had been carrying a $5,000 life policy payable to her, and that in 1925, without her knowledge, he had taken out the cash value in a loan on the policy, and that the plaintiff gave her this warranty deed, exhibit 39, because of his borrowing the full value of this life insurance policy; that she was present at the time it was written, and that his stenographer filled in the entire deed on the typewriter, just as it appears now, spelling her name wrong, and that the plaintiff then took the deed and she went with him to Mr. Micek, a notary public, whose office was on the same floor, and she was present when he acknowledged the deed, and she saw the notary sign it and attach his seal, and the deed was delivered to her at that time and place, but that she did not record it until April 13, 1933, after the plaintiff had threatened to take everything away from her.

There appear in evidence two exhibits which are photographs, greatly enlarging the paragraphs of the deed, exhibit 39, showing the name of the grantee, the consideration, and the one-tenth interest, and this court has carefully examined these exhibits and reaches the same conclusion that the trial court did in its first decree, that the exhibits clearly support the evidence of the defendant, and we therefore adopt the defendant's explanation of the execution and delivery of the deed, and we believe that she is clearly entitled in equity to a one-tenth net interest of that portion of the mausoleum property owned by the plaintiff.

The memorandum for decree of the trial court calls attention to the fact that the plaintiff and defendant on July 28, 1930, executed a warranty deed to the West Lawn Mausoleum Association, which deed was acknowledged before James H. Hanley, notary public, on August 2, 1930, and left in escrow with the Omaha National Bank as trustee, by which deed the parties conveyed the legal title to the land in question, subject to the conditional sale and trust agreement to the West Lawn Mausoleum Association, and further reserving therefrom many tombs

and niches which had theretofore been sold, and reserving in favor of the grantors rows 1, 2, 3, 4, and 5 of section 33 as a family section in said mausoleum, and the proceeds to be distributed by the trustee in accordance with the trust agreement and sales contract. The trial court found in its decree that this transaction converted the interests of the plaintiff and the defendant in the mausoleum property into personalty, and reserved to them only a right to share in the proceeds of the sales of tombs and niches, in accordance with the trust agreement, and that the trial court had the power thus to divide the property of the parties equitably between them.

It is insisted by the defendant's attorney that the plaintiff is at this time worth $120,000, and that the one-tenth interest in the mausoleum should be restored to her, as conveyed to her by the deed from her husband.

The testimony of the trust officer of the Omaha National Bank, supported by that of others, is that the defendant has delayed important business matters by refusing to sign deeds and other instruments except upon her terms and at her pleasure, and we find that to restore to her a title to a one-tenth interest in the mausoleum property, as demanded by her, might hinder the prompt sale and conveyance of tombs therein. Therefore, under the circumstances, the escrow deed and arrangement with the Omaha National Bank, trustee, appears to be the best plan which could be devised for efficiently handling this mausoleum property, and the decree in that regard should not be disturbed.

The defendant insists that this is, in effect, dividing the real estate between them, and insists that the court has no jurisdiction to divide real estate in a divorce proceeding, citing *Cizek v. Cizek,* 69 Neb. 800, 99 N. W. 28. However, this decision, rendered in 1904, was before the legislature enacted section 42-321, Comp. St. 1929, upon that subject. In *Maxwell v. Maxwell* (1921) 106 Neb. 689, 184 N. W. 227, it was held that a court could award an innocent wife a husband's interest in a remainder. The

next year, in *Bartunek v. Bartunek*, 109 Neb. 437, 191 N. W. 671, this court held that real estate could be equitably divided between the parties. See, also, *Myers v. Myers*, 88 Neb. 656, 130 N. W. 254; *Bristol v. Bristol*, 107 Neb. 321, 185 N. W. 972.

The trial court had the legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between the parties as equity required upon the granting of an absolute divorce.

From a careful examination of the evidence, we are of the opinion that the one-tenth interest of the defendant in the mausoleum is worth, at the very least, $3,500, instead of the $2,500 value placed upon it by the trial court.

In section 33 of the mausoleum certain family tombs are reserved to the owners, and within one of these tombs lies the body of the defendant's only son. The title to this tomb containing the body of her son should be set apart to her, so that she shall have the exclusive title thereto.

The decree should be modified in these two respects: First, to provide that the payments continue to the defendant until an additional $1,000 is paid to her at the rate of $100 a month for ten months; and, second, that the defendant shall have sole ownership of the tomb in which the body of her son was placed.

As thus modified, the decree of the trial court is affirmed. Defendant is allowed $200 attorney fees in this court, to be taxed as part of the costs.

AFFIRMED AS MODIFIED.

MABEL GOODWIN, APPELLEE, V. OMAHA PRINTING COMPANY ET AL., APPELLANTS.

FILED JUNE 5, 1936. No. 29817.

Master and Servant: WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY. The shooting of a traveling salesman by a highwayman, while driving from one town to another in furtherance of the business of the employer, arises out of the employment, within the meaning of section 48-110, Comp. St. 1929, providing for compensation for injury or death by accident arising out of and in the course of the employment.

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

Kennedy, Holland, DeLacy & Svoboda, for appellants.

Smith & Schall and *Gerald M. Vasak, contra.*

Heard before GOSS, C. J., ROSE, GOOD, DAY and CARTER, JJ., and KROGER and IRWIN, District Judges.

CARTER, J.

This suit was instituted by Mabel Goodwin to recover compensation for the death of her husband, Russell Goodwin, under the workmen's compensation law of this state. From a judgment awarding the compensation, the defendants have appealed.

The record discloses that Russell Goodwin, at and prior to his death, had been employed by the Omaha Printing Company of Omaha, Nebraska, as a salesman. It was his duty to call on and sell to various county officers in the state of Nebraska. He had been in the employ of the Omaha Printing Company for 15 years and, at the time of his death, was receiving wages in the amount of $45 a week. He used his own automobile in connection with his work and received five cents a mile from the Omaha Printing Company for the use thereof.

It further appears that on the morning of September 6, 1934, the deceased conferred with the officers of the Omaha Printing Company, after which he started in his

automobile for Columbus for the purpose of interviewing one of the county officials of Platte county on behalf of the Omaha Printing Company. He had with him in the car his own personal baggage, some canned goods and groceries which he had purchased for his own use, and two portfolios and a sample kit of printing supplies belonging to the Omaha Printing Company which he used in connection with his duties as a salesman.

About ten miles west of Omaha, he permitted one Harold Malmberg to ride in the car with him. At a point four miles west of Schuyler, Nebraska, Malmberg asked to be let out of the car so that he could go north from that point. After the car was stopped, Malmberg drew a gun and ordered Goodwin out of the car. As Goodwin was leaving the car, Malmberg shot him and left him lying in the road. Malmberg took the car and its contents and drove away. Goodwin suffered injuries from which he died. Malmberg was captured and is now serving a life sentence in the penitentiary for murder. The only issue before the trial court was whether or not Russell Goodwin died as a result of injuries received in an accident arising out of and in the course of his employment by the Omaha Printing Company.

It is not disputed that Goodwin died as a result of an accident within the meaning of section 48-152, Comp. St. 1929. Neither is it contended that the accident was not in the course of the employment. The question to be determined is whether the accident arose out of the employment.

The case of *City of Fremont v. Lea*, 115 Neb. 565, 213 N. W. 820, was one where compensation was allowed for the death of a fireman who was accidentally shot with a toy cannon in the hands of other firemen on the streets of Hastings while attending a state firemen's convention. In that case the court said: "It is insisted, however, that the accident occurred upon the public streets of Hastings, and that the danger created by the accidental discharge of the cannon was one to which the public, gen-

erally, was exposed, and not one which arose out of, or was inherent in, Lea's employment. Under the facts in this case, the question here raised is foreclosed by our previous decision. Even though the accident be sustained by reason of risk incidental to the streets, the accident, under the circumstances of this case, arises out of, as well as in, the course of his employment. *Coster v. Thompson Hotel Co.*, 102 Neb. 585." The court also cited with approval the case of *Dennis v. A. J. White & Co.* (1917) A. C. (Eng.) 479, Ann. Cas. 1917E, 325, in which the court said: "Where a workman is sent into the streets on his employer's business, whether habitually or occasionally, and whether on foot or on a bicycle, or on an omnibus or a car, and he meets with an accident by reason of a risk of the streets to which his employment exposes him, the accident arises out of as well as in the course of his employment; and it is immaterial that the risk which caused the accident is one which is shared by all members of the public using the streets under the like conditions."

In *Coster v. Thompson Hotel Co.*, 102 Neb. 585, 168 N. W. 191, the deceased was engineer and general foreman of mechanical work for a hotel owned by defendant. It was his custom to buy materials for repair work, and, if quickly needed, take them to the hotel himself. On his way to a plumber's shop for materials, his motorcycle collided with a street car and injuries were caused which resulted in his death. The court, in affirming a compensation award, said: "The next point argued by the defendant is that the death 'was not caused by accident arising out of and in the course of employment.' We cannot take this view. It was a part of Coster's duty to obtain materials. He was his own master as to his hours and place where he might engage in his master's service. When he ordered material by telephone from his house he was in the course of his employment, and when he was accidentally struck and killed upon the street while on the way to procure materials, the accident arose out of

the employment. Both the order for the goods and the going to procure them were strictly within his duties. The fact that he rode upon a motorcycle which he commonly used in performing errands and in going to and from his home does not alter the case. He had the right to use such instrumentalities as were best fitted to perform his master's work."

In the case of *Good v. City of Omaha,* 125 Neb. 307, 250 N. W. 61, where plaintiff was engaged in grading roads and was struck by a brick hurled at him by some boys whom he had chased off his machine, the court said: "When an employee is engaged to work upon a public street in his master's business and is there injured, while engaged in such employment, by a missile intentionally thrown at him by another, without provocation from the employee, such injury arises from a risk of the street that is such as to cause it to arise out of and in the course of his employment."

In the case of *Beem v. H. D. Lee Mercantile Co.,* 85 S. W. (2d) (Mo.) 441, 100 A. L. R. 1044, the court said: "Death of traveling salesman occurring while he was being robbed on highway as he was traveling between towns on his usual route *held* compensable as 'arising out of employment,' which term signifies a causal connection between death and employment, since salesman's employment reasonably covered traveling over such road and being exposed to hazard of highway robbery; it being immaterial whether salesman was killed while resisting robbery of his own money or that of his employer."

In the case of *Industrial Commission v. Pueblo Auto Co.,* 71 Colo. 424, 207 Pac. 479, the court said: "An auto salesman, driving a machine belonging to his employer and returning to town after making a sale, was attacked and killed by persons whose purpose was to obtain the automobile in which he was riding. *Held,* that the industrial commission was justified in awarding compensation to his dependent widow, his death having been occasioned by an accident arising out of, and in the course of his employ-

ment." Also, in *Industrial Commission v. Hunter*, 73 Colo. 226, 214 Pac. 393, the court said: "A water commissioner whose duties required him to travel over his district, while riding in the automobile of another, who had sold him a car, was making inspections of streams and ditches on the way from his home to the automobile agency. He was shot and killed by a person who attempted to steal the car. *Held*, this his death was proximately caused by an accident arising out of, and in the course of his employment."

In the case at bar, the duties of the deceased required him to travel the highway where the accident occurred. He was killed while being robbed of property, a part of which was his own and a part that of the employer. A salesman who is required to travel from town to town for the purpose of selling his employer's goods is as much within the employment in so doing as he is when selling goods at such towns. Highway robbery is a hazard of the highway and a hazard of an employee whose employment requires him to travel the highways in the service of his employer. The contention is made that the deceased brought the injuries upon himself by inviting Malmberg to ride with him. The record does not disclose that Goodwin disobeyed any directions or instructions of his employer in so doing. While it is true that highway robbery and murder are sometimes committed on the highways, yet it cannot be said that such acts are so common that the inviting of a "hitchhiker" to ride in the car is anything more than a charitable act. For aught we know, if Goodwin had not stopped when hailed by Malmberg, he might have been shot and robbed anyway. Robbery is generally planned and committed not because of but regardless of the acts and wishes of the victim. A traveling salesman in inviting a "hitchhiker" to ride in his automobile, under such circumstances as are shown in this case, does not step aside from his employment and act for himself on business or pleasure of his own. He is still within the scope of his employment. After a

consideration of all the facts, and in view of the authorities cited, we are constrained to hold that the accident arose out of and in the course of the employment. The judgment of the trial court is correct.

AFFIRMED.

ANTHONY E. KENNEDY, APPELLEE, V. JOYCELYN H. WOODS ET AL., APPELLANTS.

FILED JUNE 5, 1936. No. 29618.

1. **Appeal.** "Testimony of a doctor, reciting a history of injury given witness by plaintiff, *held* not to have been prejudicially erroneous, where other and primary testimony covered the facts given in the history and where no instruction relating to the admission was requested." *Roberts v. Kubik*, 129 Neb. 795, 263 N. W. 143.
2. **Evidence:** COMPETENCY. The fact a doctor had examined an injured plaintiff the day before trial for the sole purpose of qualifying him as a witness would not make his testimony incompetent; and his opinion, based upon his observation and deductions from such examination, related by him in evidence, and on assumed facts of which there was evidence, was properly received.
3. **Trial.** "An objection to a question asked at the trial should be sufficiently explicit to indicate the specific reason for its interposition." *Miller v. Drainage District*, 112 Neb. 206, 199 N. W. 28.
4. **Appeal.** Ordinarily, error may not be predicated upon remarks made by the court in the presence of the jury, when the court's attention was not called to the matter by objection or otherwise, so as to give the trial court timely opportunity to correct the prejudicial effect, if any.
5. ———. An instruction favorable to appellants, though erroneous, is not ground for reversing a judgment against them.
6. ———. Error cannot be predicated upon failure of the court to give a requested instruction where the court, on its own motion, has fully and properly instructed the jury with reference to the subject-matter covered by the instruction tendered.

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

Tyler & Peterson and *Raymond Frerichs*, for appellants.

Rosewater, Mecham, Shackelford & Stoehr and *Thomas E. Dunbar, contra.*

Heard before GOSS, C. J., ROSE and DAY, JJ., and ELDRED and TEWELL, District Judges.

ELDRED, District Judge.

This is an action for damages for personal injuries sustained as a result of a collision of an automobile in which the defendants were riding owned by the defendant Joycelyn H. Woods, and then being driven by her husband, the defendant Edwin C. Woods, with a wagon on which plaintiff was riding. The collision occurred after dark on Highway No. 75, a paved highway. Plaintiff was proceeding south with a team of horses hitched to the running gears of a wagon and was riding on the hounds in front of rear axle. Defendants were also proceeding in a southerly direction on the same highway. Just south of the village of Avery, there is a rather long but not a steep hill near the bottom of which is a slight curve to the right. Close to such curve the driver of the defendant's car, in attempting to pass plaintiff, struck the rear of the running gears of plaintiff's wagon, throwing plaintiff therefrom to the highway, with resulting injuries for which he is seeking to recover in this case. The issues involve the question of negligence and the nature and extent of plaintiff's injuries. By a general allegation in defendants' answer, contributory negligence is also made an issue. From a verdict and judgment for plaintiff, defendants appeal.

The first five assignments of error will be considered together. By these assignments complaint is made of the ruling of the court during the trial in permitting witnesses, Doctors Nolan and Zimmerer, to answer hypothetical questions, which, it is contended, assumed facts which were for the determination of the jury. The further objection is made to some of the testimony of Dr.

Zimmerer, "because it is based to a greater extent upon the 'history' of the case, consisting of self-serving declarations, * * * than upon the actual examination of the plaintiff." And objection is also made to the testimony of such witness that he examined the plaintiff for the sole purpose of qualifying him to testify. The fact that this witness had examined plaintiff the day preceding trial for the sole purpose of qualifying him as a witness did not make his testimony incompetent; the delay in the making of such examination going to the weight and not the competency of his evidence. The opinion of such doctor based on his observation and deductions from such examination, related by him in evidence, and on assumed facts, of which there was evidence, was properly received. Other testimony had been received as to the assumed facts embodied in the hypothetical questions. The doctors not being personally cognizant with all the facts relative to the history of the patient, which were material to the formation of an opinion as to the matter inquired about, it was proper to assume facts of which there was some evidence, in formulating and propounding the hypothetical questions; and it was proper for such witnesses to state the history as related to them, and which was considered by them in arriving at their opinions as given in testimony. *Roberts v. Kubik,* 129 Neb. 795, 263 N. W. 143. The effect to be given evidence based in whole or in part upon assumed facts is a matter properly covered by the instructions of the court. The trial court would doubtless have given such an instruction in this case had one been requested.

Criticism is also made of the inclusion of a reference to an X-ray plate in a hypothetical question submitted to Dr. Zimmerer. It appears that Dr. Overgaard, whose profession is given as X-ray physician, specializing in that work for the last twenty years, testified at length as to the taking and development of the X-ray of plaintiff's head; and likewise Dr. Nolan, plaintiff's physician, at whose request the X-ray was taken, testified at length

and in detail as to the X-ray, and it was identified and offered in evidence. The objection made to the question which embodied a reference to such exhibit being that it was "incompetent, irrelevant and immaterial, no proper foundation laid, and assuming a state of facts not in evidence." After examining the record, we conclude that, as against the objection made, the evidence was properly admitted. If there was some particular respect in which the proof of foundation was lacking, the trial court's attention should have been specifically directed thereto by appropriate objection. *Miller v. Drainage District*, 112 Neb. 206, 199 N. W. 28.

By the sixth assignment of error, criticism is made of a remark by court during the examination of a doctor as an expert; reference was made by witness to the "history" of plaintiff's condition previous to and following the accident which was objected to as hearsay. In ruling on the objection the court stated: "Doctors have a right to have a history of their patients before they give their opinions. Every lawyer knows that. Overruled." There was nothing objectionable in the first clause of the court's remarks. While the last clause served no purpose and might better have been omitted; yet, the attention of the trial court was not directed to any objectionable feature of the remarks at that time, in any manner. Ordinarily, error will not be predicated upon remarks made by the court, in the presence of the jury, when the attention of the court was not then called to the matter by objection or otherwise, so as to give the court timely opportunity to correct the prejudicial effect, if any. *Payne v. Clark*, 117 Neb. 238, 220 N. W. 262. Further, in this case, the remark complained of did not amount to a comment upon the weight of evidence and was not prejudicial. "It is, of course, better practice for a trial court to simply rule upon an objection without commenting on the evidence before the jury; however, a remark which does not express an opinion on the weight of the evidence is not prejudicial error." *Goldman v. State*, 128 Neb. 684, 260 N. W. 373.

The seventh assignment of error urges that the trial court limited the cross-examination of one of plaintiff's witnesses. After examining all the testimony of the particular witness, we do not find that there was any limitation of right of cross-examination. While as to some questions asked on cross-examination objections thereto appear to have been sustained, no complaint is made as to the ruling on the objections. The right of cross-examination appears to have been fully and adequately exercised.

By the eighth assignment of error, complaint is made of an instruction given the jury on the comparative and contributory negligence rule. On examination we conclude that the record does not disclose any negligence on the part of the plaintiff justifying an instruction on comparative or contributory negligence. An instruction as to comparative or contributory negligence was not required. Under the facts in this case, the instruction given was favorable to the defendant, and not prejudicial. An instruction in a party's favor, though erroneous, is not a ground for reversing a judgment against him. *Hanover Fire Ins. Co. v. Stoddard,* 52 Neb. 745, 73 N. W. 291.

Ninth, error is assigned in the refusal of the court to give instruction No. 2 requested by defendant, by which offered instruction the court is requested to advise the jury that it is not necessarily negligent for the operator of an automobile to drive at such a rate of speed that he is unable to stop or turn aside in time to avoid striking an object appearing within the range of the lights of his car; and "where the nature of the object or the color of a vehicle or animals upon the highway is such as to blend with the surface of the highway, and reduce the visibility thereof, the driver of an automobile is only required to exercise due care in stopping or turning aside his car, if possible, after such object, vehicle or animals can be seen by the exercise of due care." The court nowhere advised the jury that a driver of a car was necessarily negligent under such circumstances; but by

instruction No. 5 given by the court, the jury were instructed: "It was the duty of the defendant to drive his car in a reasonably careful manner at a reasonable rate of speed and have the same under reasonable control and exercise ordinary care to avoid an accident. A failure to exercise ordinary care in any of these matters would be evidence of negligence." And by instruction No. 11 the jury were further advised that no person should operate a motor vehicle on a highway at a rate of speed greater than was reasonably safe and proper, having due regard for the traffic and use of the highway, and the condition of the highway; nor at a rate of speed such as to endanger the life, limb or property of another; and further, "that a failure on the part of the defendant to observe the law regarding the rate of speed would not of itself necessarily constitute the defendant guilty of negligence, but is a fact as shown together with all other facts and circumstances as to the state of the traffic, the condition of the highway, the character of the vehicle and other matters, so far as shown by the evidence, having a bearing upon the question of defendant's negligence, to be considered by the jury in determining whether or not the speed at which the defendant was traveling was a negligent one." The instructions given, while not mentioning specifically all the circumstances referred to in the requested instruction, do authorize the jury to take into consideration in connection with the evidence as to the rate of speed, "all other facts and circumstances, as to the state of the traffic, the condition of the highway, the character of the vehicle and other matters, so far as shown by the evidence," in determining the question of negligence. This was comprehensive enough to authorize the consideration by the jury of the circumstances mentioned in the requested instruction. If there was evidence of conditions coming within the rule announced, it was a matter which, under the facts in this case, was properly left to the argument by counsel to the jury. The proposition contained in the requested instruction being suffi-

ciently covered by the instruction given by the court, there was no error in refusing the instruction tendered.

Finding no error prejudicial to appellants, the judgment of the district court is

AFFIRMED.

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

FILED JUNE 12, 1936. No. 29611.

Appeal. The sustaining of a motion to strike certain parts of an answer, without further judicial action, does not constitute a final, appealable order.

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

Howard Saxton, for E. H. Luikart, receiver of Verdigre State Bank, appellant.

Smith & Schall and *Gerald M. Vasek,* for National Surety Company, appellee.

F. C. Radke and *Clarence G. Miles,* for State Bank of Omaha.

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

EBERLY, J.

In a proceeding instituted by the attorney general of this state, in the district court for Douglas county, under our banking act, having for its purpose the winding up of the affairs of the State Bank of Omaha, an insolvent institution, George S. Van Schaick, superintendent of insurance of the state of New York, filed a petition of intervention challenging the claim of E. H. Luikart, receiver of the Verdigre State Bank of Verdigre, Ne-

braska, to certain dividends claimed by him arising out of the State Bank of Omaha, and due to the National Surety Company of New York. The prayer of the petition of intervention included the following: "That intervener as superintendent of insurance of the state of New York in behalf of himself and National Surety Company be adjudged and decreed to be entitled to all dividends declared on the claims of the National Surety Company heretofore filed herein and adjudicated by the order of this court made on January 2, 1935."

To this, E. H. Luikart as receiver of the Verdigre State Bank, filed his "answer." It is made up of 26 numbered paragraphs, together with exhibits attached to this pleading, which in all comprise 201 pages of the typewritten transcript on appeal filed in this court.

To this pleading, intervener George S. Van Schaick, superintendent of insurance of the state of New York, filed his motion to strike parts of the answer of E. H. Luikart, for reasons stated therein. This motion to strike was made up of 35 paragraphs and excepted from its scope the first paragraph of the answer and the prayer thereof.

Thereafter, on April 25, 1935, after due hearing, an order was duly entered in this cause by the district court for Douglas county sustaining this motion to strike and setting forth: "It is by the court ordered that said motion be, and the same hereby is, sustained *in toto*, and said E. H. Luikart as said receiver, excepts."

It will be remembered that the first paragraph of the answer to intervener's petition was in no manner affected by the sustaining of this motion to strike. Such first paragraph admits paragraph one of said petition of intervention; admits that on June 1, 1934, an order, a copy of which is attached to said petition of intervention as exhibit 1, was professed to be entered in the supreme court of the state and county of New York; and admits that exhibit 2, attached to said petition of intervention, is a correct copy of article XI, chapter 191 of the Laws

of New York; *and denies each and every other allegation in said petition of intervention contained.* There also remains wholly unaffected by this order of the district court for Douglas county the prayer for relief forming a part of Luikart's answer.

Notwithstanding the effect of the motion thus sustained, issues were actually joined and the cause is still pending in the district court for Douglas county. The record now before us discloses no final order making any disposition of such cause. But from the order of the district court for Douglas county sustaining this motion to strike, Luikart, as receiver, endeavors to appeal to this court.

The preliminary, and, in this case, final question presented to this tribunal on appeal is: Does the record disclose an appealable order, a final order, as defined by our Code?

In argument, the appellant insists that the motion to strike is to be considered as a general demurrer to the several parts of his pleading stricken by the sustaining thereof. In view of the fact that even if this contention were true it would not afford a basis for relief, we will merely suggest that it would seem, in consideration of the actual situation, that this contention involves obvious inaccuracy in the use of language, in view of what the record actually presents.

The decision of this court in *Welch v. Calhoun,* 22 Neb. 166, 34 N. W. 348, is controlling in the instant case. In the *Welch* case the district court had sustained a motion "to strike the amended petition from the files." Plaintiff sought a review of this order. In this court, appellee moved to dismiss on the ground that there was no final order or judgment rendered in the district court upon which a proceeding in error could be predicated. Reese, J., delivered the opinion of the court, sustaining this motion to dismiss the appeal. From this opinion, announced by this court in the July term, 1887, almost a half century ago, we quote:

"Section 582 of the Civil Code provides that, 'A judgment rendered or final order made by the district court may be reversed, vacated, or modified by the supreme court, for errors appearing on the record.'

"By section 581 a final order is defined to be 'an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment.'

"It is apparent that under this definition the order of the district court sustaining the motion to strike the amended petition from the files was not an order, which, in effect, determined the action and prevented a judgment. So far as is shown by the record—this order being the last one entered—no final order has been made and the cause is yet upon the docket of the district court for determination.

"Plaintiff in error has cited two cases from the supreme court of Michigan (*Webster v. Hitchcock*, 11 Mich. 56; *McMann v. Westcott*, 47 Id., 177), in which it is held that such an order as the one made in the case at bar is final, and can be reviewed on error. But we have failed to find any statutory enactment in that state by which a final order is defined, as in this. And did one exist, we should feel bound by the decision of this court, by which the law of the state is fully settled, and, we think, correctly. See *Daniels v. Tibbets*, 16 Neb. 666; *Artman v. West Point Mfg. Co.*, 16 Neb. 572; *Nichols, Shepard & Co. v. Hail*, 5 Neb. 194; *Aspinwall v. Aspinwall*, 18 Neb. 463."

Sections 581 and 582 of the Civil Code, quoted from in the *Welch* opinion, now appear as sections 20-1902 and 20-1911, Comp. St. 1929. They have not been amended, nor has the construction thereof varied from that announced in the cited case. Nor would appellant be entitled to greater consideration if the motion to strike were considered as a general demurrer.

"Where a demurrer to a petition is sustained in the

court below, to authorize a review of the case by the supreme court, there must be a final judgment dismissing the case." *Miller v. Burlington & M. R. R. Co.*, 7 Neb. 227. See, also, *Scofield v. State Nat. Bank of Lincoln*, 8 Neb. 16; *Shedenhelm v. Shedenhelm*, 21 Neb. 387, 32 N. W. 170; *School District v. Cooper*, 29 Neb. 433, 45 N. W. 618; *Larson v. Sloan*, 77 Neb. 438, 109 N. W. 752; *Huffman v. Rhodes*, 72 Neb. 57, 100 N. W. 159; *Bartels v. Sonnenschein*, 54 Neb. 68, 74 N. W. 417; *Whitney v. Spearman*, 50 Neb. 617, 70 N. W. 240; *Yager v. Lemp*, 39 Neb. 93, 58 N. W. 285.

No order of dismissal or final disposition of the instant case is shown in the transcript before us.

We find that for more than half a century the provisions of our Civil Code, relative to appealable orders, have been consistently and continuously construed in a manner adverse to the contention of appellant in the instant case.

Nor is appellant altogether sustained by some of the authorities cited in his brief.

2 American Jurisprudence, Appeal and Error, sec. 71, quoted in full, is as follows: "In the absence of statutory regulation, an order overruling or sustaining a demurrer is not, as a general rule, final or appealable. If, however, the party against whom the demurrer is filed chooses to stand on his pleading and allows final judgment to go against him, especially if the merits of the case are thus involved, the judgment thus entered may be reviewed, and upon such review the correctness of the ruling on the demurrer can be determined. However, statutory provision has been made for appeals from rulings on demurrer in some jurisdictions. But even under such statutes, the defendant must elect to stand upon his demurrer in order to avail himself of such right in regard to orders overruling or sustaining such demurrer."

"Statutory provision" just above referred to, does not include the statutes of Nebraska.

In 2 American Jurisprudence, Appeal and Error, sec.

73, we find this rule announced: "In the absence of statute, a ruling upon a motion to strike off or to strike out a pleading or part thereof is not, as a general rule, reviewable. But where a party elects to stand upon his motion to strike and a final judgment is entered thereon, such judgment is appealable."

What is intended by the words "final judgment is entered thereon" may be determined beyond doubt by an inspection of the case cited to support this text, viz., *First Title & Securities Co. v. United States Gypsum Co.*, 211 Ia. 1019, 233 N. W. 137, 73 A. L. R. 1196. The official report of this case in 73 A. L. R. 1196 discloses that a complete statement there made includes the following: "A contention that an appeal is one from a ruling on a motion to strike out a portion of the answer, and hence should be dismissed as being not one from a final order, is not sustainable where the appeal is also from a final judgment dismissing the petition, entered upon the plaintiff's electing to stand upon his motion to strike."

So, too, in the annotation in 21 A. L. R. 264, cited by the appellant, we find, in the commencement of this note, the words: "In the absence of statutory regulation, an order overruling a demurrer is not, as a general rule, final or appealable."

While we have endeavored to examine the authorities cited by appellant with care, we find them largely based on statutory enactments peculiar to the jurisdictions from which they are cited. If we may reiterate the well-chosen words of Justice Reese in *Welch v. Calhoun, supra*, we would add, if statutory provisions in any of such states were truly similar to our own, "we should feel bound by the decision of this court, by which the law of the state is fully settled, and, we think, correctly."

It follows, in the instant case, that the order of the district court for Douglas county sustaining intervener's motion to strike parts of the answer of Luikart, receiver, is not a final order, as defined by our statutory provision, and a review of the correctness thereof is not proper at

this time. The proceedings on appeal are, therefore, dismissed at the cost of the appellant, and the cause remanded for further proceedings.

APPEAL DISMISSED.

CHARLES CARLSON, TRUSTEE, APPELLANT, V. FRED KIRCHMAN ET AL., APPELLEES.

FILED JUNE 12, 1936. No. 29637.

1. **Bankruptcy.** The federal bankruptcy act gives the trustee in bankruptcy a right to recover property transferred in violation of state law, without reference to the four months' limitation, and if a creditor could have avoided the transfer under the state law, the trustee may do the same.
2. **Fraudulent Conveyances.** The question of fraudulent intent in all cases pertaining to fraudulent conveyances under the laws of Nebraska shall be deemed a question of fact, and not of law, and no conveyance or charge shall be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration. Comp. St. 1929, sec. 36-405.
3. ———: CONSIDERATION. "In a contest between a vendee and creditors of the vendor, the adequacy of the consideration, if it be a valuable consideration, will not be inquired into except for the purpose of throwing light on the intention of the parties." *Jones v. Dunbar*, 52 Neb. 151, 71 N. W. 976.
4. ———: ———. In absence of actual fraudulent intent participated in by the parties to a challenged conveyance, the payment of what amounts substantially to the fair market value of premises purchased, irrespective of size or actual amount of the purchase price, must be deemed the payment of an adequate present consideration by the transferee or encumbrancer, and negatives any fraud on creditors, and is sufficient to sustain the transaction.
5. **Evidence** in the record examined *de novo*, and *held* ample to justify the findings and decree of the trial court.

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

H. A. Bryant and *William Niklaus*, for appellant.

J. H. Barry and *H. V. Kanouff, contra.*

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

EBERLY, J.

This was an action in the nature of a creditor's bill brought by Charles Carlson, as trustee in the matter of bankruptcy of Herman L. Johnson, in the district court for Saunders county, against Fred Kirchman and Hilma Kirchman. The purpose of the action was to set aside, as fraudulent, a warranty deed executed by Herman L. Johnson on October 24, 1933, purporting to convey to defendant Fred Kirchman an undivided one-seventh interest in 229 acres of land situated in Saunders county, Nebraska, all properly described therein, expressly subject to the homestead and dower rights of Carrie Johnson, an incompetent, in and to the same. The petition charges that this deed was executed by the grantors while insolvent, with the intent and purpose on part of the grantors of hindering, delaying, cheating and defrauding their creditors, as to all of which the grantee is alleged to have had full knowledge at and prior to his acceptance of said deed.

By the answer of defendants, they admit the appointment and qualification of the plaintiff, trustee, as of date April 20, 1934; that on or about the 25th day of October, 1933, the said Herman L. Johnson was insolvent, and the owner of a one-seventh interest in the land described in plaintiff's petition, and on said date conveyed the same to defendant, Fred Kirchman. This answer sets forth the homestead of Carrie Johnson, incompetent, and the value thereof; admits the purchase of said interest in said land subject to a real estate mortgage thereon securing approximately $1,470 unpaid, in favor of Carrie Johnson, incompetent; and alleges that the purchase price paid constituted the fair and reasonable value thereof; expressly denies all charges of fraud made by plaintiff; that, prior to the time these defendants purchased said real estate,

said Herman L. Johnson had repeatedly sought to sell the same, and had offered the same to Charles Carlson, who is now suing as trustee, and to John G. Johnson, guardian of Carrie Johnson, incompetent, on substantially the same terms as those upon which these defendants purchased the land, and all refused to purchase the same, giving as reason therefor that said property was not worth the amount of the mortgage against it. It is further alleged that said property was purchased by the defendants for the reason that the defendant Hilma Kirchman, who is a daughter of Carrie Johnson, the owner of the homestead interest, is likewise the owner of an undivided one-seventh interest in said land, and if the same were sold to a stranger, in all probability it would mean discord, lawsuits and expense to the widow, Carrie Johnson, and the remaining heirs who are the owners of this real estate.

To this answer, the plaintiff filed a general denial.

There was a trial to the court, at the close of which the court found generally in favor of the defendants and against the plaintiff, ordered the deed confirmed, and that plaintiff pay the costs of the action. From the overruling of his motion for a new trial, the plaintiff appeals.

We have carefully examined the testimony as preserved in the bill of exceptions, and are quite of the opinion that the action of the trial court is, in all respects, correct.

Carrie Johnson, the incompetent, is the mother of John G. Johnson, Herman L. Johnson, and Hilma Kirchman. Prior to the conveyance, Herman L. Johnson was the owner of the one-seventh interest in the real estate in litigation. It was embraced within the mother's homestead, and subject to the superior rights of the mother for the period of her lifetime. It was mortgaged to Carrie Johnson, the incompetent, to secure an indebtedness then amounting to $1,470. It is fairly established that this one-seventh interest in its then condition was unsalable and could not be partitioned, and the actual value thereof did not exceed the amount due on the mortgage lien. In

this condition of affairs, the son-in-law, Fred Kirchman, purchased it for the amount of the encumbrance against it, and took a conveyance thereof, subject to the same, and paid therefor, in addition, the sum of $1 in cash. This transaction was more than four months prior to the institution of the bankruptcy proceedings which resulted in the appointment of plaintiff herein as trustee in bankruptcy. It is quite true that, as to such transactions, by the provisions of the federal bankruptcy act, as to property of the bankrupt or in which he had any interest and which is not in custody of the bankruptcy court, the trustee is deemed vested, as of the date of institution of bankruptcy proceedings, with all the rights and remedies of a judgment creditor holding an execution duly returned unsatisfied. In other words, section 70e of the bankruptcy act gives the trustee in bankruptcy a right to recover property transferred in violation of state law, without reference to the four months' limitation, and if a creditor could have avoided the transfer under the state law, the trustee may do the same. *Stellwagen v. Clum*, 245 U. S. 605. It follows that the true character of the conveyance in litigation must be determined by our state law.

Section 36-405, Comp. St. 1929, provides: "The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact, and not of law, and no conveyance or charge shall be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration."

This court has announced the rule: "In a contest between a vendee and creditors of the vendor, the adequacy of the consideration, if it be a valuable consideration, will not be inquired into except for the purpose of throwing light on the intention of the parties." *Jones v. Dunbar*, 52 Neb. 151, 71 N. W. 976.

Under our statute, there must be actual intent to defraud, participated in by both parties to the transaction, and, indeed, this appears to be the general rule in other

jurisdictions. *Skinner v. Overend,* 190 Minn. 456, 252 N. W. 418.

In the present case, the grantee paid what amounted to the fair market value of the premises, even though the actual cash that changed hands at the time of the delivery of the deed was only $1. He is well within the protection of the rule: "The payment of an adequate present consideration by the transferee or encumbrancer negatives any fraud on creditors and is sufficient to sustain the transaction." 7 C. J. 174. Particularly is this unquestionably true where, as in the instant case, the evidence furnishes no foundation for the inference of actual fraud.

In addition, it appears to be a general rule that a court of equity will not set aside, as fraudulent, a conveyance of an equity in land which was clearly of no actual value. *Williams v. Robbins,* 15 Gray (Mass.) 590; *Tait v. Crissman,* 158 Ia. 220, 139 N. W. 461; *Keith v. Albrecht,* 89 Minn. 247, 94 N. W. 677; *Aretz v. Kloos,* 89 Minn. 432, 95 N. W. 216. In short, an examination of the evidence in the record *de novo* leads inescapably to the conclusion that there was no actual fraud in the transaction in litigation, and that the trial court's action was correct.

The judgment of the district court is, therefore,

AFFIRMED.

WALTER HOWARTH, APPELLEE, V. NICHOLAS M. BECKER ET AL., APPELLANTS.

FILED JUNE 12, 1936. No. 29690.

1. **Mortgages:** FORECLOSURE: MORATORIUM. "When it appears from the evidence that the amount of the mortgage liens on the land exceeds its value, a moratory stay under section 20-21,159, Comp. St. Supp. 1935, must be denied." *Srajhans v. Mares,* 130 Neb. 924, 267 N. W. 82.
2. **Constitutional Law.** "A statute will not be declared unconsti-

tutional unless necessary to proper disposition of pending case." *First Trust Co. v. Stenger*, 130 Neb. 750, 266 N. W. 642.

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

Waring & Waring, for appellants.

Edward J. Kubat, contra.

Heard before GOSS, C. J., GOOD, EBERLY, DAY and CARTER, JJ., and KROGER and IRWIN, District Judges.

EBERLY, J.

This is an action to foreclose a mortgage on 80 acres of land in Fillmore county. On February 7, 1933, a decree of foreclosure and sale of the premises was entered, adjudging the amount then due plaintiff, Howarth, on his first mortgage lien, to be $5,807.32, bearing 10 per cent. interest from the date of the decree, and the amount due Peter B. Becker on his second mortgage the sum of $2,747.45, with interest at 7 per cent. per annum from date of decree, and directing sale of the premises to satisfy the amounts so found due.

In due time the premises were sold and the sale confirmed, and the mortgagor and owner of the equity of redemption made application for relief under the terms of the Nebraska moratorium act of March 2, 1933.

On appeal to this court, the action of the trial court was reversed and the cause remanded, for the reason that the pleadings in the district court contained no challenge to the constitutionality of the moratorium act, and the appellee in the hearing before the district court failed to carry the burden of proof, and introduced no evidence tending to show that the mortgaged premises were of less value than the amount of the decree of foreclosure. See, *Howarth v. Becker*, 128 Neb. 580, 259 N. W. 505.

On remand, the defendant Nicholas M. Becker made further application for relief by moratorium under the

provisions of House Roll No. 1 of the Laws of 1935, Laws 1935, ch. 41. To this application plaintiff filed written objections setting forth, in addition to other allegations, that there was then $7,269.63 due and unpaid upon his first mortgage lien; that real estate taxes assessed against said premises for the years 1930, 1931, 1932, 1933, and 1934 were due and unpaid, and in the aggregate amounted to $244.40; that the amount due and unpaid on the second mortgage in decree amounted to $3,318.45; that the actual value of the mortgaged real estate, exclusive of buildings, did not exceed $4,500; that said improvements thereon were not worth to exceed the sum of $1,000; and that the real estate was of less value than the unpaid tax liens thereon and the amount due on plaintiff's decree. In addition, plaintiff challenged the moratorium act of 1935 as unconstitutional, and violative of constitutional provisions expressly set forth in such objections. After due hearing, the district court determined, from the evidence presented, "that good cause has been shown why the relief under said act should be denied for the reason that the defendant applicant has no substantial equity in the real estate involved herein, and, further, that said House Roll No. 1 is unconstitutional." Thereupon the trial court sustained the objections of plaintiff, and denied application of defendant Nicholas M. Becker for relief under said act. From this judgment, Becker appeals.

A careful review of the evidence preserved in the bill of exceptions fully sustains the judgment of the trial court as to the value of the mortgaged premises, and brings this case squarely within the doctrine announced in *Clark v. Hass*, 129 Neb. 112, 260 N. W. 792, viz.: "Where, upon a hearing on an application for a moratory stay of proceedings * * * it appears that the amount of the mortgage lien exceeds the value of the lands secured by the mortgage, it is not an abuse of discretion on the part of the trial court to deny the application." Though the court, in the case last cited, was dealing with the act

of 1933, the principle is equally controlling as applied to the provisions of House Roll No. 1, Laws of 1935.

"When it appears from the evidence that the amount of the mortgage liens on the land exceeds its value, a moratory stay under section 20-21,159, Comp. St. Supp. 1935, must be denied." *Srajhans v. Mares,* 130 Neb. 924, 267 N. W. 82. See, also, *First Trust Co. v. Stenger,* 130 Neb. 750, 266 N. W. 642; *Luikart v. Graf,* 130 Neb. 736, 266 N. W. 641.

In view of the fact that the instant case is not one entitled to come within the scope of relief which the moratorium statute purports to give, we are obviously precluded from considering the constitutional questions argued in the briefs.

"A statute will not be declared unconstitutional unless necessary to proper disposition of pending case." *First Trust Co. v. Stenger,* 130 Neb. 750, 266 N. W. 642.

The fundamental doctrines which control this tribunal in the determination of constitutional questions presented for its consideration are substantially the same as those observed by the supreme court of the United States. These have been epitomized by one of its eminent judges in the following language:

"1. The court will not pass upon the constitutionality of legislation in a friendly, nonadversary, proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between inviduals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.' *Chicago & Grand Trunk R. Co. v. Wellman,* 143 U. S. 339, 345, 12 Sup. Ct. 400, 402, 36 L. Ed. 176. Compare *Lord v. Veazie,* 8 How. *251, 12 L. Ed. 1067; *Atherton Mills v. Johnston,* 259 U. S. 13, 15, 42 Sup. Ct. 422, 66 L. Ed. 814.

"2. The court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'

Liverpool, N. Y. & P. Steamship Co. v. Emigration Commissioners, 113 U. S. 33, 39, 5 Sup. Ct. 352, 355, 28 L. Ed. 899; *Abrams v. Van Schaick,* 293 U. S. 188, 55 Sup. Ct. 135, 79 L. Ed. 278; *Wilshire Oil Co. v. United States,* 295 U. S. 100, 55 Sup. Ct. 673, 79 L. Ed. 1329. *'It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'* (Italics ours.) *Burton v. United States,* 196 U. S. 283, 295, 25 Sup. Ct. 243, 245, 49 L. Ed. 482.

"3. The court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, N. Y. & P. Steamship Co. v. Emigration Commissioners, supra.* Compare *Hammond v. Schappi Bus Line, Inc.,* 275 U. S. 164, 169-172, 48 Sup. Ct. 66, 72 L. Ed. 218.

"4. *The court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.* (Italics ours.) This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the court will decide only the latter. *Siler v. Louisville & Nashville R. Co.,* 213 U. S. 175, 191, 29 Sup. Ct. 451, 53 L. Ed. 753; *Light v. United States,* 220 U. S. 523, 538, 31 Sup. Ct. 485, 55 L. Ed. 570. Appeals from the highest court of a state challenging its decision of a question under the federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground. *Berea College v. Kentucky,* 211 U. S. 45, 53, 29 Sup. Ct. 33, 53 L. Ed. 81.

"5. The court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. *Tyler v. Judges, etc.,* 179 U. S. 405, 21 Sup. Ct. 206, 45 L. Ed. 252; *Hendrick v. Maryland,* 235 U. S. 610, 621, 35 Sup. Ct. 140, 59 L. Ed. 385. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks

a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained. *Columbus & Greenville R. Co. v. Miller*, 283 U. S. 96, 99,100, 51 Sup. Ct. 392, 75 L. Ed. 861. In *Fairchild v. Hughes*, 258 U. S. 126, 42 Sup. Ct. 274, 66 L. Ed. 499, the court affirmed the dismissal of a suit brought by a citizen who sought to have the nineteenth amendment declared unconstitutional. In *Massachusetts v. Mellon*, 262 U. S. 447, 43 Sup. Ct. 597, 67 L. Ed. 1078, the challenge of the federal maternity act was not entertained although made by the commonwealth on behalf of all its citizens.

"6. The court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. *Great Falls Mfg. Co. v. Attorney General*, 124 U. S. 581, 8 Sup. Ct. 631, 31 L. Ed. 527; *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407, 411, 412, 37 Sup. Ct. 609, 61 L. Ed. 1229; *St. Louis Malleable Casting Co. v. Prendergast Construction Co.*, 260 U. S. 469, 43 Sup. Ct. 178, 67 L. Ed. 351.

"7. 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell v. Benson*, 285 U. S. 22, 62, 52 Sup. Ct. 285, 296, 76 L. Ed. 598." *Ashwander v. Tennessee Valley Authority*, 56 Sup. Ct. Rep. 466, 482.

It follows, in the instant case, that, upon the sole ground that the mortgage liens exceed the value of the mortgaged premises, we determine that the denial of relief as made by the trial court was correct. and its judgment is

AFFIRMED.

STATE, EX REL. WILLIAM H. WRIGHT, ATTORNEY GENERAL, APPELLEE, V. WILLIAM O. BROWN, APPELLANT.

FILED JUNE 12, 1936. No. 29850.

1. **Justices of the Peace.** A justice of the peace is a constitutional officer, and legislative action relative thereto is limited by the Constitution.
2. **Courts:** MUNICIPAL COURTS. A municipal court may be substituted by law for justices of the peace within such districts. Const. art. V, sec. 1.
3. ———: ———: DISTRICTS. The phrase, "within such districts," as used in the Constitution, means that the territorial limits of the municipal court so substituted must be coextensive with the district for which it is substituted.
4. **Constitutional Law.** A statute substituting a municipal court for justice of the peace courts, the election of the judge of which court is limited to the electors of a city in which the court sits, excluding electors of territory outside city, but within its jurisdiction, contravenes the Constitution. Const. art. I, sec. 22; art. VI, sec. 1.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JEFFERSON H. BROADY and LINCOLN FROST, JUDGES. *Reversed and dismissed.*

James A. Brown, William O. Brown, Robert A. Nelson, Willis R. Hecht, Bruce Fullerton and *Frank Barrett,* for appellant.

William H. Wright, Attorney General, Daniel Stubbs and *Lester A. Danielson, contra.*

Joseph Ginsburg, Arthur Whitworth, Edward Fisher, J. Lee Rankin and *J. P. O'Gara, amici curiæ.*

Heard before GOSS, C. J., ROSE, GOOD, DAY and CARTER, JJ., and KROGER and IRWIN, District Judges.

DAY, J.

This is an action in *quo warranto* brought by William H. Wright, attorney general, to oust the defendant from the office of justice of the peace for Lancaster precinct,

which is located within the tenth justice of the peace district of Nebraska. This action is based upon chapter 59, Laws 1935, effective January 1, 1936, which provides that in each justice of the peace district in which there is located a city of the first class, having a population of not less than 40,000 nor more than 100,000, municipal courts, as heretofore established, are substituted by law for the justice of the peace courts within such districts. The tenth justice of the peace district of Nebraska is coextensive with Lancaster county, and there is located in the district the city of Lincoln, in which there was established a municipal court, so that the tenth justice of the peace district comes within the contemplation of the law. The answer of the defendant admits this situation, but asserts that the law is invalid because it transgresses several provisions of the state Constitution. This case was tried in the district court for Lancaster county before Judges E. B. Chappell, J. H. Broady, and Lincoln Frost. The district court held that House Roll 166 (Laws 1935, ch. 59) was a valid, constitutional enactment, and allowed the writ of *quo warranto* to issue, ordering the defendant to transfer his dockets and records to the municipal court of the city of Lincoln forthwith.

The statute applies only to the tenth justice of the peace district, the territory of which is coextensive with Lancaster county. Lancaster precinct is a political subdivision of Lancaster county outside of the territorial limits of the city of Lincoln. The municipal court of the city of Lincoln, which was substituted for justice of the peace courts in the tenth district, has a judge elected by the electors of the city of Lincoln. By the act, the municipal court of Lincoln was substituted for all justices of the peace in the district.

Section 32-217, Comp. St. 1929, originally provided: "In each justice of the peace district in which there is located a city of the metropolitan class, or a city of the first class having a population of not less than forty thousand (40,000) nor more than one hundred thousand

(100,000), municipal courts, as heretofore or hereafter established, are hereby substituted by law for the justice of the peace and police judge within such cities. Provided, this act shall not be construed to substitute municipal courts for justices of the peace outside said cities in said justice of the peace district."

Chapter 59, Laws 1935, amended this section to read as follows: "In each justice of the peace district in which there is located a city of the metropolitan class, or a city of the first class having a population of not less than forty thousand (40,000) nor more than one hundred thousand (100,000), municipal courts, as heretofore or hereafter established, are hereby substituted by law for the justice of the peace and police judge within such justice of the peace districts. Provided this act shall not take effect until January 1, 1936."

The situation is unique in that the municipal court of the city of Lincoln is substituted for justices of the peace for territory outside the city limits. The municipal court in the city of Lincoln had jurisdiction coextensive with Lancaster county. Comp. St. 1929, sec. 22-201. The judge of the court is elected by the voters within the city. In order to be eligible for the office, he must have resided within the city for a period of five years.

The power of the legislature to enact chapter 59, Laws 1935, must rest upon section 1, art. V of the Constitution of the state of Nebraska: "The judicial power of the state shall be vested in a supreme court, district courts, county courts, justices of the peace, and such other courts inferior to the supreme court as may be created by law; *but other courts may be substituted by law for justices of the peace within such districts, and with such additional civil and criminal jurisdiction as may be provided by law.*" (Italics ours, to indicate the amendment of 1920.) Prior to 1920, the legislature did not have the power to substitute another court for a justice court. In *State v. Kubat,* 110 Neb. 362, 193 N. W. 754, this court stated: "Formerly the Constitution contained no pro-

vision for substituting other courts for justices of the peace, and the legislature had attempted to establish municipal courts with exclusive jurisdiction within the limits of counties over all civil matters up to $1,000. This court held that the legislature had no such authority under the Constitution. *State v. Magney,* 52 Neb. 508."

A justice of the peace is a constitutional officer, and legislative action relative thereto is limited by the Constitution. See *Conroy v. Hallowell,* 94 Neb. 794, 144 N. W. 895, which holds that a county judge is a constitutional officer. The same reasons apply to a justice of the peace.

The legislative action exercised in this instance must rest upon the constitutional provision above set out "but other courts may be substituted by law for justices of the peace within such districts." The legislature substituted another court for justice of the peace in the tenth district. They substituted the municipal court of Lincoln. The legislature had already conferred jurisdiction over the entire district upon the municipal court of Lincoln. In *State v. Kubat, supra,* it was held that the municipal court could be substituted for justice of the peace courts within the district. The situation in that case was different in some respects from this, because there the municipal court of Omaha was substituted for justices of the peace within the sixteenth district, the territory of which was coextensive with the city of Omaha. But it is authority for the rule that a municipal court may be substituted by law for justices of the peace within such districts. Const. art. V, sec. 1.

The legislative action is questioned for the reason that the electors of the justice of the peace district No. 10 residing outside the city of Lincoln are not permitted by law to vote for the judge of the municipal court of the city of Lincoln. It is urged that electors have a constitutional right to vote that is accorded other electors of the territory from or for which such officer is elected.

This argument is based upon section 22, art. I of the Constitution, which is: "All elections shall be free; and

there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Section 1, art. VI, provides: "Every citizen of the United States, who has attained the age of twenty-one years, and has resided within the state for six months and within the county and voting precinct for the term provided by law, shall be an elector."

Is the constitutional right of citizens to vote impeded or hindered by this statute? The relator asserts that no right is violated and cites three cases to support his contention. In *State v. Hanson,* 80 Neb. 724, 115 N. W. 294, the question arose relative to a statute providing for the election of officers of a drainage district. It was provided that only landowners in the district could vote and should have one vote for each acre of land. It was held that the last-cited provision of the Constitution does not apply to an election of officers for a drainage district. "The formation of the district is not for the purpose of government, but for the purpose of constructing a public improvement, after the proper governmental body has determined that the same would be of public utility." *State v. Hanson,* 80 Neb. 738, 746, 117 N. W. 412.

The only other Nebraska case called to our attention is *State v. Cones,* 15 Neb. 444, 19 N. W. 682, which discusses the right of women to vote at school district elections. In answer to the argument that the Constitution did not confer the legislative franchise upon women, and that, therefore, the legislature lacked power to permit them to vote at school elections, the opinion stated that the provisions in regard to elections were not intended to apply to school districts.

The last case cited by relator, *Page v. Millerton,* 114 Ia. 478, 86 N. W. 440, discusses the power of the legislature to establish city courts and confer on them concurrent jurisdiction with the district and circuit courts. This legislative act required persons residing outside the city in which said court was established, but within the district, to submit to its jurisdiction. This was held not

to violate the provisions of the Iowa Constitution requiring all laws to be of uniform operation and requiring that the right of trial by jury shall remain inviolate. It appears that the rules announced in these cases are not applicable to the situation presented here, or that the questions actually decided are not identical with those presented here.

In *State v. Moorhead,* 99 Neb. 527, 156 N. W. 1067, it was held that our Constitution (art. I, sec. 1) requires that every voter shall as far as practicable have an equal voice in the affairs of government. Certainly, a provision that the city of Lincoln shall provide a court to be substituted for justice of the peace courts in all the territory of Lancaster county is not giving the people outside the city an equal voice in the affairs of government. At the same time, it requires the city of Lincoln to furnish courts for the entire county, a burden not to be overlooked.

In *Peard v. State,* 34 Neb. 372, 51 N. W. 828, it was held (opinion by Post, J.): "It is not within the power of the board of county commissioners to disfranchise legal voters by subdividing a county for election purposes in such manner as to leave them without an opportunity to participate in the election of county officers."

In *State v. Reilly,* 94 Neb. 232, 142 N. W. 923, is a discussion of the jurisdiction of courts. It was urged that the legislature had extended the jurisdiction of the police magistrates three miles beyond the city limits, and thus created a district court. The court regarded this as a curious question unnecessary of determination, but stated: "If the legislature could create a judicial district without reference to the present judicial districts, providing a judge for the district, with jurisdiction not superior to the present district courts, and attempted to do so without giving all the voters of the district a voice in his election, such legislation would probably be invalid."

It has been held: "A statute creating court and limiting election of judge to electors of cities in which court was

to sit, while excluding electors of territory outside of cities, but within jurisdiction of court, *held* unconstitutional." *State v. Sande,* 238 N. W. 504 (205 Wis. 495).

Most of the cases are not directly in point, but by analogy some of them are helpful. It is unthinkable that under our constitutional provisions the election of a judge for Lancaster county (justice of the peace district No. 10) should be limited to the electors of the city of Lincoln, to the exclusion of the electors of the balance of the territory within the jurisdiction. If the legislature can enact a valid law to accomplish this purpose, it may change the justice of the peace districts and substitute the municipal court of Lincoln over a larger territory, including many counties in the state. This is not to say that judges must be elected. But if elected, they must be elected by all the electors of their district. The plan of electing officers by a part of the electors of the district has certainly been condemned. It was argued that the electors of the state did not have a right to vote for all the judges of the supreme court. Each district elects one judge, and each has equal rights in the selection of the court.

Every section of the Constitution must be construed with every other, and the provision that the legislature may substitute other courts for justice of the peace courts must be construed in connection with the last two sections discussed. So construed, it provides that the legislature may substitute municipal courts for justice of the peace courts within its territorial limits. It is urged that the municipal court of Lincoln has jurisdiction over the entire district. That question, though still debatable, is not presented here. But the territorial limits for which the court is elected does not include the entire district. It is also suggested that justices of the peace have jurisdiction over the entire district. However, their court is established in the district for which they are elected and sit. The mere fact that they may send process outside of their precinct is not conformable to the situation.

The writ should not have issued. The judgment is accordingly reversed, and the cause dismissed.

REVERSED AND DISMISSED.

HELEN SHUMWAY ET AL., APPELLEES, V. DEPARTMENT OF BANKING, RECEIVER, APPELLANT.

FILED JUNE 12, 1936. No. 29464.

Banks and Banking: INSOLVENCY: PREFERENCES. Sureties who confessed liability on bond given to secure deposits of village in bank which became insolvent and recouped part of their loss by selling bonds delivered to them by bank for their protection *held* not entitled to preferred claim against assets of bank.

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

F. C. Radke, W. A. Crossland and *John A. Young,* for appellant.

I. D. Beynon and *Frederick L. Wolff, contra.*

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and KROGER and IRWIN, District Judges.

PAINE, J.

Interveners filed claim for $9,571.12 against assets of the Farmers Bank of Lyons. The receiver thereof classified it only as a general claim. Upon appeal to the district court, it was decreed to be a trust fund, payable in full as a first preferred lien out of the assets of the insolvent bank. The department of banking appealed.

This case was first argued to division No. 1 of this court on December 2, 1935, and an opinion entered, which is found in 130 Neb. 491, 265 N. W. 553, which opinion, released February 28, 1936, is hereby withdrawn by this court. The oral argument on the motion for rehearing was allowed on May 18, 1936, to the full court.

The evidence discloses that financial difficulties overtook the Farmers Bank of Lyons, Burt county, Nebraska,

on January 6, 1933, and it was taken over as insolvent by the department of banking of the state of Nebraska on January 7, 1933, and did not, at any time after said date, open its doors and operate as a going concern, but remained in charge of the department of banking, and with its doors closed, until May 20, 1933. The provisions were then complied with, under which an insolvent bank might be allowed to reopen for the sole purpose of doing a "limited banking business," in strict accordance with House Roll No. 167, Laws 1933, ch. 16 (Comp. St. Supp. 1933, sec. 8-1,121), which had become a law on February 1, 1933, under its emergency clause. As so reopened, it was still an insolvent bank. No cash reserve was required. This restricted operation continued until October 30, 1933, when the bank was declared insolvent and formal liquidation commenced. Solvency of the bank was never restored after the original closing on January 7, 1933, under section 8-116, Comp. St. 1929, reading in part: "A banking corporation subject to the provisions of this article shall be deemed to be insolvent when the actual cash market value of its assets is insufficient to pay its liabilities to its depositors, or when it is unable to meet the demands of its creditors in the usual and customary manner, or when it shall fail to make good its reserve as required by law, or when the stockholders, upon notice from the department of trade and commerce or its successor, shall fail to make good an impairment of its capital."

The testimony shows that the bank had made written application on May 3, 1932, to become depository for the funds of the village of Lyons, and the trustees of said village named the bank as its depository and accepted $13,000 of securities of the bank as collateral to a personal bond of the officers of the bank in the sum of $15,000 as full security for the village deposits. Later a new bond was furnished by the bank in the sum of $20,000, signed by Helen Shumway and Clara A. Christiansen as sureties, and the securities which had been previously

pledged to the village were transferred to these two sureties for their protection on the personal surety bond they had given for the bank. On June 1, 1932, the board of trustees accepted and approved the new bond, and the village treasurer continued to deposit and withdraw funds from said account until the bank was taken over as insolvent on January 7, 1933, at which time the village had on deposit in such checking account the sum of $16,965.77, secured by the depository bond of the interveners and appellees, who were protected by the securities they had received for signing the bond.

While the bank was closed and in possession of the department of banking, and before it had been permitted to reopen under restrictions, the village board brought action on the bond of the interveners for the amount of the deposit of the village. The sureties and interveners confessed judgment upon condition that no execution would issue against them if they would make a $5,000 payment on September 1, 1933, another payment September 1, 1934, and the balance September 1, 1935, which agreement was approved by the village trustees May 2, 1933, and a judgment was entered by the district court against the sureties on May 12, 1933. The deposit of the village was assigned to the sureties; that is, the village deposit was to be closed out and an account opened in the name of the two sureties for exactly the same amount. The sureties took whatever interest the village had in its deposit which had been otherwise secured.

The sureties sold the securities which had been pledged to them by the bank, and received $7,199.33 upon securities which had a face value of about $13,000. This amount was paid to the village to reduce the liability on the judgment, and the deposit in the bank thereby was reduced to $9,766.44.

Helen Shumway and Clara A. Christiansen, sureties, filed a petition in intervention on March 21, 1934, alleging that the village of Lyons wrongfully and unlawfully deposited funds of said village with said bank, contrary

to the statutes of Nebraska; that said bank did not apply for the privilege of becoming a depository, and that the village board did not designate nor approve said bank as a depository, and that said bank paid no interest on such deposits, and that the village treasurer was without authority to make a general deposit of funds in said bank, and that the said village had a preferred claim for such trust funds against the assets of the bank. On May 12, 1933, the said village duly assigned to the interveners its claim against the bank, and interveners allege that the receiver erroneously refused to classify the claim as a claim for trust funds, and erroneously classified it as a general claim, and they ask that the action of the receiver be set aside, and that they be given a valid preferred claim in the sum of $9,571.12.

The superintendent of banks filed an answer thereto, and insists that said claim was properly classified for the reason that it was a claim based upon a deposit which was otherwise secured under section 8-1,102, Comp. St. Supp. 1933, and alleges that on January 7, 1933, the said village of Lyons had a general checking account, which was secured by a bond, and that the principal on said depository bond was the bank, and the two sureties thereon were the two interveners herein, and that to protect said interveners as sureties on said bond the bank pledged for their protection certain securities, the face value thereof being some $13,000; that from the sale thereof the sureties realized only the amount of $7,199.33, which, upon being applied to the reduction of the deposit of the village in said bank, left a balance due the village from the sureties in the sum of $9,766.44, upon which amount two dividends of one per cent. have been paid to the sureties, leaving a net balance due thereon of $9,571.12.

The trial court decided against the banking department, and decreed that the interveners had a claim for trust funds in the full sum of $9,571.12, with interest at 6 per cent., and directed that the same was entitled to priority payment from the assets of the bank before the claims

of unsecured depositors were paid, from which order an appeal was taken to this court.

A number of errors are set out, but the errors in the findings of the district court that the bank was not legally appointed the village depository, and that said funds were unlawfully mingled with the general assets of said bank, and that the bank had become a trustee as to such deposits, are argued at length.

W. S. Newmyer testified that for many years he had been president of the bank, and that he was the father of the two interveners who had signed the bond as sureties for the bank. He further testified that for 25 years the bank had paid no interest to the village on its deposit in said bank, and that the village funds were mingled with the other assets of the bank; that the bank had, on its part, agreed to collect the water and light bills for the village each month and to render such collection service as an offset for the interest which should have been paid the village on its deposit, which deposit at times ran as high as $30,000.

The bank filed application to be appointed a depository, and, by resolution of the village board, was so selected. For the next year the resolution passed by the board was not signed by the chairman and clerk. However, the village, under section 77-2601, Comp. St. 1929, brought an action against the sureties who had given a bond to protect the deposit of the village in the bank.

The sureties did not contest this suit but consented to judgment being entered against them on condition that execution on said judgment would be stayed if the sureties would make payments as hereinabove set out. It was proper for the village clerk to identify the records and minutes of the village board, as he was responsible for their custody.

When the village board brought suit to collect from the two sureties on their bond, the sureties confessed judgment, thereby admitting that the bank was a legal depository. By the record made, this bank was legally

designated as the depository bank for the village funds. Both the bank and the village acted on that understanding. The mere fact that the bank rendered a monthly service in the collection of light and water bills for the village instead of paying interest would not destroy the legal designation of the bank as a depository.

The appellees call our attention to the case of *Village of Overton v. Nagel*, 128 Neb. 264, 258 N. W. 461, but the holding does not apply to the case at bar, where the bank had been approved as a depository by the village board.

In *Bliss v. Mason*, 121 Neb. 484, 237 N. W. 581, it is provided that a state bank may pledge its assets to secure the repayment of county deposits in such depository bank, and, further, that a state bank designated as a depository may lawfully pledge its assets to protect sureties upon such depository bond for public funds, as was done in this case. It is unfortunate that the bonds upon being sold brought only the amount of $7,199.33. The interveners now seek to have their claim for the balance of $9,571.12 declared a trust fund and payable in full out of the assets of the bank. It cannot be done, for the bank's assets were used to protect and secure the bondsmen. *State v. State Bank of Omaha*, 125 Neb. 492, 251 N. W. 99.

We held in *State v. First State Bank*, 122 Neb. 109, 239 N. W. 646, that, when a city relied upon a bond, the balance of a deposit unprotected was only a general claim. See, also, *State v. South Omaha State Bank*, 128 Neb. 733, 260 N. W. 278; *State v. Bank of Campbell*, 125 Neb. 485, 251 N. W. 101. In *State v. Platte Valley State Bank*, 128 Neb. 562, 259 N. W. 643, we held that, by assignment of an adjudicated claim against an insolvent bank, the assignee acquires only the rights of the assignor. See, also, *Kullman & Co. v. Woolley*, 83 Fed. (2d) 129, decided April 18, 1936. In the case at bar, these sureties could have demanded that the bank put up additional bonds for their protection, and the bank could legally have complied

therewith, but the sureties did not protect themselves in this manner allowed under the law.

It is clear that the assets of the Farmers Bank of Lyons were depleted to a large amount by reason of the pledge of the securities of said bank, and that the sureties received the entire benefit from the sale of said securities, and that this fact clearly brings this case within the law as set out in section 8-1,102, Comp. St. Supp. 1933, as a deposit otherwise secured.

The trial court held that the interveners were entitled to recover a claim of $9,571.12, with interest at 6 per cent. as trust funds, and that the same should be paid as a first, prior and preferred lien on all the assets of the Farmers Bank. Having determined in this opinion that the Farmers Bank had been duly appointed depository under a valid depository contract with the village of Lyons, and that the funds were deposited as ordinary deposits, and not trust funds, and that said deposits were secured by a depository bond, upon which these interveners were sureties, it is the opinion of the court, supported by the authorities herein cited, that it would be inequitable for said interveners to secure priority over all the other depositors of said bank when such interveners had received a deposit of bonds from the bank to protect them as such sureties, and therefore the decree of the district court is reversed and set aside, and it is hereby directed that the action of the receiver of said bank, in classifying the claim of the interveners as a general claim against the assets of said bank, was right, and the decree of the district court is hereby reversed.

REVERSED.

CLARENCE FLEENER, ADMINISTRATOR, ET AL., APPELLANTS, V. OMAHA NATIONAL COMPANY ET AL., APPELLEES.

FILED JUNE 12, 1936. No. 29681.

1. **Trusts:** LIABILITY OF TRUSTEE. When the provisions of a trust deed provide that, in case of a default under the mortgage for a period of 30 days, the trustee may, at its option and election, accelerate the maturity date and foreclose the mortgage for the benefit of bondholders, the trustee will not be held liable in damages for honest mistakes of judgment in failing to so do.
2. ———: LIMITATION OF LIABILITY. Ordinarily, the parties to a trust relation may limit their liability by agreement. A trustee may not, however, contract for immunity from liability for gross negligence or acts done in bad faith.
3. ———: ———. The exculpatory provisions of a trust deed providing that "the trustee shall be liable only for its own gross negligence and wilful default" are valid and may be invoked by the trustee as a defense.
4. ———: LIABILITY OF TRUSTEE. Where a trust deed provides that, in case of default in payment of taxes by the mortgagor, the trustee may, at its option, but shall not be obliged to do so, pay such taxes and include the amount thereof as part of the indebtedness secured by the mortgage, the trustee will not be held liable for electing to pay the taxes instead of declaring a default and foreclosing the mortgage if it appears that the trustee was acting in good faith.
5. **Evidence** examined and *held* insufficient to support a finding that the trustee was guilty of gross negligence or wilful default within the meaning of the exculpatory provisions of the trust deed.

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

Beghtol, Foe & Rankin, for appellants.

Good, Good & Kirkpatrick, William C. Ramsey and *Sherman Welpton, Jr., contra.*

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

CARTER, J.

This is an action against the Omaha National Company,

as trustee for bondholders under the terms of a trust deed to certain lands in Cedar county, for damages for breach of trust. The trial court directed a verdict for the defendant and entered a judgment in its favor. From the overruling of their motion for a new trial, plaintiffs appeal.

On April 1, 1925, Hans J. Voss obtained a loan of $23,000 for five years with interest at 5 per cent. on his Cedar county farm from the Omaha Trust Company. He gave the trust deed and mortgage involved in this action to secure the loan. In addition thereto, he gave a second mortgage for $575, payable in 10 semiannual instalments, as payment of the commission for making the loan. The bonds which the trust deed and mortgage were given to secure were sold to customers of the Omaha Trust Company and other investors. Bonds in the amount of $5,000 were sold to one John Fleener, now deceased. The plaintiffs in this action are the heirs of John Fleener, and the defendant Omaha National Company is the successor-trustee for bondholders.

Plaintiffs base their claims for damages on three alleged breaches of trust: (1) That defendant wrongfully and in violation of the trust advanced money to pay interest coupons that became due and failed to notify plaintiffs of this default; (2) that defendant, in violation of its duties as trustee, permitted the taxes to become delinquent upon the property and failed to notify plaintiffs of said default; and (3) that the defendant failed to foreclose the mortgage security, as required by the trust deed, which caused additional loss by virtue of the subsequent depreciation in the value of the property, and failed to obtain a personal judgment against the mortgagor at a time when he was solvent and able to pay.

The record discloses that the mortgagor failed to pay the interest coupons promptly as they became due. The trustee advanced the $575 necessary to pay the interest coupons falling due on October 1, 1925. This was repaid by the mortgagor by December 18, 1925. The money

to pay the April 1, 1926, interest coupons was advanced by the trustee and it was repaid by the borrower by June 1, 1926. The money was also advanced to pay the October 1, 1926, interest coupons and it was repaid by Voss by September 21, 1927. The interest was also advanced to take up the October 1, 1927, coupons and it was repaid by February 11, 1928. After February 11, 1928, the trustee was never fully reimbursed for advancements made on interest. Foreclosure proceedings were commenced on August 19, 1930. At the time of the commencement of the foreclosure action, the trustee had collected back all advancements made except the sum of $329.59. Does this constitute a breach of trust for which the trustee must respond in damages?

The mortgage provides that, if default be made in the payment of any of the sums secured, and if "such default or breach shall continue for the space of thirty (30) days, then the trustee with full powers as a mortgagee in the premises, may, at its option and election, and shall, upon the written request of the holders of a majority in amount of the outstanding bonds, declare the whole indebtedness due and payable, and proceed to foreclose this mortgage for the benefit of all holders of said bonds." In the case at bar, the trustee did not elect to foreclose every time the mortgagor was in default. Instead, it elected to advance the interest and reimburse itself by making the collection from the mortgagor. The fact that only $329.59 of the interest remained unpaid prior to the date that the mortgage matured is evidence of how well the trustee performed this service. The terms of the mortgage do not require or contemplate that the trustee should foreclose the mortgage immediately upon a default of its terms. The exercise of judgment on the part of the trustee is required by the trust deed to determine the time for the commencement of the foreclosure action in the absence of written request to so do by holders of a majority in amount of the outstanding bonds. The trustee, under such circumstances, would not be liable for a mistake of

sound business judgment as it appeared from the point of view of the trustee at the time it was called upon for a decision. It is true that the trustee did not notify bondholders of each default that occurred. We have held: "It is the duty of a trustee to fully inform the *cestui que trust* of all facts relating to the subject-matter of the trust which come to the knowledge of the trustee and which are material for the *cestui que trust* to know for the protection of his interests." *First Trust Co. v. Carlsen,* 129 Neb. 118, 261 N. W. 333. In the same case we also said: "Where it appears that a trustee has practiced concealment, evasion or misrepresentation, thereby depriving the *cestui que trust* of material information relative to the subject-matter of the trust to his injury, the trustee, together with the persons participating in the wrong, may be required to respond in damages."

These statements of the law must be construed with the provisions of the trust deed. This was expressly stated in each of the bonds issued. We have also held that a bond, which refers specifically to a recorded trust deed and mortgage for a statement of the terms under which it was issued, thereby incorporates the trust deed and mortgage as a part of the contract. *Munch v. Central West Public Service Co.,* 128 Neb. 645, 259 N. W. 736. The trust deed in the suit at bar contained the following provisions: "So long as the trustee shall act in good faith and in reliance upon notices or other information which it may deem to be reliable, and so long as the trustee shall exercise reasonable prudence and care in its administration hereunder, the trustee shall not be liable for any loss of damage sustained or incurred by the mortgagors or any holder or holders of said bonds, or by any other persons whomsoever, it being expressly stipulated that the trustee shall be liable only for its own gross negligence and wilful default in the premises."

Appellants contend that, as the trust deed was drawn by the trustee, it ought to be construed against it. This would be true if the provisions of the trust deed were so

worded as to require a construction, but where the language used is definite and unambiguous, its usual and ordinary meaning should be adopted by the court. We conclude therefore that the exculpatory provisions of the trust deed may be invoked by the trustee to relieve it of all liability except for gross negligence and wilful default. The proper rule is stated by a highly regarded authority as follows:

"(1) Except as stated in subsections (2) and (3), the trustee, by provisions in the terms of the trust, can be relieved of liability for breach of trust.

"(2) A provision in the trust instrument is not effective to relieve the trustee of liability for breach of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary, or of liability for any profit which the trustee has derived from a breach of trust.

"(3) To the extent to which a provision relieving the trustee of liability for breaches of trust is inserted in the trust instrument as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor, such provision is ineffective." Restatement, Trusts, sec. 222.

In *Browning v. Fidelity Trust Co.*, 250 Fed. 321, the court said: "The plaintiff admits that as a general proposition parties creating a trust can, by their agreement, limit the liability which is imposed by one and accepted by the other (*Tuttle v. Gilmore*, 36 N. J. Eq. 617) but maintains, very properly, that the law, dictated by considerations of public policy, determines a point beyond which the parties cannot agree to relieve a trustee from liability for breach of a trust duty. For instance, a trustee cannot contract for immunity from liability for acts of gross negligence or for acts done in bad faith. Such contracts are invalid because repugnant to law."

The record in this case is replete with letters written by the trustee to the mortgagor insisting upon payments being made upon the note and mortgage as agreed.

Trustee's fieldmen made numerous calls upon the mortgagor for the purpose of enforcing collection of the amounts due. The trustee procured chattel mortgages on the mortgagor's crops, live stock and machinery as additional security for the payment of arrearages under the mortgage. The record shows that on at least one occasion the mortgagor wrongfully sold property mortgaged to the trustee for the benefit of bondholders and appropriated the proceeds to his own use. This security was lost through no fault of the trustee. The record further shows that on or about May 31, 1927, the mortgagor deposited $1,000 that he intended to pay the trustee herein in a bank in Laurel the day before the bank closed and it was lost. Clearly this was through no fault of the trustee. The trust deed in this case did not require the trustee to give notice of interest defaults to the bondholders. It is true that in the case of *First Trust Co. v. Carlsen, supra,* we held that it was the duty of the trustee to so do and he would be required to respond in damages for not so doing when the situation was such that the information would be material in preventing losses to the beneficiary of the trust. It is quite apparent from what we have heretofore said that the trustee in this case acted in good faith, diligently performed the duties cast upon it by the terms of the trust deed, and exercised its best judgment in the light of the situation before it when called upon to make a decision. A trustee cannot be held liable for honest mistakes of business judgment which can be ascertained only from a retrospective point of view. We fail to find evidence of bad faith, concealment or misrepresentations on the part of the trustee. The record indicates that the trustee used its best efforts for the benefit of bondholders, and considering in addition thereto the exculpatory provisions of the trust deed, we fail to find that the trustee has been guilty of such negligence or bad faith required by the contract to create liability.

Appellants contend that the trustee was guilty of gross negligence and bad faith in paying the delinquent taxes

for the years 1926, 1927, 1928, 1929, 1930 and 1931, and not notifying bondholders of the fact that the mortgagor had failed to pay them. At the outset, it must be borne in mind that the duties and powers of a trustee are determined by the provisions of the instrument creating the trust except for such provisions that have been held invalid because repugnant to public policy. In the case at bar the trust deed provided: "In the event the mortgagors should fail to pay any or all of said taxes and assessments before the same shall become delinquent, the trustee may, at its option, but shall not be obliged to do so, pay such taxes and assessments and include the amount of such payments made, together with interest thereon at the rate of ten per cent. (10%) per annum, as part of the indebtedness secured by this mortgage." There is no provision in the trust deed requiring the giving of notice to bondholders upon the failure of the mortgagor to pay the taxes on the mortgaged property or at the time the trustee elects to pay them under the express provisions of the trust deed. We can conceive of situations where nonpayment of taxes by the mortgagor might become so serious as to require the trustee, in the exercise of its judgment, to give notice to bondholders. The diligence and good faith exercised by the trustee in collecting interest advancements from the mortgagor are as applicable to its collection of delinquent taxes, and we will not repeat those facts again. The trustee collected the amount of the 1924 and 1925 taxes from the mortgagor and reimbursed itself to that extent on advancements made by it on taxes. When we consider that the trustee was expressly authorized to make advancements for the payments of taxes by the provisions of the trust deed, that it used every reasonable method of collecting the amounts thereof from the mortgagor, and in view of the exculpatory provisions of the trust deed, we are convinced that the trustee is not guilty of gross negligence or wrong-doing in handling the taxes on this property as it did.

Having held that the trustee did not breach its trust in

failing to commence foreclosure sooner than it did, the trustee is not liable for any subsequent depreciation in the value of the property. Appellants contend that the trustee should have obtained a personal judgment against the mortgagor and allege that, if the property had been foreclosed at an earlier date, the mortgagor would have been financially able to pay off a deficiency judgment. The record contains no evidence to sustain this allegation and it necessarily fails for want of proof.

We therefore conclude that the trial court was right in directing a verdict for the defendant.

AFFIRMED.

UNION LOAN & SAVINGS ASSOCIATION, APPELLEE, V. ROBERT G. SIMMONS, APPELLANT.

FILED JUNE 12, 1936. No. 29694.

1. **Mortgages:** DISCHARGE: RELIEF IN EQUITY. Where an existing lien has been discharged and released by the holder, and a renewal taken without knowledge of the existence of an intervening lien against the property, the mortgagee will be regarded as acting under such a mistake of fact as to entitle him to relief by a restoration of his priority if the rights of innocent parties are not involved.
2. ———: PRIORITIES. "Where the release of a former mortgage on certain land was filed on the same day as a subsequent mortgage thereon, and the mortgagee at all times was unaware of the existence of an intervening second mortgage, such second mortgage will not be given priority over the subsequent new mortgage, where it appears that it was the intention of the parties thereto that such new mortgage was not a discharge of the former mortgage lien but a continuation thereof." *Peoples Bank v. Trowbridge*, 123 Neb. 312, 242 N. W. 647.
3. ———: DISCHARGE: RELIEF IN EQUITY. In such a case, an action for damages against the abstracter who overlooked the intervening lien is not an adequate remedy at law, and the equity powers of the court may be invoked to obtain relief.
4. ———: ———: REMEDY. Where the holder of the intervening mortgage has suffered no damages because of the abstracter's mistake, the rights of innocent parties not being involved, the holder of the renewal mortgage is not required

to rescind his contract but may affirm it and have his mortgage adjudged a first lien by a court of equity.

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

Robert G. Simmons, pro se.

Floyd E. Wright, contra.

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

CARTER, J.

This is an action in which plaintiff prays that a mortgage given as a renewal of a first mortgage on certain real estate in Scotts Bluff county be declared prior to the lien of an intervening mortgage. From a decree granting the relief prayed for, the defendant, Robert G. Simmons, appeals.

It appears from the record that on November 22, 1922, the defendant, Robert G. Simmons, and his wife were the owners of certain real estate, and that on said date they executed a real estate mortgage thereon to the plaintiff, which was placed of record. On November 13, 1928, Robert G. Simmons and wife conveyed the premises to Otis W. Simmons who assumed and agreed to pay the mortgage given to plaintiff. On October 20, 1931, Otis W. Simmons and wife executed and delivered a mortgage to Robert G. Simmons in the amount of $1,000, which was recorded on October 24, 1931. On August 20, 1932, default having been made under the first mortgage, Otis W. Simmons and wife executed a new mortgage to the plaintiff in the amount of $1,550, the same representing $1,299.56 due upon the old mortgage, $175.59 paid for taxes due on the premises, $35.30 for expenses in refinancing, and the sum of $39.55 which was credited on the note. Prior to the completion of the loan, plaintiff caused the abstract of title to be extended by an abstracter, who overlooked the mortgage of $1,000 given to the defendant, Robert G. Simmons. It appearing to the plaintiff, because of the

mistake of the abstracter, that there were no intervening liens, it released its prior mortgage and recorded the renewal mortgage. Upon discovery of the $1,000 intervening mortgage, and the refusal of the defendant, Robert G. Simmons, to acknowledge the priority of the renewal mortgage, this action was commenced to have the $1,550 renewal mortgage declared a prior lien to the $1,000 mortgage of the defendant, Robert G. Simmons.

The trial court found that the $1,550 renewal mortgage was a first lien on the premises except for the item of $35.30 contained therein.

The appellant first contends that appellee is not entitled to relief in a court of equity under the facts shown in the record. To this we are unable to agree. In the case of *Peoples Bank v. Trowbridge*, 123 Neb. 312, 242 N. W. 647, this court said: "Where the release of a former mortgage on certain land was filed on the same day as a subsequent mortgage thereon, and the mortgagee at all times was unaware of the existence of an intervening second mortgage, such second mortgage will not be given priority over the subsequent new mortgage, where it appears that it was the intention of the parties thereto that such new mortgage was not a discharge of the former mortgage lien but a continuation thereof."

We fail to find any evidence in the record indicating that appellant has been injured by the transaction. The amount of the renewal mortgage was a lien prior to that of appellant before the first mortgage was released. Appellant was a signer of the first mortgage and was personally liable on the debt. After the renewal mortgage was executed and delivered and the release of the first mortgage filed, appellant was relieved of this personal liability. Appellant had actual knowledge of the existence of the first mortgage at all times for the reason that his second mortgage contained a provision that it was subject to a mortgage to the Union Loan & Savings Association. We are convinced that where, as in this case, an existing lien has been discharged and released by the holder, and

a renewal taken without knowledge of the existence of an intervening lien against the property, the mortgagee will be regarded as acting under such a mistake of fact as to entitle him to relief by a restoration of his priority if the rights of innocent parties are not involved.

In the case of *Holt v. Mitchell,* 96 Colo. 412, 43 Pac. (2d) 388, 98 A. L. R. 838, the court said: "The fact involved, is the existence of the Rhodes trust deed at the time of the release of the first trust deed. The mistake is the assumption of the nonexistence of the instrument when in fact it did exist. The mistake does not depend on the degree of care used to ascertain the existence of the second mortgage, but on the state of mind of the plaintiff with respect to its existence. If he had a *bona fide* belief that it did not exist, so far as he was concerned such a belief was a mistake of fact. If he acted in reliance on such belief and changed his status with reference to the land covered by the trust deed to his own injury, then as between himself and the owner of the land and third persons who were not injured he is entitled to have his status with reference to the land restored by equity. Those who are not injured, as was well stated by the court in *McKenzie v. McKenzie,* 52 Vt. 271, should not be permitted to 'speculate in another's blunders.'"

Appellant contends that appellee failed to exercise due care in discharging the first mortgage, and as a result is not entitled to equitable relief. The case of *Institute Building & Loan Ass'n v. Edwards,* 81 N. J. Eq. 359, 86 Atl. 962, is in point, and in that case the court said: "And it may, I think, be appropriately added that the chief aim and purpose of our recording statutes is the protection from loss of innocent purchasers and encumbrancers who have changed their position to their detriment without notice, actual or constructive, of prior liens or conveyances. I am convinced that in a case of this nature where no one has been injured by the mistake but the party complainant and no one has changed his position by reason of the act which has been performed in consequence of the mistake,

relief cannot be properly denied upon the theory that a high degree of vigilance has not been exercised by complainant. The negligence of complainant in failing to procure proper searches should, I think, be thus considered with reference to its effects on the rights of others, and so considered cannot be properly regarded as that type of culpable negligence which appropriately affords a bar to equitable relief."

In *Seeley v. Bacon*, 34 Atl. (N. J. Ch.) 139, a case in which an inadequate investigation of the records was involved, the court said: "If these complainants had canceled these mortgages with full knowledge of all the facts, they would admittedly have no standing as suitors asking for such a decree. If, however, they did it through a misunderstanding of a fact, then the question is presented, was it such a mistake as, under the circumstances, a court of equity should rectify? Now, that the cancelation occurred by reason of a mistake of facts is undisputed. It is entirely clear that the supposition that no subsequent encumbrances existed upon the mortgaged property was the inducing cause to such action. Now, as a rule, equity will refuse to rectify a mistake which occurred through the unexcusable negligence of the party who asks to be relieved from the effect of the mistake. * * * But what degree of vigilance is to be exercised must depend upon the facts of each case. Where the act done by mistake is one calculated to induce others to take a line of conduct which will put them to loss if the mistake is corrected, it ought to be clear that the party asking for relief has been led into the mistake in spite of the employment of the highest degree of vigilance. Where, however, no one is injured by the mistake but the party himself, and no one has changed his position by reason of the act executed through the influence of the alleged mistake, I see no reason why the mistake should not be corrected, although the highest degree of vigilance has not been exercised. For instance, if the mortgage held by Mr. Bacon had been taken for money advanced by him at the time, and had been taken after the

cancelation of the old mortgages, and before the record showed the existence of the new mortgage, a case would have been presented requiring the strongest evidence of unpreventable mistake to justify the reinstatement of these mortgages. But, as has already been observed, the facts in respect to the mortgage held by Mr. Bacon are entirely different. He advanced nothing at the time his mortgage was accepted, and the old mortgages were still a subsisting lien at that time. So it is perceived that the security of his mortgage, after the restoration of the two old mortgages, is exactly the same as it was before the cancelation. No valuable consideration was advanced by Bacon at the time of the execution of the mortgage to him on the faith of the supposed nonexistence of the two old mortgages, arising from their cancelation of record. By the decree asked for, the parties will be placed in *statu quo*."

Appellant further contends that appellee has an adequate remedy at law by maintaining an action for damages against the abstracter and his bondsman. It must be borne in mind that, under the authorities herein cited, appellee has a first lien on the real estate in question. The mistake of the abstracter brought about a situation on the public records that clouded the certainty of appellee's priority. This uncertainty appellee asks a court of equity to remove. An action for damages would provide no remedy at all. The position taken by appellant would require appellee to surrender its first lien and accept in lieu thereof a cause of action for damages. This contention is without merit. Clearly the appellee has no adequate remedy at law to have the priority of its mortgage lien determined and is entitled to invoke the powers of a court of equity to obtain relief.

Appellant also complains because appellee did not rescind its contract *in toto*. The fact of the matter is that appellee did not rescind at all, nor is it required to do so. Appellee does not seek to rescind the renewal mortgage. It retains the new mortgage and asks to have its first lien confirmed by the court. This it has a right to do when the holder of the intervening mortgage has suffered no damage

and where the rights of innocent parties are not involved. The trial court very properly granted the prayer of appellee's petition.

AFFIRMED.

RAY SANKS ET AL., APPELLEES, V. ST. PAUL FIRE & MARINE INSURANCE COMPANY, APPELLANT.

FILED JUNE 12, 1936. No. 29575.

1. Insurance: ACTS OF AGENT: RATIFICATION. The act of a local agent of several insurance companies, who chooses which of the several companies he represents shall carry insurance for the insured, and who advances premiums for the insured, in accepting cancelation of a policy of insurance written for such insured and in good faith substituting a policy in another company in lieu of the former policy, is ratified by the insured when the insured accepts the benefit of the unearned premium upon the former policy before loss and with knowledge of all facts brings action upon the latter policy after loss.
2. ———: KNOWLEDGE OF AGENT. Knowledge of the local agent of an insurance company either acquired in the course of his acts as agent of such company in writing a policy of insurance for his principal, or so closely interwoven with such acts as to plainly show that such knowledge was present in the agent's mind when such policy was written, is, in the absence of fraud or collusion on the part of such agent, imputed to his principal.
3. ———: POLICY: CANCELATION. Whenever provision for cancelation of an insurance contract is made in a policy of insurance, such cancelation can be effected by one party without the consent of the other only by a strict compliance with the terms and conditions of such provision.
4. ———: ———: CONSTRUCTION. The construction of a policy of insurance is primarily to be sought in the language of the policy itself, but if the intent of the parties does not clearly appear from such language, the court, in construing such policy, will take into consideration other matters, such as conditions surrounding the execution of the policy, the subject-matter of the contract, the business in which the parties were engaged at the time the contract was written, and the purpose and object of the contract, and will, when logically possible, construe such policy so as to effectuate the purpose of the contract, which is insurance against loss.

5. ———: ———: ———. Under the facts stated in the opinion, a tarpaulin is held to be included within property described as "the automobile herein described and the equipment usually attached thereto."
6. ———: ———: PROMISSORY WARRANTY: BREACH. Breach of a promissory warranty contained in a policy of insurance against loss by theft, to the effect that in case of damage to the property the insured will use due care to protect the property from loss by theft, will prevent a recovery upon such policy for loss by theft, when such breach existed at the time of such loss and contributed to such loss.

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

Ziegler & Dunn and *William Stalmaster,* for appellant.

Wear, Boland & Nye, contra.

Heard before GOSS, C. J., ROSE and DAY, JJ., and ELDRED and TEWELL, District Judges.

TEWELL, District Judge.

This action was begun in the district court for Douglas county. The petition contains two causes of action. The case was tried to a jury, and from a verdict and judgment in favor of plaintiffs in both causes, the defendant appeals.

Each cause of action is based upon an insurance policy. Each policy was issued on January 12, 1934, to the plaintiffs Sanks and Gayman by defendant through Frank M. Lepinski, as agent of the defendant. Each policy purports to insure Sanks and Gayman against loss of a truck and trailer by fire or theft, the policy in the first cause being upon an International A 3 truck and the policy in the second cause being upon an International B 3 truck. The plaintiffs Sanks and Gayman were joint owners of both trucks and used them in doing hauling for hire, and the plaintiff, International Harvester Company of America, hereinafter referred to as the Harvester Company, had an interest in both trucks and in the policies, by virtue of chattel mortgages and provisions in the policies. Except as to the de-

scription of property described in each policy, the two policies are identical in form, each being made through the use of printed forms furnished to Lepinski by the defendant. The A 3 truck and trailer involved in the first cause was destroyed by fire about March 5, 1934, while being used to haul baled alfalfa hay. Loss by theft of parts of the B 3 truck and trailer involved in the second cause about March 2, 1934, is alleged in the second cause.

By its answer the defendant denied that either of said policies had ever gone into force and effect on account of a provision in each prohibiting other insurance, and alleged the existence of insurance against loss by fire and theft by policies issued by Federal Union Insurance Company. The defendant further alleged that, if said policies became effective, they were canceled by the defendant through notice to Lepinski by the defendant on February 20, and February 27, 1934, prior to any loss, it being alleged that such notice of cancelation was sent by the defendant, without knowledge of facts that prevented such policies from being in effect.

The evidence discloses that about November 11, 1933, the plaintiffs Sanks and Gayman applied to Lepinski for insurance upon the above mentioned trucks. Lepinski was the local agent in Omaha of several different insurance companies, including the defendant. Lepinski then issued policies of insurance upon these trucks in the Federal Union Insurance Company. Sanks and Gayman then made a note dated November 11, 1933, to General Securities Company, a corporation, of which Lepinski was the managing officer, for an advance by that company of a part of the premium upon such policies, and paid Lepinski the balance of the premiums thereon in cash. In the early part of January, 1934, notice of cancelation of these policies was sent to Lepinski by the Federal Union Insurance Company, and Lepinski thereupon debited the amount of the short rate premium upon these two former policies to Sanks and Gayman upon his account with them, and the next day issued the two policies sued upon. About February 15, or 16,

1934, Sanks and Gayman made further cash payment to Lepinski upon their account with him. At the time of this subsequent payment by Sanks and Gayman, no change of any kind was made in the policies sued upon, and for aught that the evidence shows, no notice of such further payment by Sanks and Gayman was sent to the defendant. The defendant did not at any time extend credit for premium to Sanks and Gayman, but at all times looked only to Lepinski to account for the premiums. The evidence conflicts as to whether or not Sanks or Gayman knew, prior to the losses involved, that the policies in Federal Union Insurance Company had been canceled and the two policies sued upon issued.

The defendant contends that, if the plaintiffs were not notified of the cancelation of the prior policies and the issuance of the policies sued upon, the prior policies were either in effect at the time of the loss and the policies sued upon not in effect on account of the prohibition against other insurance, or that Lepinski was the agent of the plaintiffs to keep the trucks insured and to receive notice of cancelation of the policies sued upon, and further contends that notice of cancelation of the policies sued upon was given to Lepinski by the defendant prior to the loss. The evidence is conclusive to the effect that Lepinski intended to cancel the former policies and did all acts required to accomplish such cancelation, unless notice to the plaintiffs was necessary and not given. The plaintiffs accepted the benefit of the unearned premium upon the former policies and made further payment to Lepinski upon their account with him after the issuance of the policies sued upon and before the loss, and after the loss brought this action upon the substituted policies. Lepinski, in issuing the former, as well as the substituted policies, chose which of the various companies he represented should carry the insurance, advanced any portion of the premiums that plaintiffs did not pay in cash, and at the time of the issuance of the policies sued upon knew all facts connected with the attempted cancelation of the former policies. Under such

a state of facts, we deem it immaterial whether or not Lepinski was authorized to receive notice of cancelation of the former policies. Lepinski was agent of Sanks and Gayman for some purposes, and the acts of Sanks and Gayman under the facts stated so ratified his acts in canceling the former policies as to make such cancelation effective as of the date of such attempted cancelation. 32 C. J. 1254. Furthermore, Lepinski with full knowledge of all facts relating to the existence or nonexistence of the former policies in good faith issued the policies sued upon, and this knowledge existing at the time of the issuance of the policies sued upon and being directly connected and interwoven with his acts as agent of defendant was imputed to the defendant. 32 C. J. 1325. With such imputed knowledge the defendant issued the policies sued upon, has retained the premiums thereon, and has waived the provisions of the policies relating to prior insurance. 32 C. J. 1325.

Defendant contends that, if the policies sued upon became effective, they were canceled by letters written by the defendant to Lepinski. The complete body of the letter of February 20, 1934, reads as follows:

"Re: Policy AO 2518—M. Gayman & A. Sanks.

"It comes to our attention that the above risk is used in commercial hauling. Inasmuch as this is a classification we are not writing at the present time, we must ask that you relieve us of liability immediately upon receipt of this letter."

The letter of February 27, 1934, reads as follows:

"Re: Policy AO 2518—M. Gayman & A. Sanks.

"On February 20th we wrote you asking that you kindly relieve us of liability under policy AO 2518, and in writing this letter we inadvertently overlooked the fact that we were covering the same assured under policy 2519, in view of which, we would appreciate it if you would kindly return this policy for cancelation along with 2518."

A clause in each policy sued upon provides that the policy may be canceled by the defendant giving to the assured five

days' written notice of cancelation, with or without tender of unearned premium, and that notice of cancelation shall state that the unearned premium, if not tendered, will be refunded on demand. Except as a right of cancelation of an insurance contract is provided for by statute, or reserved in the contract, neither the insured nor the insurer can effect a cancelation without the consent of the other, and when provision for cancelation is made without the consent of one party to the contract, such cancelation can be effected only by a strict compliance with the terms and conditions provided therefor by the contract and by statute. *German Ins. Co. v. Rounds,* 35 Neb. 752, 53 N. W. 660; *Artificial Ice Co. v. Reciprocal Exchange,* 192 Ia. 1133, 184 N. W. 756; 32 C. J. 1245.

The above quoted letters did not state that the unearned premium would be refunded on demand, and in other ways did not comply with the provisions of the policies relating to cancelation and did not effect a cancelation. The trial court would have been justified in instructing the jury that both policies sued upon were, as a matter of law, under the evidence, in force at the time of the loss involved in each cause.

Another contention made by the defendant is that the trial court erred in allowing the plaintiffs to prove the reasonable value of a tarpaulin used by plaintiffs to cover the load upon the A 3 Truck involved in the first cause of action, and in failing to exclude the reasonable value of such tarpaulin from the permitted amount of recovery, upon the first cause. The policy provides insurance against loss by fire of *"the automobile herein described and the equipment usually attached thereto."* (Italics ours.) Lepinski, at the time the policies sued upon were written, and officers of the defendant itself prior to the loss, knew that the truck described in the first cause was being used to do commercial hauling. No roof existed over the space in the trailer provided for its load. A tarpaulin, under such a state of facts, is a very commonly used article, and in many instances necessary as a condition to securing contracts to do

hauling for hire. The intention of the parties to a written contract of insurance is primarily to be sought in the language of the instrument itself, but if the intent does not clearly appear from the language itself, the court, in construing the contract, will take into consideration other matters, such as surrounding circumstances, the subject-matter of the contract, the business in which all parties were engaged at the time the contract was made, and the purpose and object of the contract, and will construe the contract, when possible, so as to effectuate the purpose of the contract, which is insurance against loss. 32 C. J. 1148. In this case the tarpaulin involved was stretched over the load at the time of the loss. Under the circumstances surrounding the parties at the time the contract was written and at the time of the loss, no provision in the contract to the contrary appearing, the tarpaulin was included within equipment usually attached to the property specifically described in the policy, and no error was committed in allowing its reasonable value to be included within the amount of the loss.

To the second cause, namely, that which alleges a loss by theft, the defendant by its answer pleads, and now claims, that it did not become liable therefor on account of the failure of the plaintiffs to use diligence to guard against such theft, after the property had been damaged. The evidence discloses that at about 5 o'clock in the morning of March 2, 1934, the plaintiff Sanks was driving the B 3 truck involved in the second cause near Chicago, Illinois, and that such truck and trailer went into a ditch. The trailer was upset and badly twisted and broken. Sanks worked most of the day in an attempt to get the truck and trailer out of the ditch and disconnected the tractor or truck portion of the equipment from the semitrailer. He drove this tractor portion to Chicago, but left the semitrailer in the ditch, without making any arrangements with any one living near the locality of his accident to in any way guard the trailer against theft. At Chicago Sanks talked to the operators of a garage relative to hiring some one to haul

the trailer into Chicago, and agreed to pay the amount for which these operators estimated they could secure some one to haul in the trailer. He then left Chicago for Omaha, and did not return to the locality where the trailer had upset until March 8 or 9. He then found that no one had hauled the trailer into Chicago, that its frame and body still lay in the ditch, and that the wheels, springs, axles, brakes, tires and air hose had been stolen. The policy of insurance contains the following provisions:

"In the event of any loss or damage, whether insured against hereunder or not, the assured shall protect the property from other or further loss or damage, and any such other or further loss or damage due directly or indirectly to assured's failure to protect shall not be recoverable under this policy."

This provision of the policy placed an obligation upon the insured to use reasonable diligence in protecting the property from theft after it had been damaged. An act of the insured that constitutes a clear breach of a promissory warranty in an insurance contract and which contributes to the loss will prevent a recovery for such loss. *Johnson v. Caledonian Ins. Co.*, 125 Neb. 759, 251 N. W. 821; Comp. St. 1929, sec. 44-322. The provisions of the policy above quoted constitute a promissory warranty. 32 C. J. 1274. By it the assured agreed to use reasonable care to protect the property from theft after it had been damaged, whether loss by such damage was insured against or not. The damaged trailer was left in a ditch beside a well-traveled highway in a thickly populated community for a period of about seven days without any protection against theft. Such facts, as a matter of law, constituted a breach of the promissory warranty above quoted, existed at the time of the loss, and, as a matter of law, is held to have contributed to the loss by theft, and to prevent a recovery in the second cause.

Several assignments of error made by defendant relate largely to the failure of the trial court to instruct the jury as requested by the defendant relative to Lepinski being

an agent of Sanks and Gayman for the purpose of receiving notice of cancelation. The views of the law and the evidence herein expressed render a discussion of such assignments of error unnecessary. We have considered all assignments of error made by defendant, including that by which the amount of the verdict in the first cause is claimed to be excessive, and find no error prejudicial to defendant in the trial of the first cause.

For reasons above given, the judgment entered in the first cause is affirmed, and that rendered in the second cause is reversed and the second cause remanded, with instructions that it be dismissed.

AFFIRMED IN PART AND REVERSED IN PART.

HUGH W. THOMAS, APPELLEE, V. PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLANT.

FILED JUNE 12, 1936. No. 29591.

1. Insurance: DISABILITY: PROOF. If the provisions of a life insurance policy providing for monthly benefits in case of disability clearly show that such benefits shall not accrue until proof of disability has been furnished the insurer, the furnishing of such proof of loss is a condition precedent to the commencement of liability of the insurer to pay such benefits.
2. ———: ———. To be wholly and permanently unable to engage in any occupation for compensation of financial value, within the meaning of a clause in an insurance policy providing for disability benefits when such a condition of the health of the insured exists, and providing also for a discontinuance of such benefits in case of recovery, the disability must be such as honestly and reasonably to prevent the insured from performing the substantial and material acts necessary to the performance of any occupation for compensation of financial value and also such that the insured, during the time for which a recovery of such benefits will be allowed, is expected with reasonable certainty to continue under such disability indefinitely.

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

Montgomery, Hall & Young and *Laurens Williams,* for appellant.

John A. McKenzie, contra.

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

TEWELL, District Judge.

This action was brought to recover monthly payments alleged to be due under the disability provisions of a life insurance policy. The cause was tried to a jury and the trial resulted in a verdict and judgment for plaintiff. The defendant appeals.

The plaintiff by profession was a chiropractor. The alleged disability consists of an arthritis in the third, fourth and fifth cervical vertebræ, which plaintiff claims renders him unable to use his arms without severe pain and without causing him to be bedridden for a time after physical exertion in which his arms are used. Several very reputable physicians testified that X-ray plates showed no signs of arthritis in the cervical vertebræ. Dr. Schrock, one of the plaintiff's own witnesses, testified that he advocated increased motion of the arms to retain flexibility; would not say that the X-ray disclosed any arthritis, and that he thought the plaintiff "could carry on as a white collar man to a high degree of effectiveness." Since the claimed disability began, the plaintiff, through an examination, has been licensed to practice law in Nebraska, but has not engaged in such practice.

That the policy of insurance was in effect at the time of the alleged disability is conceded. Portions of the policy providing for disability benefits are as follows:

"If the insured shall furnish due proof to the company that, while this policy was in full force and effect, he (or she), at any time after payment of the first premium on the policy, while less than sixty years of age, from any cause whatsoever had become permanently disabled or physically or mentally incapacitated to such an extent that he (or she) by reason of such disability or incapacity is

rendered wholly and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value, the company will waive the payment of any premium or premiums under the policy the due date of which, as specified on the first page hereof, shall occur after the receipt of proof of such disability and while such disability continues. * * *

"If such disability shall occur before the insured is sixty years of age the company will, in addition to such waiver, during such disability, pay to the insured monthly as specified on the first page hereof, the sum of $10 for each $1,000 of the face amount of insurance under the policy."

The policy also contains a provision to the effect that disability benefits and also waiver of premiums shall cease in case of recovery from the degree of disability required to give rise to them.

In his petition the plaintiff alleges that his disability began on November 5, 1932, and that he furnished due proof thereof to the defendant on December 1, 1932. The plaintiff seeks to recover benefit payments from December 1, 1932, to September 1, 1933, both inclusive. The evidence shows that no proof of disability was furnished to the defendant until January 24, 1933. By instruction No. 4 the court instructed the jury that, if they found for the plaintiff, their verdict would be "in the amount prayed for." The verdict of the jury included benefit payments from December 1, 1932, to September 1, 1933, both inclusive. The above quoted provisions of the policy plainly show that the furnishing of proof of disability was a condition precedent to liability of the defendant for disability benefits. If the provisions of a life insurance policy that provides for payment of monthly benefits in case of disability clearly state that such benefits shall only accrue after the insured shall furnish proof of disability, furnishing of such proof is a condition precedent to liability of the insurer, and the insured may not recover benefits for time preceding the date such proof is furnished. *Smith v. Missouri State Life Ins. Co.*, 134 Kan. 426, 7 Pac. (2d) 65; *Orr v. Mutual*

Life Ins. Co., 64 Fed. (2d) 561; *Hayes v. Prudential Ins. Co.*, 114 W. Va. 323, 171 S. E. 824. The verdict therefore erroneously included benefit payments from December 1, 1932, to January 24, 1933, in the amount of $27 and any interest computed thereon. Furthermore, this instruction No. 4 failed to allow the jury to find that the plaintiff could recover only for a portion of the time that he alleges he was disabled, after proof of disability was furnished, if he once had the disability but during such time recovered.

The defendant also complains of instruction No. 5 given to the jury. This instruction was as follows:

"You are instructed that the supplemental agreement in the policy insuring plaintiff against physical incapacity to the extent that he is wholly and permanently unable to engage in any occupation or profession, and so forth, does not require that plaintiff must be in a state of absolute helplessness, but one is incapacitated under these provisions in an insurance policy, if you find by a preponderance of the evidence that he was unable to substantially follow any work or labor for which he was or had been qualified to pursue, in the usual and customary way."

It is impossible to determine with certainty to what time the trial court referred in this instruction in his use of the words "was unable" and "was or had been qualified to pursue." If any definite or fixed time was meant, the instruction ignores the permanent feature of the disability required for recovery by the plaintiff. Also, this instruction, very probably, misled the jury into believing that the plaintiff could recover if his disability was such as to render him unable to substantially follow the work of a chiropractor, in which he is shown to have been engaged at the time he alleges his disability arose. The policy does not provide for disability benefits if plaintiff becomes unable to perform his usual occupation, as in the case with some policies, but, instead, when and if he is *"rendered wholly and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value."*

Other than in instruction No. 5 above quoted, the trial

court did not define the words "wholly and permanently" as used in the above mentioned provisions for disability benefits. The policy provides for a discontinuance of disability benefits and waiver of premiums in case of recovery from disability. The words "wholly and permanently unable," when construed in connection with the provisions for discontinuance of disability benefits and waiver of premiums in case of recovery, in the policy before us, contemplate a disability that is sufficient honestly and reasonably to prevent the insured from performing the substantial and material acts necessary to the prosecution of any work, whether his usual occupation or otherwise, for compensation of financial value, and also a disability that is of such a nature that the insured may at the time under consideration with reasonable certainty be then expected to continue to have such disability indefinitely. *Maze v. Equitable Life Ins. Co.*, 188 Minn. 139, 246 N. W. 737; *Foglesong v. Modern Brotherhood of America*, 121 Mo. App. 548, 97 S. W. 240; *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N. W. 397; *Eastep v. Northwestern Nat. Life Ins. Co.*, 114 Neb. 505, 208 N. W. 632. We regard this instruction as prejudicial to the defendant. The provisions of the policy above mentioned and the circumstances shown in the evidence are of such a nature that the instructions to the jury should have clearly defined the extent of disability and also the degree of permanency of disability that must be shown to have existed before the plaintiff could recover, and should also have clearly stated that the plaintiff could not recover unless the required extent of disability and degree of permanency of disability were shown by the required degree of proof. The above mentioned provisions of the policy do not appear in the instructions, and the instructions, worded as they were, were such as to lead the jury to fail to give due consideration to these provisions of the policy.

For reasons above stated, the judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED.

THOMAS MULVEY, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

FILED JUNE 12, 1936. No. 29782.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY. Evidence examined, and found that plaintiff, a claimant under the workmen's compensation law, has proved by a preponderance of the evidence that he sustained a personal injury to his head on February 8, 1926, while he was regularly employed as a city fireman of the city of Lincoln, and that the injury was caused to the plaintiff by an accident arising out of and in the course of his employment.
2. ———: ———: INJURY: NOTICE. Evidence examined, and it is disclosed thereby that the city of Lincoln was not notified of the injury to plaintiff's head acceptable to the terms of the workmen's compensation law.
3. ———: ———: ———. An examination of the evidence shows that plaintiff has proved by a preponderance of the evidence that the injury sustained by him was the efficient cause of his mental incapacity or "incompetency due to mental deterioration" and that the evidence reasonably excludes all other efficient causes.
4. ———: ———: ———: LIMITATIONS. In case of physical or mental incapacity resulting from injury, the limitations as to notice provided in section 48-133, Comp. St. 1929, and the limitation for commencement of action provided in section 48-138, Comp. St. 1929, do not begin to run until six months after removal of such incapacity.
5. ———: ———: LATENT INJURY. Latent injuries, progressive in nature, entitle employee to compensation when disability is discovered to exist, and failure to make claim within six months after the accident will not deprive employee of his rights.
6. ———: ———: ———. Evidence examined, and found to prove that the injury to plaintiff was latent and progressive in its nature and that with its progress came mental incapacity which has never been removed and which still exists.
7. ———: ———: ———: ATTORNEY'S FEES. In a case under the workmen's compensation law wherein the defendant appeals to the district court from the action of the compensation commissioner, and on appeal the date of commencement of payment under the award is fixed at a later date than that fixed by the compensation commissioner, such change in date of commencement of payment amounts to a reduction of the award and thus deprives the district court of the right and authority to allow an attorney's fee for plaintiff's attorney.

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

Loren H. Laughlin and *H. B. Porterfield,* for appellant.

Chambers & Holland, contra.

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

YEAGER, District Judge.

This is an action instituted originally by the plaintiff in his own name before the compensation commissioner against the defendant, city of Lincoln, the object and purpose of which was to secure compensation for injuries claimed to have been sustained by him growing out of and in the course of his employment as a city fireman for the city of Lincoln. An award was allowed by the compensation commissioner whereby the plaintiff was permitted to recover the sum of $15 a week from and after February 26, 1926, for a period of 300 weeks, and thereafter during life 45 per cent. of his weekly wage at the time of the accident, but not to exceed $12 a week for the remainder of his lifetime. The defendant appealed from this award to the district court where, without objection, the case proceeded with Thomas Mulvey as plaintiff by Catherine Mulvey, wife and next friend. The case was tried in the district court where a like result was obtained except that the weekly payments were to start as of June 27, 1927, and an attorney's fee of $200 was allowed for plaintiff's attorneys. From the judgment of the district court, the defendant brings the case to this court for review, setting forth fifteen assignments of error.

A review of all of the assignments of error is not necessary to a disposition of the case. An examination of the entire record presents four important questions. They are:

(1) Did the plaintiff, on February 8, 1926, receive the injury to his head claimed by him?

(2) Has the plaintiff proved by a preponderance of the

evidence that the claimed injury was an efficient cause of his claimed mental incapacity and did such evidence reasonably exclude all other efficient causes?

(3) Was the injury of such character and such nature as to incapacitate him from or obviate the necessity of giving the notice required by and within the time provided by statute?

(4) If the three previous questions must be answered favorably to plaintiff, then does a difference of the date of the commencement by the district court beyond the date fixed by the compensation commissioner amount to the reduction of award as contemplated by statute which would defeat the right of the district court to allow an attorney's fee?

Without question, plaintiff received certain injuries on the date in question, the apparently most serious injury at the time being to a finger, the nail of which was torn off. Also it is clear that he sustained an injury to his head. The injury was variously referred to as a cut or bruise, and the witness Slattery testified that he placed a bandage over the injury. Data concerning it do not appear on the records of the fire department. The head injury was doubtless considered of no particular consequence at the time. Whether this is the reason it does not appear of record or whether it was not reported is not apparent anywhere in the record. The burden of proof is upon a claimant under the workmen's compensation law to prove by a preponderance of the evidence that personal injury was caused to the employee by an accident arising out of and in the course of the employment. *Bartlett v. Eaton,* 123 Neb. 599, 243 N. W. 772; *Townsend v. Loeffelbein,* 123 Neb. 791, 244 N. W. 418; *Pensick v. Boehm,* 124 Neb. 28, 244 N. W. 923; *Kuhtnick v. Carey,* 124 Neb. 762, 248 N. W. 89; *Mullen v. City of Hastings,* 125 Neb. 172, 249 N. W. 560; *Parsons Oil Co. v. Schlitt,* 125 Neb. 223, 249 N. W. 613. The plaintiff has sustained this burden. The first question must therefore be answered in the affirmative. We must conclude, however, that plaintiff has not proved that the defendant

received notice as required by law of the receipt of the injury which plaintiff claims resulted in his mental incapacity.

The second question presents more of difficulty. For answer, it is necessary to examine the medical testimony. Dr. Rex M. Strader, called as a witness for plaintiff and a specialist in mental and nervous diseases, after testifying that in his opinion plaintiff was incompetent due to mental deterioration, testified, further, that, in the light of examinations made by him, the history of the case and a hypothesis propounded, in his opinion "the mental status, confusion and behavior at the time you mentioned just after the accident and the present condition, mental condition, was due to the accident." Dr. William H. Slattery, who was the attending physician for a long period of time, but not a specialist, testified that in his opinion the accident of February 8, 1926, was the direct cause of plaintiff's condition. The witnesses whose testimony has been referred to were called by plaintiff. Dr. Winchell McKendree Craig, a witness called by the defendant and who operated on plaintiff after examination at the Mayo clinic, in response to a question which involved a hypothesis, the history of the case and his own examination, testified as follows: "From the evidence which we have in our history and examination, it would be impossible to state definitely." Dr. D. G. Griffiths, a specialist in mental diseases and disturbances, was called as a witness for the defense and testified on direct examination that he had no opinion as to the cause of the condition of the plaintiff, after having a hypothetical question propounded to him embodying the evidence pertaining to the condition of plaintiff from the time of the accident down to the trial. On cross-examination he testified that, if, shortly after the accident, plaintiff was quite morose and was completely changed from a happy-go-lucky devil-raiser who recited poetry and had a lot of fun, such change would indicate that he had an injury there that caused mental trouble. It was his opinion that until he could no longer perform his duties as a fireman he was

mentally competent with some symptoms of incompetency; that as soon as his associates noticed that he could not tie a knot and could not carry on his work he was incompetent. He fixes April, 1927, as a date after which the plaintiff was no longer competent. Dr. W. W. Carveth was of the opinion that plaintiff was competent as long as he was able to perform the necessary duties of a city fireman. He also thought that at the time of the trial he was mentally competent. Dr. Milton F. Arnholt testified that he thought plaintiff was competent, although he was not a patient of the doctor and no hypothesis was propounded covering the pertinent facts of the case. Little or no consideration may be given to this testimony, since it depends upon very casual observation and conversation in the waiting room of the city of Lincoln clinic. This is a brief resumé of the competent evidence bearing upon the question of the causation of the mental incompetency or incapacity of the plaintiff, termed or characterized as "incompetency due to mental deterioration." There is nothing in the record beyond a bare suggestion that there was any other cause. We must, in answer to the second question therefore, conclude that the plaintiff has proved by a preponderance of the evidence that the injury sustained by him was the efficient cause of his mental incapacity or "incompetency due to mental deterioration," and that the evidence reasonably excludes all other efficient causes.

Again, the third question, requires a further and more enlarged examination of the testimony of the witnesses. The record preponderantly discloses by many witnesses a history of slight injury to the head in February, 1926, followed immediately by severe headaches, a changed attitude, moroseness, forgetfulness, occasions of irresponsibility, and, finally, early in 1927, an inability to perform simple duties of a city fireman and of course mental incompetency from that time on. The evidence is so voluminous that we shall not attempt to quote or abstract it. The evidence sufficiently discloses that since the first occurrence of incompetency it has continued to exist. We must de-

termine whether or not this evidence is sufficient to bring the case within the exception contained in section 48-133, Comp. St. 1929, and to remove it from the operation of section 48-138, Comp. St. 1929. The proof is not sufficient to sustain a claim that the defendant had the notice required by statute, and likewise it is not proved that claim was made within six months or petition filed within one year after the accident.

The evidence in this case, if it proves anything at all, and we think it does, supports the claim that plaintiff was suffering from a latent injury which was progressive in its nature. This court is committed to the rule that latent injuries, progressive in nature, entitle employee to compensation when disability is discovered to exist, and that failure to make claim within six months after the accident will not deprive the employee of his rights. *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609, 197 N. W. 615; *Selders v. Cornhusker Oil Co.*, 111 Neb. 300, 196 N. W. 316; *Johansen v. Union Stock Yards Co.*, 99 Neb. 328, 156 N. W. 511. It is also committed to the rule, which rule finds its source in the statute, that in the event of physical or mental incapacity it is sufficient if the claim for compensation is made within six months after the removal of such physical or mental incapacity. Comp. St. 1929, sec. 48-133; *Simon v. Cathroe Co.*, 101 Neb. 211, 162 N. W. 633.

The first manifestations of plaintiff's condition were severe headaches, which were followed by moroseness, spasms, irresponsibility and affection of ocular vision. Following these manifestations came treatment in a hospital at Lincoln, Nebraska, and a brain operation at Rochester, Minnesota. According to the evidence, the mental incapacity or "incompetency due to mental deterioration" still exists. The injury was latent, and therefore we are required to hold that this case comes within the exception provided by statute.

But one question remains. This one challenges the action of the district court in awarding an attorney's fee for plaintiff's attorney. Defendant appealed from the award

of the compensation commissioner and on the trial in the district court the time of the commencement of compensation was fixed as the 27th day of June, 1927, whereas the compensation commissioner had fixed as the date of commencement the 26th day of February, 1926. June 27, 1927, was the date when payments of regular compensation as a fireman were discontinued. The terms of the award were not otherwise changed.

This precise question seems never to have been before the court. The pertinent portion of the statute bearing on the question being a portion of section 48-125, Comp. St. 1929, as amended by the Laws of 1935 (Laws 1935, ch. 57, sec. 20) is as follows:

"In the event the employer appeals to the district court from the award of the compensation court or any judge thereof and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer."

The defendant in appealing to the district court brought about, and properly, a reduction of the award so as to relieve it from payment of compensation to plaintiff for the period beginning February 26, 1926, and ending June 27, 1927. In the light of this reduction, the district court had no authority to allow an attorney's fee. To this extent the decision of the district court is modified and in all other respects it is affirmed.

AFFIRMED AS MODIFIED.

HORACE L. HELFRICH, APPELLANT, V. IRVING F. BAXTER ET AL., APPELLEES.

FILED JUNE 13, 1936. No. 29781.

1. **Appeal.** The decision of the supreme court upon a former appeal becomes the law of the case only as to the actual question then determined.
2. **Evidence.** "Ambiguity in a written instrument may be ex-

plained by oral testimony showing the mutual understanding of the parties." *Myers v. Persson*, 94 Neb. 467, 143 N. W. 447.

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

Gaines, McLaughlin & Gaines, for appellant.

Crofoot, Fraser, Connolly & Stryker, Fradenburg, Webb, Beber, Klutznick & Kelley and *Hall, Young & Williams, contra.*

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

DAY, J.

In this suit to foreclose a mortgage after the sale of the mortgaged premises, the plaintiff sought a judgment against the defendants involved in this appeal for the resulting deficiency on the mortgage debt in the sum of approximately $13,000. In 1919 Elwood executed a note, due in five years, and secured it by this real estate mortgage. Helfrich bought the note and mortgage in 1923. The defendants and others purchased the property after the execution of the mortgage and took title in Baxter as trustee. They did not assume and agree to pay the mortgage debt. Payment of the note and mortgage was extended five years in 1923. For a more comprehensive statement of facts, see *Helfrich v. Baxter*, 128 Neb. 281, 258 N. W. 532, an opinion on a former appeal of this same case. It was determined by this court at that time: (1) That grantee's retention of the amount of the mortgage out of the purchase price does not render him personally liable for the mortgage debt in the absence of an agreement to pay it; (2) that section 20-2141, Comp. St. 1929, as amended by section 1, ch. 41, Laws 1933, taking away the power of the court to enter deficiency judgments was not applicable to this, a suit pending at the time the statute became effective; (3) that there was a valuable consideration for the contract between Helfrich and the

appellees for the contract of January 5, 1928; and (4) that the court has the power to award a deficiency judgment. The cause was remanded for a new trial in accordance with the opinion and not with directions to enter a judgment.

The decision of the supreme court upon a former appeal becomes the law of the case only as to the actual question then determined. *Schwanenfeldt v. Chicago, B. & Q. R. Co.*, 80 Neb. 790, 115 N. W. 285.

The only defendants involved in this appeal are Reynolds, A. Herzberg, and Calkins. They did not hold the legal title and are not liable for a deficiency on the mortgage unless by an agreement to pay the same.

It is now the contention of the plaintiff that, by virtue of a written agreement, the defendants are liable to pay the expenses and costs incurred in connection with the purchase and holding of the tax certificate and the subsequent taxes. They were not, of course, personally liable, prior to the execution of the agreement, either for the mortgage debt or the taxes and expenses incident to the tax sale.

This contention requires a construction of their contract of January 5, 1928, with Helfrich. In order to convey a clear idea of the question involved, it is necessary to set out the provisions of the contract relied upon to bind these defendants. It provides:

"That said parties of the second part jointly and severally further agree to pay, or cause to be paid, *to the extent of the value of said premises, including the proceeds from the sale thereof and the income derived therefrom,* to said H. L. Helfrich, the interest as it falls due according to the terms of the said fourteen thousand dollar mortgage note, also the principal of said mortgage note at its maturity, as fixed by said extension agreement, and we further agree to pay to said H. L. Helfrich all other expenses and costs incurred or to be incurred by him in connection with this contract and in connection with the purchase and holding of said certificate of purchase, including said sale, until

said sale is finally confirmed and the deed of the county treasurer executed and delivered to said party of the first part, or his assigns.

"Said parties of the second part further agree to promptly pay all state, county and city taxes and all special taxes not delinquent against said property not included in the said tax foreclosure suit, and will thereafter pay all taxes and assessments against said real estate, which will hereafter become due, before they become delinquent." (Italics ours.)

But this agreement also includes this provision: "It is mutually agreed between all the parties hereto that nothing herein contained shall affect the liability of the parties of the second part to the party of the first part on said fourteen thousand dollar note, until it is fully paid, regardless of the validity of this contract."

Now, since there was no personal liability of the defendants to pay the mortgage debt or the incidental taxes, this section by itself negatives the contention of the plaintiff that the contract was an agreement to assume personal responsibility. Another phrase in the last paragraph of the contract specifically states that this is not an extension of the term of the mortgage. This demonstrates that the terms of the contract as a whole are indefinite, ambiguous, and contradictory.

"The general rule appears to be that where parties have entered into a contract or agreement which has been reduced to writing, in the absence of fraud or mistake, parol evidence is not admissible to contradict, vary, alter, add to, or detract from the terms of the instrument." *Olson Construction Co. v. Commercial Building & Investment Co.*, 127 Neb. 609, 256 N. W. 22.

But an authority states the general rule applicable here as follows: "In arriving at the intention of the parties, where the language of a contract is susceptible of more than one construction it should be construed in the light of the circumstances surrounding them at the time it is made, it being the duty of the court to place itself as

nearly as may be in the situation of the parties at the time so as to view the circumstances as they viewed them, and so to judge of the meaning of words and the correct application of the language of the contract." 13 C. J. 542.

"The parol evidence rule does not preclude the admission of parol or extrinsic evidence for the purpose of aiding in the interpretation or construction of a written instrument, where the language of the instrument itself taken alone is such that it does not clearly express the intention of the parties or the subject of the agreement. Such evidence is admitted not to add to or detract from the writing, but merely to ascertain what the meaning of the parties is." 22 C. J. 1173. This court has recognized this rule in several cases.

"Ambiguity in a written instrument may be explained by oral testimony showing the mutual understanding of the parties." *Myers v. Persson*, 94 Neb. 467, 143 N. W. 447. In *Nebraska Hardware Co. v. Humphrey Hardware Co.*, 81 Neb. 693, 116 N. W. 659, it was held: "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 relations 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."

Again, it has been said: "In construing a paragraph of a contract which is in dispute, the court must endeavor to place itself in the position of the parties, and ascertain their intention, as well as the object and purpose to be accomplished by the doubtful provision, and interpret it in the light of the actual facts and circumstances surrounding them at the time it was made." *Lyman-Richey Sand & Gravel Co. v. State*, 123 Neb. 674, 243 N. W. 891.

In the instant case, testimony was offered to aid in the

interpretation and construction of the written contract. The written contract is ambiguous and contradictory and does not clearly express the intention of the parties. It is necessary for the court to place itself in the position of the parties and ascertain their intention as well as the object and purpose to be accomplished by the doubtful provisions and interpret it in the light of the surrounding circumstances.

Mr. Baxter, one of the parties, and Mr. Olmsted, who drew the contract and contacted Helfrich, testified as to the negotiations. Mr. Olmsted prepared the contract agreeable to Helfrich and presented it to Baxter and the defendants. The contract as originally prepared was rejected because Baxter and the others thought it imposed personal liability for the mortgage debt. Baxter testified as follows: "Mr. Olmsted and Mr. Calkins and myself discussed the provisions of the proposed contract that attempted to hold myself and associates liable for the payment of the mortgage debt and taxes, and Mr. Olmsted contended that the provisions of the paper, as he drew it, did not hold us liable or obligate us, and thereafter said, 'Well, what changes would you propose?' And thereupon, on a piece of paper, I outlined along with Mr. Calkins a clause which I desired inserted in the document in question."

The clause proposed by Baxter was inserted by Olmsted and is indicated here by italics in the contract as set out. It is an inescapable conclusion from the testimony that it was not the intention of the parties that the defendants were to become personally liable for the mortgage debt or the taxes. While the contract might have been more carefully phrased, the parol evidence in connection with the clause inserted, that the defendants would pay to the extent of the value of said premises, including the proceeds from the sale thereof, and the income derived therefrom, would indicate that it was the positive intention of the parties that no personal liability should be assumed. Now, the defendants have accounted for all the income of the

property. This property was sold at foreclosure sale for $2,000 to Helfrich, and the sale confirmed because it was sold subject to over $6,000 of taxes, which the court found was an adequate price for the premises.

Our conclusion is in agreement with the finding of the trial court, and the judgment is

AFFIRMED.

RICHARD G. STROBLE ET AL., APPELLEES, V. CYRIL SMITH ET AL., APPELLANTS.

FILED JUNE 19, 1936. No. 29588.

1. **Vendor and Purchaser:** LAND CONTRACTS: STRICT FORECLOSURE. An application for the strict foreclosure of a land contract for default in the payment of the purchase price is directed to the sound legal discretion of the court.
2. ———: ———: ———. Strict foreclosure of a land contract may be decreed for failure of vendee to pay delinquent instalments of the purchase price, where denial of such relief would be inequitable.
3. ———: ———: ———: EVIDENCE. In a suit in equity for the strict foreclosure of a land contract for nonpayment of delinquent instalments of the purchase price, evidence *held* insufficient to prove that payments specified in the written instrument were subsequently changed by oral agreement of the parties.

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

W. A. Ehlers, for appellants.

Carl T. Self, contra.

Heard before GOSS, C. J., ROSE and DAY, JJ., and ELDRED and TEWELL, District Judges.

ROSE, J.

This is a suit in equity for the strict foreclosure of a contract dated May 29, 1931, obligating Cyril Smith and Elizabeth Smith, defendants, to purchase from Richard G. Stroble and Louise A. Stroble, plaintiffs, the improved resi-

dence property described as lot 17, block 20, Westside Addition to Omaha. The purchase price was $4,800. Vendees paid $500 in cash and agreed to pay $4,300 with interest on the unpaid debt at the rate of 6 per cent. per annum in monthly instalments of $40 each, beginning July 1, 1931. Vendees also agreed to keep the building on the premises insured for $3,500 for the benefit of vendors and to pay promptly all taxes and assessments levied against the real estate subsequent to 1931.

The contract authorized vendors, at their option, to forfeit the interests of vendees therein and retain the payments made, in the event of a breach of covenant or nonpayment of a monthly instalment of the purchase price, after a default continuing 90 days.

In the petition it was alleged that defendants permitted taxes to the extent of $96.96 to become delinquent; that there were defaults in stipulated payments of the purchase price; that, for defaults, plaintiffs forfeited the contract and declared the entire unpaid debt of $3,951.62 due and payable. Attached to the petition was a statement showing payment of $500 May 29, 1931, monthly payments and partial monthly payments from July 1, 1931, to and including June 2, 1934. The petition was filed August 4, 1934.

Defendants in their answer admitted the execution of the contract, but denied they made default as charged in the petition. They also alleged in effect that the written contract was orally altered by agreement of the parties to change the stipulated monthly payments from time to time to monthly payments as actually made and as shown by the statement attached to the petition. The facts affirmatively pleaded in defense were put in issue by a reply.

Upon a trial of the cause the district court found the issues in favor of plaintiffs and ordered the forfeiture of all rights and interests of vendees under the contract unless plaintiffs were paid $3,951.62 and costs within 30 days from the entry of the decree. Defendants appealed.

In equity were plaintiffs entitled to a strict foreclosure?

This is the question presented by the appeal. The principal issue of fact arose on the defense that the parties orally agreed to change the amount of the monthly payment of $40. The evidence proves without controversy that monthly payments were made by defendants and accepted by plaintiffs, as follows: From July 1, 1931, to August 1, 1932, $40; August 1, 1932, to March 1, 1933, $33; March 1, 1933, to October 2, 1933, $20; October 2, 1933, to July 1, 1934, $25. The parties, however, did not agree on the conditions under which the reduced payments were made and accepted. Cyril Smith, defendant, testified, in substance, that his income was reduced in 1932 and that he called upon Richard G. Stroble, plaintiff, and asked for a reduction in monthly payments from $40 to $30 and that by mutual consent they agreed upon $33; that the other changes from 40-dollar payments, for various reasons, likewise resulted from mutual agreements. Stroble testified he did not consent to any change in the written instrument and that the sums accepted were partial payments on the unpaid debts already due. To some extent he was corroborated by his wife who also testified as a witness. On the defensive issue that the contract was changed, the preponderance of the evidence was in favor of plaintiffs as found by the district court.

Would denial of strict foreclosure be inequitable? The application therefor is directed to the sound legal discretion of the court. Strict foreclosure of a land contract, though not containing an express provision for forfeiture, may be decreed for nonperformance by vendee, where the denial of such relief would be inequitable. *Harrington v. Birdsall*, 38 Neb. 176, 56 N. W. 961.

Defendants had possession or control of the premises in controversy under their contract of purchase from July, 1931, until the trial in December, 1934. In the meantime they paid on the purchase price and interest $1,616. which was little more than the rental value of the property while they controlled it. They were in default in the payment of taxes and purchase price. The evidence does not

prove their willingness or ability to continue to pay the unchanged stipulated monthly instalments of $40 each. Without notice to plaintiffs they leased the premises and surrendered possession to tenants. They collected the rents and applied a portion thereof to partial payments of the delinquent purchase price due plaintiffs. While they made repairs at an outlay of $69, they did not do any interior decorating or outside painting. The dwelling-house was in good repair when the lot was sold. Cyril Smith's highest estimate of the value of the property at the time of the trial was $3,400. At the same time the indebtedness to plaintiffs under the contract was $3,951.62, not including delinquent taxes amounting to more than $90. According to evidence adduced by defendants themselves, therefore, they have no equity based on value considered with debt. Under the circumstances it would be inequitable to deny strict foreclosure. In these views of the facts and the law the district court granted the proper relief. Redemption, however, by payment of debt, interest and all costs in both courts will be allowed within 30 days from the filing of the mandate in the district court.

AFFIRMED.

STATE, EX REL. WILLIAM H. WRIGHT, ATTORNEY GENERAL, PLAINTIFF, V. ROBERT A. BARLOW, DEFENDANT.

FILED JUNE 19, 1936. No. 29868.

1. **Attorney and Client.** Practice of law includes not only the trial of causes in court and the preparation of pleadings to be filed in court, but also includes drawing, and advising as to the legal effect of, petitions for the probate of wills, drawing of wills, deeds, mortgages and other instruments of like character, where a legal knowledge is required and where counsel and advice are given with respect to the validity and legal effect of such instruments.
2. ———. One may be guilty of the practice of law without a license, notwithstanding he receives no fee for the service performed.

3. ———. The act of an agent of a bonding company in preparing and executing a bond for his principal, where he merely performs the duties of such agent, does not constitute the practice of law.
4. ———. One who acts merely as an amanuensis in preparing an assignment of a judgment is not engaged in the practice of law.
5. ———. The supreme court is vested with the sole power to admit persons to the practice of law in this state and to fix the qualifications for admission to the bar.
6. ———: CONTEMPT. The supreme court possesses the inherent power to punish for contempt any person assuming to practice law within the state without having been duly licensed so to do.
7. ———. The practice of law by one not duly licensed may be punished as for a contempt of this court, notwithstanding such practice may be a criminal offense under the statute.

Original action by the state, on the relation of the attorney general, citing defendant for contempt for practicing law without a license. Defendant demurred to the complaint. *Demurrer sustained in part, with leave to plead.*

William H. Wright, Attorney General, Milton C. Murphy and *Lester A. Danielson,* for plaintiff.

Ginsburg & Ginsburg and *R. P. Kepler,* for defendant.

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and KROGER and IRWIN, District Judges.

GOOD, J.

This is an original action in this court, instituted by the state of Nebraska, upon relation of the attorney general, against the defendant, Robert A. Barlow, who is county judge of Cheyenne county, Nebraska.

The information contains ten counts, in each of which it is alleged that defendant has practiced law in this state without being licensed so to do, and that such practice constitutes contempt of this court. Defendant has filed a general demurrer to the information as a whole and to each count thereof. It is defendant's contention that the facts alleged in each of five counts of the information are insufficient to constitute the practice of law. Defendant

tacitly concedes, and we think it is beyond question, that counts 1, 2, 3, 5 and 9 sufficiently charge the defendant with the practice of law within this state without having a license so to do.

An all-embracing definition of the term, "practice of law," would involve great difficulty. For the purpose of this proceeding, it is sufficient to say that it includes not only the trial of causes in court and the preparation of pleadings to be filed in court, but also includes drawing and advising as to the legal effect of petitions for the probate of wills, the drawing of wills, deeds, mortgages and other instruments of like character, where a legal knowledge is required, and where counsel and advice are given with respect to the validity and legal effect of such instruments. Among the cases so holding, in substance, the following are mentioned: *In re Opinion of the Justices*, 194 N. E. (Mass.) 313; *Paul v. Stanley*, 168 Wash. 371, 12 Pac. (2d) 401; *Boykin v. Hopkins*, 174 Ga. 511, 162 S. E. 796; *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N. E. 650. We do not desire to be understood as saying that the mere act of drawing a promissory note, chattel mortgage, real estate mortgage, deed or other similar instruments would constitute the practice of law, where the person so drawing them acts merely as an amanuensis and does not advise or counsel as to the legal effect and validity of such instruments.

Defendant insists that to constitute the practice of law one must hold himself out as a licensed attorney and receive a fee for his service. We think that this claim is not well founded. One may represent a client in court, draw the pleadings for his client's cause and actually try it in court without receiving a fee for such service. Certainly, no one would contend that such acts do not constitute the practice of law. It is a matter of common knowledge that attorneys are appointed by the federal courts to defend indigent persons, charged with crimes in such courts, and that they render such service without compensation. It can scarcely be said that the defense of a person charged

with a crime in the federal court is not the practice of law. It might as well be said that a surgeon who performs, without fee or reward, a tonsillectomy or appendectomy is not practicing surgery. Other authorities, holding to the effect that the charging and receiving of a fee is unnecessary to constitute the practice of law, are *Ferris v. Snively,* 172 Wash. 167, 19 Pac. (2d) 942; *People v. Association of Real Estate Taxpayers,* 354 Ill. 102, 187 N. E. 823.

Defendant contends that counts 4, 6, 7, 8 and 10 are insufficient to charge the practice of law without a license. Count 4 charges defendant with giving advice and counsel to certain named parties concerning the execution and delivery of a promissory note and chattel mortgage, and that he did prepare such note and mortgage and advised the parties as to the legal effect thereof. This sufficiently charges the practice of law.

Count 6 charges that defendant, purporting and pretending to act as a duly licensed attorney at law, did unlawfully counsel with and advise one certain named person and her husband to execute and deliver to another a note and chattel mortgage, and did then and there advise said person that said transaction was legal and binding. We think this is sufficient to charge the defendant with practicing law.

Count 7 charges that defendant had acted as agent for the National Surety Company, a corporation, in the drafting and preparation of surety bonds for divers executors, administrators and guardians, and in collecting the premiums upon said bonds. In our opinion, this count is insufficient to charge the practice of law. It is not charged that the surety company was not authorized to transact a bonding business in this state. If it was so authorized, it could act only through an agent, and if defendant was acting as agent for the company and was authorized by the company to execute the bonds, then he was only performing a duty which the state authorizes a bonding company to perform. It would no more constitute the practice

of law than would the act of a recording agent for an insurance company who prepares and delivers to an insured a policy of fire insurance. The law of this state permits companies to transact such business and authorizes them to appoint agents, and the agents are duly licensed by the state. Certainly, it cannot be said that one licensed to transact an insurance or bonding business can be guilty of the practice of law, where he merely performs the duties of such agent.

Count 8 charges that defendant did draw and prepare, at the request of one Bolger, a certain assignment in writing of a certain judgment. So far as appears, defendant did no more than act as an amanuensis for Bolger in writing the assignment. The assigned judgment was in the county court of which the defendant was the county judge. Thereafter he received and filed the assignment in his court. However, had the assignment been prepared by any other person, and had the assignee brought the assignment to the defendant as county judge, it would have been his duty to receive and file the same in his court. Count 8 of the information is insufficient to charge the practice of law.

Count 10 charges the defendant with advising and counseling as attorney at law with one Lenzen, guardian of certain minors in a guardianship matter in the county court of Cheyenne county, Nebraska, and that he did advise and counsel with said guardian to lend to himself funds belonging to the estate of his ward, and did then and there draw and prepare an order of the county court of Cheyenne county, authorizing said loan by said guardian to himself, and did prepare and draw a note and mortgage to secure the payment of said loan. This sufficiently charges the practice of law.

We are of the opinion that each count of the information, except counts 7 and 8, charges defendant with the practice of law.

Defendant contends that this court is, by constitutional provision, subordinate to the legislature in the regulation

of the practice of law; that it can only act in the absence of legislation; that the legislature has occupied the field and thereby excluded this court from the exercise of such power. He relies upon section 25, art. V of the Constitution, which, so far as applicable to the present controversy, reads: "For the effectual administration of justice and the prompt disposition of judicial proceedings, the supreme court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters." We think the constitutional provision was intended to authorize this court to promulgate rules for the practice and procedure in courts, and that it was not intended to limit the power of the court with reference to the admission or disbarment of attorneys, or to limit the court in fixing the qualifications which one must possess to be admitted to practice law.

Section 1, art. II, Const., provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted." Section 1, art. V, Const., provides: "The judicial power of the state shall be vested in a supreme court, district courts," etc.

This court has heretofore recognized and decided that it has the power to adopt rules fixing the qualifications for admission to the bar, and requires a higher standard of educational qualifications than does the statute. In *In re Disbarment Proceedings of Newby*, 76 Neb. 482, 107 N. W. 850, it was held: "This court alone can pass upon the qualifications of applicants for admission to the bar, and has sole power to annul such admission." See, also, *In re Admission to the Bar*, 61 Neb. 58, 84 N. W. 611. The principles announced in these cases were approved in the case of *State v. Goldman*, 127 Neb. 340, 255 N. W. 32.

Turning now to the decisions of other courts, we find

that in *In re Opinion of the Justices, supra,* it was said (194 N. E. p. 316): "It is inherent in the judicial department of government under the Constitution to control the practice of the law, the admission to the bar of persons found qualified to act as attorneys at law and the removal from that position of those once admitted and found to be unfaithful to their trust. While the judicial department cannot be circumscribed or restricted in the performance of these duties, appropriate and essential assistance in discharging them may be afforded by the enactment of statutes."

In *In re Lavine,* 2 Cal. (2d) 324, 41 Pac. (2d) 161, it was said (p. 328): "An attorney is an officer of the court and whether a person shall be admitted is a judicial, and not a legislative, question. However, notwithstanding the inherent power of the courts to admit applicants for licenses to practice law it is generally conceded that the legislature may prescribe reasonable rules and regulations for admission to the bar which will be followed by the courts. The regulations so prescribed must, as stated, be reasonable and shall not deprive the judicial branch of its power to prescribe additional conditions under which applicants shall be admitted, nor take from the courts the right and duty of actually making orders admitting them. * * * In short, such legislative regulations are, at best, but minimum standards unless the courts themselves are satisfied that such qualifications as are prescribed by legislative enactment are sufficient. The requirements of the legislature in this particular are restrictions on the individual and not limitations on the courts. They cannot compel the courts to admit to practice a person who is not properly qualified or whose moral character is bad. In other words, the courts in the exercise of their inherent power may demand more than the legislature has required." Similar rulings have been announced in *Rhode Island Bar Ass'n v. Automobile Service Ass'n,* 179 Atl. (R. I.) 139, and in *People v. People's Stock Yards Bank,* 344 Ill. 462, 176 N. E. 901.

We have reached the definite conclusion that this court is vested with exclusive power to determine the qualifications of persons who may be permitted to practice law in this state, and possesses the exclusive power to disbar licensed attorneys who have been unfaithful to the trust which the court has reposed in them.

Whether the unauthorized practice of law may be punished as a contempt has not been hitherto decided by this court. Other courts have passed upon the question.

In *In re Morse*, 98 Vt. 85, 126 Atl. 550, the question was before that court, and it was therein said (p. 94): "It is true we have no constitutional or statutory provision on the subject, but none is necessary. Nor is it necessary to search the common law for authority, since such authority is fairly to be implied from the express power conferred upon this court in the matter of licensing attorneys. * * * Our conclusion is that this court has implied power to punish for contempt persons pretending to practice as attorneys before the courts of this state."

In *People v. People's Stock Yards Bank, supra,* it was said (p. 471): "Having power to determine who shall and who shall not practice law in this state, and to license those who may act as attorneys and forbid others who do not measure up to the standards or come within the provisions of its rules, it necessarily follows that this court has the power to enforce its rules and decisions against offenders, even though they have never been licensed by this court. Of what avail is the power to license in the absence of power to prevent one not licensed from practicing as an attorney? In the absence of power to control or punish unauthorized persons who presume to practice as attorneys and officers of this court the power to control admissions to the bar would be nugatory. And so it has been held that the court, which alone has authority to license attorneys, has as a necessary corollary ample implied power to protect this function by punishing unauthorized persons for usurping the privilege of acting as attorneys." See *People v. Alfani,* 227 N. Y. 334, 125

N. E. 671; *People v. Association of Real Estate Taxpayers, supra; People v. Motorists Association of Illinois*, 354 Ill. 595, 188 N. E. 827; *People v. Securities Discount Corporation*, 361 Ill. 551, 198 N. E. 681; *People v. Chicago Motor Club*, 362 Ill. 50, 199 N. E. 1; *Rhode Island Bar Ass'n v. Automobile Service Ass'n, supra.*

Defendant further contends that, since the legislature has, by statute, provided a penalty for the practice of law without a license and has not, by statute, made such practice a contempt, this court is powerless so to do. That an act denounced by statute as a crime may constitute a contempt of the court is beyond question, nothwithstanding the offender may be prosecuted under a criminal statute. The question has been before other courts and a like holding has been made in *People v. Association of Real Estate Taxpayers, supra*, and in *Rhode Island Bar Ass'n v. Automobile Service Ass'n, supra.* This court possesses inherent power to protect itself and its officers from any unlawful interference with its functions as a court. This it may do, not only for the purpose of protecting the court and its officers, but in the interest of the public at large to prevent it from being exploited and injured by one unlawfully assuming to act as an officer of the court. There are many instances where persons' rights have been jeopardized and sacrificed because of following the counsel and advice of unlicensed persons, giving or attempting to give legal advice.

We reach the conclusion that the demurrer should be sustained as to counts 7 and 8, and overruled as to all other counts. Defendant is allowed 20 days in which to further plead.

JUDGMENT ACCORDINGLY.

DWIGHT L. HUSTEAD, APPELLEE, V. VILLAGE OF PHILLIPS ET AL., APPELLANTS.

FILED JUNE 19, 1936. No. 29650.

1. **Municipal Corporations:** BOUNDARIES. In the absence of specific constitutional limitations, the power of the legislature to change the boundaries of municipal corporations, and to apportion the municipal debts upon such change of boundaries, is absolute. When the act or statute authorizing a change of boundaries is silent as to apportionment of municipal debts, the territory embraced within the new boundaries becomes liable for all prior debts, and the territory excluded from the new boundaries is forever released from all municipal debts.
2. ———: ———. A decree of the district court finding that justice and equity require detachment of farm land from the boundaries of a municipal corporation will not be set aside unless it is clearly shown that the trial court made an important mistake of fact, or made an erroneous inference of fact or of law.
3. ———: ———. The fact that unplatted land used exclusively for agricultural purposes was included in the incorporated limits of a village, with tacit permission of former owner, does not estop his grantee or successor in title from proceeding under section 17-412, Comp. St. 1929, to have it disconnected therefrom.
4. ———: ———. A municipality may not annex, or retain within its boundaries, strictly farm land for revenue purposes only.
5. ———: ———. "Any person dealing with such a corporation (a village) does so with the knowledge that its territory may be enlarged or diminished in the manner prescribed by the law in existence at the time." *Hardin v. Pavlat*, 130 Neb. 829, 266 N. W. 637.
6. ———: ———. "A bondholder or other creditor of such a corporation has no vested right on that account to have the territorial boundaries thereof remain constant so long as the corporation continues to exist with a substantial part of its original territory unimpaired." *Hardin v. Pavlat, supra.*
7. ———: CONTRACTS: IMPAIRMENT. "Where a bondholder became a creditor of a village at a time when section 17-412, Comp. St. 1929, was in force, the disconnecting of lands from the village under the provisions of that statute is not an impairment of the bondholder's contract, within the purview of section 16, art. 1 of the Nebraska Constitution, or section 10,

art. 1 of the Constitution of the United States." *Hardin v. Pavlat, supra.*

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

William H. Wright, Attorney General, Milton C. Murphy and *Craft, Edgerton & Fraizer,* for appellants.

Charles F. Adams, contra.

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

EBERLY, J.

Dwight L. Hustead instituted this action seeking to have 28.14 acres of unoccupied, agricultural land, theretofore embraced in the corporate limits of the village of Phillips, detached therefrom. By his amended petition, filed under the provisions of section 17-412, Comp. St. 1929, he set forth the strictly agricultural character of the land involved; alleged that it received no benefits from the village or from the utilities operated by it; that an excessive municipal tax was imposed upon it; and that justice and equity required that this territory be disconnected from the village.

To this pleading, the village of Phillips filed an answer setting forth, specifically, allegations pertaining to the land involved which, in effect, traversed the allegations of the amended petition, and, in addition, set forth that to grant the same would necessarily impose an additional tax burden upon the taxpayers of the village, and further charged that, by reason of the laches of plaintiff and his predecessors in title, he was estopped from claiming the right to have his land set out of said village. No constitutional questions are presented by the answer of the village.

Twenty-five taxpayers of the village of Phillips intervened, setting forth that the total assessed valuation of all the real estate of the village was $69,710; that the assessed valuation of the land sought to be detached is

$2,025; that there were outstanding $8,000 of unpaid water bonds theretofore issued by said village; that if said real estate of plaintiff were detached, on account of said unpaid indebtedness, each of the remaining taxpayers of said village would be compelled to pay more than his just share of said bonds, principal and interest, and will thereby be deprived "of the equal protection of the law and will take their property without due process of law, all contrary to the Constitution of the state of Nebraska, and the Constitution of the United States."

The state of Nebraska, by a petition in intervention, sets forth the due issuance, by the village of Phillips, of $8,000 in water bonds, now owned by the state of Nebraska; further alleges that to permit the real estate involved in this action to be detached from said village and exempted from the payment of its proportionate share of the principal and interest of said bonds will impair the obligation of said bonds, and will impair and deprive the state of Nebraska of the security pledged by the terms thereof, and will deprive the state of its property without due process of law, and will deprive the state of the equal protection of the laws, all contrary to, and in violation of, the Constitution of the United States and the Constitution of this state. In addition, the state of Nebraska challenges the validity of section 17-412, Comp. St. 1929, on the ground that it attempts to confer on the judiciary the power to tax.

To the answer of the village and the petitions of intervention, plaintiff presented his reply and answers.

Upon trial, the district court found generally for plaintiff; found that justice and equity require that the lands in suit be disconnected from the village of Phillips; found against the interveners and denied their respective prayers for relief; and entered decree as prayed in plaintiff's petition. From this decree the defendant village and the interveners appeal.

As to the general issues involved in this case, it may be said that, in the absence of specific constitutional limita-

tions, the power of the legislature to change the boundaries of municipal corporations, and to apportion the municipal debts upon such change of boundaries, is absolute. When the act or statute authorizing a change of boundaries is silent as to apportionment of municipal debts, the territory embraced within the new boundaries becomes liable for all prior debts, and the territory excluded from the new boundaries is forever released from all municipal debts. McQuillan, Municipal Corporations (2d ed.) sec. 311. See, also, *Bisenius v. City of Randolph,* 82 Neb. 520, 118 N. W. 127; *Gottschalk v. Becher,* 32 Neb. 653, 49 N. W. 715.

A decree of the district court finding that justice and equity require detachment of farm land from the boundaries of a municipal corporation will not be set aside unless it is clearly shown that the trial court made an important mistake of fact, or made an erroneous inference of fact or of law. *Gregory v. Village of Franklin,* 77 Neb. 62, 108 N. W. 147; *Joerger v. Bethany Heights,* 97 Neb. 675, 151 N. W. 236; *MacGowan v. Village of Gibbon,* 94 Neb. 772, 144 N. W. 808; *Marsh v. Village of Trenton,* 92 Neb. 63, 137 N. W. 981; *Chapin v. Village of College View,* 88 Neb. 229, 129 N. W. 297; *Bisenius v. City of Randolph,* 82 Neb. 520, 118 N. W. 127; *Michaelson v. Village of Tilden,* 72 Neb. 744, 101 N. W. 1026; *Keim v. Village of Bloomington,* 119 Neb. 474, 229 N. W. 769.

So too, the fact that unplatted land used exclusively for agricultural purposes was included in the incorporated limits of a village, with tacit permission of former owner, does not estop his grantee or successor in title from proceeding under section 17-412, Comp. St. 1929, to have it disconnected therefrom. *Joerger v. Bethany Heights,* 97 Neb. 675, 151 N. W. 236; *Barber v. Village of Franklin,* 77 Neb. 91, 108 N. W. 146; *Village of Osmond v. Smathers,* 62 Neb. 509, 87 N. W. 310.

Further, a municipality may not annex, or retain within its boundaries, strictly farm land for revenue purposes only. *Witham v. City of Lincoln,* 125 Neb. 366, 250 N. W. 247; *Joerger v. Bethany Heights,* 97 Neb. 675, 151 N. W. 236;

Village of Osmond v. Smathers, 62 Neb. 509, 87 N. W. 310.

So far as the issues between the plaintiff and the village of Phillips are concerned, we are committed to the view: "In proceedings under section 8978 aforesaid (Comp. St. 1929, sec. 17-412), it is not a defense that the defendant is indebted upon its bonds or otherwise." *Bisenius v. City of Randolph*, 82 Neb. 520, 118 N. W. 127.

As to the constitutional questions raised by the state and by the taxpayers of the village, the reasoning of Carter, J., in *Hardin v. Pavlat*, 130 Neb. 829, 266 N. W. 637, is applicable and controlling as applied to the record before us. We, therefore, reannounce and reapprove the following principles set forth therein:

"Any person dealing with such a corporation (a village) does so with the knowledge that its territory may be enlarged or diminished in the manner prescribed by the law in existence at the time.

"A bondholder or other creditor of such a corporation has no vested right on that account to have the territorial boundaries thereof remain constant so long as the corporation continues to exist with a substantial part of its original territory unimpaired.

"Where a bondholder became a creditor of a village at a time when section 17-412, Comp. St. 1929, was in force, the disconnecting of lands from the village under the provisions of that statute is not an impairment of the bondholder's contract, within the purview of section 16, art. 1 of the Nebraska Constitution, or section 10, art. 1 of the Constitution of the United States."

It follows that the disposition of this case as made by the district court was, in all respects, correct, and it is

AFFIRMED.

JOE A. KIELIAN ET AL., APPELLANTS, V. KENT & BURKE COMPANY ET AL., APPELLEES.

FILED JUNE 19, 1936. No. 29656.

1. **Judgment:** VACATING: NEWLY DISCOVERED EVIDENCE. "Newly discovered evidence which is merely cumulative in character will not entitle a party to a new trial, nor will such evidence justify a court of equity in setting aside a judgment obtained in a law action." *Gutru v. Johnson*, 115 Neb. 309, 212 N. W. 622.
2. ———: ———. "A party should, in preparing his case for trial, proceed on the assumption that his adversary will produce evidence to make good the averments of his pleading." *Secord v. Powers*, 61 Neb. 615, 85 N. W. 846.
3. ———: ———. "In an action to vacate a judgment on the ground that it was obtained by fraud the plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision was not attributable to his own fault or negligence." *Secord v. Powers*, 61 Neb. 615, 85 N. W. 846.
4. ———: ———. Under section 20-2001, Comp. St. 1929, it is only when a judgment is clearly shown to have been obtained by fraud or false testimony (and which it would be against good conscience to enforce) that, upon application of the unsuccessful parties, accompanied by a proper showing of due diligence, such judgment will be vacated.
5. **Evidence** in the record examined *de novo*, and *held* insufficient to establish a cause of action in behalf of plaintiffs.

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

Dewey Hanson and *G. N. Anderson*, for appellants.

George B. Thummel, contra.

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

EBERLY, J.

The plaintiffs first instituted an action in the district court for Polk county, praying that a warranty deed, dated February 25, 1932, recorded in book R. R. on page 595 of the deed records of Merrick county, and also recorded in book 48 on page 102 of the deed records of Polk county,

and purporting to have been executed by them and to convey to Kent & Burke Company the lands in suit situated in Merrick and Polk counties, be set aside and canceled of record. Their petition set forth the contract of settlement and this deed of conveyance of plaintiffs' farm; alleged that both were procured by and through the fraudulent acts, representations, and concealment of Kent & Burke Company; that neither the deed nor the contract had been knowingly executed or acknowledged by them; that the notary public purporting to certify to such acknowledgment was disqualified by interest, had never been appointed, and had never qualified as such officer; that the lands in suit constituted the homestead of plaintiffs; and that said written instruments, not having been actually acknowledged or knowingly executed by the grantors, were wholly void.

To this pleading the defendant Kent & Burke Company filed its answer and cross-petition, in which the allegations of plaintiffs' petition were denied; also, setting forth at length the approved qualifications of the notary public who officiated in taking the acknowledgment of the grantors to the deed in suit, and detailing the several acts performed by him in that transaction; and praying that the title to the premises be quieted in the defendant Kent & Burke Company.

Plaintiffs thereupon filed reply, thus joining issues. A trial to the court followed, and after hearing the evidence, the district court for Polk county entered its decree finding generally for defendant and against plaintiffs; and finding that the deed in question "is a valid warranty deed duly executed, acknowledged and delivered by plaintiffs to defendant for a consideration," and quieting title to the premises conveyed by such deed in the grantee therein named, Kent & Burke Company. No appeal was ever prosecuted from said decree, and on January 4, 1935, the present action was instituted by plaintiffs to secure a new trial.

A careful reading of the record discloses that the

matters which plaintiffs now allege as constituting perjury at the first trial were specifically set forth as facts in defendant's answer in that proceeding. Thus, plaintiffs, in advance of trial, were advised by pleading of the nature of defendant's evidence which would be presented. This evidence related to the execution of the written instruments, and the due acknowledgment thereof by the plaintiffs. Indeed, the record sustains the conclusion that, on the matters in controversy, the testimony of plaintiffs, in the present action, was substantially the same as that given by them in the trial of the first case. It amounted to no more than a practical reiteration of what had been previously presented and considered. Two witnesses testified who had not been previously called. At most, their evidence was merely corroborative of plaintiffs' testimony, and strictly cumulative.

The principle here controlling is: "Newly discovered evidence which is merely cumulative in character will not entitle a party to a new trial, nor will such evidence justify a court of equity in setting aside a judgment obtained in a law action." *Gutru v. Johnson,* 115 Neb. 309, 212 N. W. 622. See, also, *Campbell v. Holland,* 22 Neb. 587, 35 N. W. 871; *Christoffersen v. Weir,* 110 Neb. 390, 193 N. W. 922.

Practically all of the evidence charged by plaintiffs as being perjured was introduced at the first trial in support of specific allegations of defendant's pleading as to the acts and statements of plaintiffs and as to the acts and qualifications of the notary public who took the acknowledgment of plaintiffs to the deed, the validity of which was challenged.

Under such circumstances, "A party should, in preparing his case for trial, proceed on the assumption that his adversary will produce evidence to make good the averments of his pleading." *Secord v. Powers,* 61 Neb. 615, 85 N. W. 846.

So, also, "In an action to vacate a judgment on the ground that it was obtained by fraud the plaintiff must

allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision was not attributable to his own fault or negligence." *Secord v. Powers, supra.* See, also, *Gutru v. Johnson,* 115 Neb. 309, 212 N. W. 622.

Under section 20-2001, Comp. St. 1929, it is only when a judgment is clearly shown to have been obtained by fraud or false testimony (and which it would be against good conscience to enforce) that, upon application of the unsuccessful parties, accompanied by a proper showing of due diligence, such judgment will be vacated. *Secord v. Powers, supra; Gutru v. Johnson, supra.*

As hereinbefore shown, the evidence presented on part of plaintiffs in the instant case, taken as an entirety, is practically the same, so far as can be determined from the present record, as that offered in the first trial. It is not convincing. Under the circumstances disclosed, it is manifestly insufficient to entitle the plaintiffs to the relief sought. The fundamental reasons for the attitude of courts in this particular class of cases was well expressed by Letton, J., in *Scudder v. Evans,* 105 Neb. 292, 180 N. W. 254, in this language:

"An extended experience of the general inaccuracy of observation and of the frailty of human nature as exhibited on the witness-stand convinces the writer that, if judgments may be opened up and set aside on the sole ground that testimony given at the hearing was false or even perjured, then comparatively few judgments would be conclusive. It is in the highest degree essential to the welfare of the community, and to the respect which should be given to and the confidence which ought to exist in the judgments of a court, that they should not be set aside unless upon the strongest and most convincing grounds."

Two judges, each in a separate trial, heard the material evidence set forth in the present record, and found against the plaintiffs' contentions. A careful consideration of such proof by this court, *de novo,* does not warrant the conclusion that any error has been committed.

Therefore, the judgment of the trial court is deemed correct, and the same is

AFFIRMED.

SCHOOL DISTRICT OF OMAHA, PLAINTIFF, V. THOMAS GASS ET AL., DEFENDANTS.

FILED JUNE 19, 1936. No. 29854.

1. **Statutes:** CONSTRUCTION. Where two sections of the same statute, passed at the same time, are inconsistent with and repugnant to each other, such a construction must be given as will harmonize apparently conflicting provisions.
2. ———: ———. Statutes are to be construed in the light of a clearly apparent legislative policy.
3. ———: ———. Such an interpretation should not be given a statute as would render superfluous, redundant, and meaningless entire sections thereof.
4. ———: ———. If the language of a statute is ambiguous, the court will consider its purpose as a whole, and seek to carry out, and not defeat, such purpose.

Original action by the School District of Omaha against Thomas Gass and others to determine the manner of distributing liquor license fees. *Judgment for defendants.*

Frank H. Woodland, for plaintiff.

John J. Ledwith and *Peterson & Devoe,* for defendants.

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and BLACKLEDGE and LANDIS, District Judges.

PAINE, J.

A declaratory judgment is sought, to determine how funds collected by the state liquor control commission as state license fees, and paid to the state treasurer, and by him credited to the state school fund, shall be distributed.

The School District of Omaha filed a petition in an original action on April 4, 1936, asking this court to enter a declaratory judgment as to the rights of the

plaintiff in liquor license moneys paid to the state treasurer by the state liquor control commission, and named as defendants in such original suit the members of the Nebraska liquor control commission, the state treasurer, the state auditor of public accounts, and Charles W. Taylor, as superintendent of public instruction of the state of Nebraska. In said petition it is alleged that the construction placed upon the Nebraska liquor control act, being House Roll No. 128 (Laws 1935, ch. 116, Comp. St. Supp. 1935, sec. 53-301 *et seq.*) approved by the governor May 24, 1935, by the various state officers who are named as defendants herein is contrary to the terms of the law, and creates a controversy between the plaintiff and the defendants, and involves justiciable issues between the parties hereto which entitle them to relief under the declaratory judgment act, sections 20-21,140 *et seq.*, Comp. St. 1929.

It is further alleged in said petition that, for the period beginning May 24, 1935, when the act went into effect, and ending December 31, 1935, there was paid to the state liquor control commission, and by it paid to the state treasurer, license moneys for the manufacture and sale at wholesale and retail of alcoholic liquor, including beer, from within the city of Omaha the sum of $47,445, which sum should have been paid over to Douglas county for the benefit of the plaintiff school district of Omaha, but that, under the construction placed upon said act by the defendant state officers, there was paid to the plaintiff school district only the sum of $11,910, and a balance of more than $30,000, which plaintiff claims was due to the plaintiff school district, was paid to other school districts in the state of Nebraska by order of the state superintendent of public instruction.

It is further alleged in said petition that subdivision 10, sec. 53-316, Comp. St. Supp. 1935, of the Nebraska liquor control act, vests in said liquor control commission the power and duty to "receive, account for and turn over to the state treasurer state license fees and taxes provided

for in this act," and that, under the provisions of section 53-348, Comp. St. Supp. 1935, said liquor control commission is empowered to issue licenses for the sale of alcoholic liquors except beer by the drink, subject to all of the terms and conditions of the act in all cities and villages of the state.

It is also set out in said petition that section 53-392 of said act provides that all state registration fees shall be by said state treasurer credited to the liquor control fund; all retail license fees received by the city or village treasurer shall inure to the school fund of the district lying wholly or partially within the corporate limits of the city or village, and all license fees received by the liquor control commission shall be paid to the state treasurer and by him credited to the school fund, as provided in section 5, art. VII of the Constitution, which section of the Constitution reads as follows: "All fines, penalties, and license moneys, arising under the general laws of the state, shall belong and be paid over to the counties respectively, where the same may be levied or imposed, and all fines, penalties and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivisions less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue."

The plaintiff therefore prays for a declaratory judgment, declaring that all license moneys paid to the state liquor control commission, and by it paid to the state treasurer, belong to and should be paid over to the counties in which liquor licenses are granted, and for such other relief as may be just and equitable.

To this petition each and all of the state officers named as defendants join in an answer, admitting certain allegations of the petition, among which it is admitted that the plaintiff has been paid the sum of $11,910, but denying there is any balance due the plaintiff, and admit that the

state treasurer has construed said liquor control act as requiring him to place said state license moneys paid to him by the state liquor commission in the state school fund, and allege that the only state school fund of which the state treasurer has any book accounts or record is such state school fund; that the state treasurer has no information or means of ascertaining from what licensees the license moneys transferred to him were secured, or their places of business; that the said commission is not directed to give him this information; that section 79-2002, Comp. St. Supp. 1933, provides the only manner for the disposition of the state temporary school funds, and that if the liquor control act intended to provide a different disposition of any part of said fund, it would be void and unenforceable as amendatory of said section 79-2002, without repealing said section, and allege that said officers intend to continue to so handle said funds in accordance with said section of our statute. The defendants insist that section 5, art. VII of the Constitution, applies only to license moneys levied by the various subdivisions of the state. The defendants join in the prayer of the plaintiff that the court enter a declaratory judgment, establishing, declaring, and determining the rights, status, and legal relation of the parties as affected by said liquor control act.

This section of the Constitution has been before this court a number of times. In *State v. McConnel*, 8 Neb. 28, it was held that, where fines, penalties, and license money arise and are paid in under ordinances of cities, villages, towns, and precincts, being subdivisions less than a county, such money shall be appropriated and exclusively used for the support of the common schools in the respective subdivision where it accrues. It was said that reference is had to the immediate authority by which the fine or penalty is imposed or the license is granted, and that only in a technical sense could the money be said to have arisen under the general law of the state, and that such money required to be paid under ordinances of the city of Lincoln did not belong to the common school fund of Lan-

caster county, but to the common school fund of the school district of Lincoln.

In *City of Hastings v. Thorne*, 8 Neb. 160, Judge Lake again had this section of the Constitution before him, and held that the only disposition permitted with money thus levied and imposed is that it be spent for the support of the common schools within the particular municipal subdivision in which the money is raised.

In *State v. Heins*, 14 Neb. 477, 16 N. W. 767, we find an action brought by the school district of the city of Omaha for a writ of mandamus to compel the county treasurer of Douglas county to pay over to the city treasurer of Omaha (*ex officio* school treasurer), for the use of the school district of the city of Omaha, $728.80, which sum had come into his hands from the police judge of the city of Omaha for fines and penalties collected for misdemeanors against the general laws of the state of Nebraska, commonly referred to as state cases. The trial court refused to issue a writ of mandamus, and such action was affirmed by this court.

This court has had this same liquor control act before us in the case of *Hanson v. Gass*, 130 Neb. 685, 267 N. W. 403, in which it was said that this act was ambiguous and contained most unusual legislative pronouncements, and cited *Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb. 592, 66 N. W. 658: "Where two sections or portions of the same statute, passed at the same time, are inconsistent with and repugnant to each other, so much so that both cannot be enforced, the last section, or last words, will be allowed to prevail and the section or words in conflict therewith held to be repealed." Such a construction should be given as will harmonize apparently conflicting provisions of a statute. *West Nebraska Land Co. v. Eslick*, 102 Neb. 761, 169 N. W. 729.

It is clear that the act is of great length and contains many involved and uncertain provisions, and that it was arrived at only after reference to conference committees, and finally adopted in some haste. The clarification of the

ambiguities in the act cannot be achieved by giving too great weight to any one particular clause. The general plan was to have a liquor control commission in which the general public would have confidence and place in its hands full authority to dispose of all questions relating to the licenses which they granted. It is clear that the money paid for these licenses was to be turned over weekly to the state treasurer, and the only provision under which such temporary school funds can be disbursed by the state treasurer is by following said section 79-2002, Comp. St. Supp. 1933, which the state treasurer and the state superintendent of public instruction have heretofore followed. To carry out the contentions of the plaintiff, the state treasurer would be required to know from what portion of the state each and every part of said license funds came, and some method, not yet made clear, would have to be devised by which state warrants would be drawn, and such funds disbursed by a new method contended for by the plaintiff.

It is shown that the state treasurer and state superintendent of public instruction have been distributing such license funds semiannually, one-fourth equally among all the school districts of the state and the remaining three-fourths apportioned to all the counties of the state according to the *pro rata* enumeration of pupils in each county, in strict accordance with the provisions of section 79-2002, Comp. St. Supp. 1933, for the distribution of state school funds.

It is insisted by the defendants in the case at bar that section 5, art. VII of the Constitution, does not forbid the state itself to impose license fees, nor does it direct how license fees so imposed by the state shall be used for the benefit of the public schools. This section of our Constitution was again considered by this court in *State v. Nickerson*, 97 Neb. 837, 151 N. W. 981, in which case John Stevens brought an action in mandamus in Furnas county to compel the county clerk to pay the money received from issuing hunting and fishing licenses into the

county school fund in accordance with this section of our Constitution under consideration. It was argued that Furnas county had a better right to the money than any other county, but this court said this would be true if the license was levied or imposed by Furnas county. It was held that this constitutional provision applies only to license money levied or imposed by a county or some minor municipal corporation, and does not apply to a license imposed by the state at large; that such state license fees should be paid to the state treasurer for the benefit of the state school fund.

Statutes are to be construed in the light of a clearly apparent legislative policy. *Reiter v. Chapman,* 177 Wash. 392, 31 Pac. (2d) 1005, 92 A. L. R. 828.

It is a settled rule of statutory construction that such interpretation should not be given a statute as would render superfluous, redundant, and meaningless entire sections thereof.

A statute must be construed as a whole, effect being given, if possible, to all its provisions; but if its language is ambiguous, the court will consider the purpose of the statute as a whole, and seek to carry out, and not defeat, such purpose. *Street v. Commercial Credit Co.,* 35 Ariz. 479, 281 Pac. 46, 67 A. L. R. 1549; 25 R. C. L. 1004, sec. 246; 25 R. C. L. 983, sec. 230; 25 R. C. L. 999, sec. 242; R. C. L. Perm. Supp. 5639; 59 C. J. 995.

It must be concluded that the clause in section 53-392 of said liquor control act, reading "as provided in section 5, article VII, Constitution of Nebraska," applies only to such license fees as are not imposed by the state itself, otherwise it would be ambiguous and rendered inoperative by later inconsistent clauses of the act. Any other interpretation would not carry out the clear policy and intent of the law. 2 Lewis' Sutherland, Statutory Construction (2d ed.) 667, sec. 349.

State v. Fenton, 29 Neb. 348, 45 N. W. 464, was an action for mandamus to compel the county treasurer of Frontier county to pay to school district No. 38 money received

by said county treasurer for a liquor license issued by the county board of Frontier county to a licensee to sell liquor in Moorefield, which was not incorporated as a city or village on the date of the action, and this court held that, the license having been granted by Frontier county, the money did not belong to the school district in which the business was carried on, but was for the use and benefit of all the schools within the jurisdiction of the body granting the license. It appears to us by analogy that the moneys from the state licenses which are now being granted by the state liquor control commission do not belong to any particular school district within which the business of any particular licensee is carried on, but such moneys are for the use of all of the school districts within the jurisdiction of the body granting the licenses, and as such body is a state commission, it is proper to follow the law as established by the legislature and pay such moneys to the state treasurer, to be accounted for under the state school fund. While there is considerable force in the contentions of the plaintiff, yet we are of the opinion that the method of distribution of these funds which has been followed in the past is proper and lawful, and it has been a legal distribution of these funds under the law. If the plaintiff is aggrieved by this manner of distribution, then relief should be sought by an act of the next legislature, rather than through the court. The action of the state officers in the handling of state license moneys is confirmed and approved.

JUDGMENT FOR DEFENDANTS.

DAY, J., dissents.

EARL W. SLAGLE, APPELLEE, V. SECURITIES INVESTMENT CORPORATION, APPELLANT.

FILED JUNE 26, 1936. No. 29706.

1. Trial. In a law action, where, at the close of the evidence, each party requested a directed verdict in his favor and the court discharged the jury and decided the case upon the law and the

evidence, the losing party is estopped by his request from reviewing every issue of fact upon which there is any substantial conflict in the evidence.

2. Appeal. A finding of fact by the court in a law action, where the finding of a jury is waived by the parties, will not be disturbed unless clearly wrong.
3. Sales: RESCISSION. A delay for a reasonable time in a rescission by a buyer is excusable where the delay is induced by the seller.
4. ———. Section 60-310, Comp. St. 1929, does not provide an exclusive method of transferring ownership of a motor vehicle; in cases described in section 60-313, Comp. St. 1929, it may be transferred by "operation of law," as there defined.

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

Woods, Woods & Aitken, Francis P. Matthews and *William P. Kelley*, for appellant.

Richard F. Stout and *Jay O. Rodgers, contra.*

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and BECKLEDGE and LANDIS, District Judges.

GOSS, C. J.

This is a law action to recover $500 for the amount paid on the purchase price of a motor truck. At the conclusion of the evidence both sides moved for directed verdicts. The court discharged the jury and entered judgment for plaintiff for the amount claimed. Defendant appeals.

In a law action, where, at the close of the evidence, each party requested a directed verdict in his favor and the court discharged the jury and decided the case upon the law and the evidence, the losing party is estopped by his request from reviewing every issue of fact upon which there is any substantial conflict in the evidence. *Segear v. Westcott*, 83 Neb. 515, 120 N. W. 170; *Henton v. Sovereign Camp, W. O. W.*, 87 Neb. 552, 127 N. W. 869; *Howell v. Bowman*, 89 Neb. 389, 131 N. W. 597; *Knies v. Lang*, 116 Neb. 387, 217 N. W. 615; *Adams v. City of Omaha*, 119 Neb. 753, 230 N. W. 680. A finding of fact by the court in a law action, where the finding by a jury is waived by the parties, will not be disturbed unless clearly wrong.

Fidelity & Deposit Co. v. B. Grunwald, Inc., 129 Neb. 749, 262 N. W. 831.

Plaintiff alleges that on August 30, 1933, he purchased a three-ton used truck and trailer from defendant, represented to have been just previously completely overhauled and rebuilt, with all defective parts replaced, furnished with a four-ton motor, the trailer equipped with a ten-ton axle, the truck so constructed as to transport 400 cases of beer at a time from a brewery in St. Paul, Minnesota, to Lincoln and other Nebraska points (which was the business in which plaintiff was engaged). Plaintiff alleges the representations were false and untrue and gives the details thereof; and that plaintiff paid $500 on account of the purchase price of the truck for which he prays judgment.

The answer denies that the truck was purchased from defendant, and alleges that it was sold to plaintiff by the Motor Exchange and Refinance Company, which took a chattel mortgage from plaintiff for $2,691, which mortgage was duly transferred to defendant; that by reason of defaults by plaintiff in his agreed payments, defendant repossessed the truck in late December, 1933, and sold the truck to satisfy the debt due defendant under its mortgage.

The answer further denies that plaintiff ever made timely rescission of his contract of purchase of the truck, but continued to use the truck, and is estopped from rescinding and from receiving back his payments.

There was evidence on behalf of plaintiff to support findings that the truck and trailer were purchased by him from defendant and not from its assignor, that material representations as to it were false, that plaintiff had trouble with it from the start, that defendant undertook to remedy its defects from time to time but ultimately unavailingly, that it persuaded plaintiff for several months not to elect to rescind his agreement to purchase on its repeated promises and attempts to remedy the defects, and that he finally elected to rescind when the truck broke down on a trip, but that defendant repossessed the car in Iowa

before plaintiff could carry out his intention to move it to Omaha and tender it to defendant. The truck was one of two of its kind. No parts were in existence to supply those needed; they would have to be moulded. Plaintiff was not required to undergo further delays to make the truck operative. Delays and repairs required to be made all through the operation of the truck by plaintiff had been expensive and exasperating. There was ample evidence that the truck had been misrepresented and that the delay in rescinding was induced by defendant.

Under the rule stated early in this opinion, the findings of fact by the trial judge conclude us on review, unless those findings are clearly wrong.

But it is claimed by appellant that, before there can be a rescission of the contract and a restitution to plaintiff of the amount he has paid, he must, as a matter of law, have put the seller in *statu quo*, and that he did not do so after he had used the truck for 20,000 or 30,000 miles, between the months of September and December, 1933. 3 Williston, Contracts, sec. 1463.

But exceptions are made to the rule "The buyer must put the seller in *statu quo*." Those exceptions are made by Professor Williston in the section above cited. One of them is: "Where the buyer is induced by the seller to retain the property temporarily and attempt to remedy the defect, which is thereby increased." In support of the text the author cites *Feight v. Thisler*, 84 Kan. 185, 114 Pac. 249. The syllabus on that point is as follows: "Where there is a condition in a contract of sale that if the animal sold is not as warranted it may be returned to the seller if it is as sound as when sold, and where the animal turns out to be unsound and unfit for the purpose for which it was purchased, and the buyer is induced by the seller to retain the animal and attempt to cure it of infirmity and defects by remedies furnished by the seller, the condition for its return is waived and the fact that it is not returned will not preclude a recovery of damages for the breach of the warranty."

To the same effect, involving a 20-horse power International Harvester gasoline traction engine, is *Lathrop v. Maddux*, 58 Colo. 258, 144 Pac. 870. See, also, 55 C. J. 269, where it is stated: "In some jurisdictions an executed contract of sale may be rescinded upon the sole ground of a breach of warranty, regardless of whether or not there is fraud or other ground for rescission"—citing *Sedlacek v. Welpton Lumber Co.*, 111 Neb. 677, 197 N. W. 618; *Sherrill v. Coad*, 92 Neb. 406, 138 N. W. 567; *Mundt v. Simpkins*, 81 Neb. 1, 115 N. W. 325.

"A delay is excusable where it was induced by the adverse party; he cannot take advantage of a delay which he himself has caused or to which he has contributed." 21 C. J. 243. In *Rhines v. Skinner Packing Co.*, 108 Neb. 105, 187 N. W. 874, plaintiff rescinded his purchase of stock "within a year and he was not too late as a matter of law, when the circumstances are considered." In *Humbert v. Larson*, 99 Ia. 275, 68 N. W. 703, defendant was permitted to take advantage of his rescission made a year after he gave his notes for the purchase of a stallion which did not meet the representations made by plaintiff who sued upon the notes. The delay was induced by plaintiff. It was held that, in the circumstances, the rescission was made in a reasonable time.

Appellant argues that appellee did not execute the transfer of his motor registration certificate and therefore failed to complete a tender of good title to appellant. See Comp. St. 1929, secs. 60-310, 60-325. Appellant cites *In re Estate of Wroth*, 125 Neb. 832, 252 N. W. 322, in support of his contention. In that case a compliance with these sections was held necessary. The syllabus says: "Title to automobile can be transferred between living persons only by compliance with sections 60-310 and 60-325, Comp. St. 1929, relative to such transfer." That was a claim of title made in the matter of the estate of Leroy C. Wroth. Plaintiff filed a petition praying the county court to direct the administrator to deliver the automobile to her on the ground that before Leroy C. Wroth died he gave the

automobile to her in the presence of two witnesses (who testified to the fact). Claimant appealed from the adverse order of the county court to the district court, where a judgment was directed against her. We affirmed the judgment. The decision must be read and considered in the light of the circumstances on which it was based. There was no mortgage lien or vendor's lien or any sort of a contract existing between the parties. It was merely claimed that Leroy C. Wroth made a gift of the automobile. Plaintiff undertook to discharge the burden of proof of transfer of title by proving by competent witnesses the naked words of the deceased.

Here plaintiff executed a chattel mortgage and had the truck "until the appellant, for the purpose of foreclosing its mortgage, repossessed the equipment, on or about the 7th day of January, 1934." The foregoing is quoted from appellant's brief. We cannot find from the record what ultimately became of the truck. There is evidence tending to prove that it was replevied in Iowa by defendant. At any rate, defendant reduced it to possession. The presumption is that the registration certificate was carried in its container on the truck. Comp. St. 1929, sec. 60-309. "Repossession upon default in performance of the terms" is one of the circumstances which is included with transfers by operation of law and does away with the necessity of an executed transfer to divest a registered owner of title. Comp. St. 1929, sec. 60-313. We think this differentiates *In re Estate of Wroth, supra,* from the instant case and makes it inapplicable here.

The judgment of the district court is

AFFIRMED.

DAY and CARTER, JJ., dissenting.

The record in this case shows that plaintiff purchased the truck involved in this action on August 30, 1933, and that he knew that it was not as represented from the date he purchased it. He retained it for almost four months and drove it 25,000 to 40,000 miles during that time. It also appears that he did not attempt to rescind until the

truck was repossessed by the holder of the mortgage after default had been made in the payments due thereon. We are of the opinion that plaintiff had waived his right to rescind and recover back the purchase price and that his cause of action, if any, was one for damages for a breach of warranty.

FIRST TRUST COMPANY OF LINCOLN, APPELLEE, V. CARL C. CARLSEN: JOHN A. REICHENBACH ET AL., APPELLANTS.

FILED JUNE 26, 1936. No. 29832.

1. Appeal. When defendants responsible for damages for a breach of trust admit liability, the trial should be restricted to evidence tending to prove the amount of their liability.
2. Trusts. "If the trustee commits a breach of trust, he is chargeable with * * * any loss or depreciation in value of the trust estate resulting from the breach of trust." Restatement, Trusts, sec. 205.
3. Mortgages: BREACH OF TRUST: MEASURE OF DAMAGES. Where the breach of trust consists in the negligent or fraudulent failure of the trustee to advise bondholders of a default by mortgagors in the payment of interest on bonds and it becomes necessary for the bondholders or a successor-trustee to take over the security, the measure of damages is the difference between the value of that security at the time of default and its value at the time it can be taken over by or for the benefit of the bondholders, provided the value then is less than that at the time of default.
4. ———: ———: ———. As the security in the instant case was for $45,000 of bonds, of which plaintiff represented only $43,000, it would be entitled to recover only 43/45 of the difference, if any, in the values shown by application of the foregoing general rule.

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

Perry, Van Pelt & Marti, for appellants.

Beghtol, Foe & Rankin, contra.

Heard before GOSS, C. J., GOOD, DAY and CARTER, JJ., and KROGER and IRWIN, District Judges.

GOSS, C. J.

This is the second appearance of this cause in this court. The first judgment for plaintiff was reversed and the cause remanded. *First Trust Co. v. Carlsen*, 129 Neb. 118, 261 N. W. 333. The decision in that case is the law of this case so far as it applies to the facts.

This is an action at law for damages brought by the First Trust Company of Lincoln as successor-trustee of Lincoln Trust Company against defendants. Plaintiff as such successor-trustee represented 38 bondholders who had purchased bonds from the Lincoln Trust Company and the Lincoln Safe Deposit Company and claims to have suffered damages by reason of the negligent and fraudulent conduct of defendants as officers and directors of those companies. It is alleged that the bondholders here involved purchased and owned $43,000 worth of bonds out of a $45,000 issue of mortgage bonds secured by a first mortgage on 480 acres of Dixon county land. The facts and issues are rather fully stated in the opinion in the former case to which reference is hereby made for the sake of brevity.

After the mandate went down in the former case, defendants Holm, Mellor and Reichenbach filed an amended and supplemental answer in which they admitted that, by reason of the rule announced in this case by the supreme court, they are liable for the damages resulting from the breach of trust by the Lincoln Trust Company, but these defendants averred that the damages consisted solely of a loss of rents from September 1, 1931, to July 9, 1932.

The trial resulted in a verdict against all four defendants for $25,000, for which judgment was entered. On hearing the motion for a new trial, the court ordered a remittitur of $7,000, which was complied with. Defendants Holm, Mellor and Reichenbach appealed. Defendant Carlsen did not appeal.

The admission of liability by defendants left the case in such a situation that it was necessary to prove only the damages that the bondholders had suffered by reason

of the negligent and fraudulent conduct of defendants. This admission of liability, first made in the answer, was made over and over on the trial when defendants were objecting to certain evidence received by the court and submitted to the jury. Some of this evidence related to facsimile signatures of interest coupons attached to bonds secured by mortgages, which the evidence tended to show were unauthorized by the makers. The tendency of this evidence was to create in the minds of the jurors an impression that defendants were parties to or responsible for forgeries in connection with mortgages entirely disassociated with the mortgage involved here.

Other evidence, likewise objected to and received in evidence, related to the practice of the Lincoln Trust Company in making what is referred to as "employee loans." These were mortgage loans in instances where the trust company would have the title to mortgaged property conveyed to an employee, who would then execute a new mortgage or new notes and coupons which would be substituted for notes and coupons held by a customer of the trust company who would be left in ignorance of this fraud upon him and would believe that the substituted security was a good live security. Then the employee would convey the title to the trust company, subject to the mortgage. The employee would be financially irresponsible. This practice was a fraud upon bondholders. Much evidence of this nature was received over the objection of defendants, notwithstanding defendants had admitted liability on account of the mortgage in this suit. It was irrelevant to the real issue on the trial which had to do only with the amount of damages the bondholders had suffered by reason of the neglect and fraud for which defendants were responsible, as shown in the former opinion, and as admitted by defendants in their new answer based on that opinion. This evidence was calculated to inflame the passions of the jury and ought not to have been admitted. The loan was made by Webb Kellogg and wife, was extended on March 1, 1925, for five years by R. H. Matthew-

son (the then owner) and wife, who signed the new coupons. The former opinion holds that, while the bondholders did not authorize the extension, they approved and ratified the act of the then trustee in making the extension to March 1, 1930. So it was in no sense an "employee loan" but was a valid loan made by the owner of the farm and later extended by a valid agreement made with a subsequent owner of the same farm.

Defendants on this trial tendered an instruction to disregard all evidence as to "employee loans." It was refused. We think the reception of evidence as to "employee loans" and the refusal of an instruction to disregard such evidence constituted prejudicial error calling for a reversal.

Plaintiff cites general texts and some cases, where admissions were limited, to justify the rule that it was not erroneous to receive the evidence complained of. But we are of the opinion that it was prejudicially erroneous to have received this irrelevant evidence in the face of the unqualified admission of liability made by defendants in their answer.

Many other criticisms are made of instructions given and refused by the court. On another trial these will be eliminated if the trial is had upon the theory that defendants Holm, Mellor and Reichenbach admit liability for damages and that the only question to submit to the jury is the amount of damages suffered by the bondholders. So it is not necessary to discuss other errors.

"If the trustee commits a breach of trust, he is chargeable with * * * any loss or depreciation in value of the trust estate resulting from the breach of trust." Restatement, Trusts, sec. 205.

Under the rules laid down in *First Trust Co. v. Carlsen*, 129 Neb. 118, 261 N. W. 333, defendants, as officers of Lincoln Trust Company, were declared liable for the acts of that company as trustee. It was in recognition of that rule that defendants admitted liability for whatever damages resulted to the bondholders for whom the present plaintiff is trustee.

There was authority in the former opinion in this case for the instruction given by the court in the trial of the instant case for the jury to fix the damages to the bondholders by finding the difference in the value of the mortgaged land on the first day of March, 1929 (which was the date when Lincoln Trust Company should have notified the bondholders of the default to pay interest on their bonds), and November 14, 1932 (which was the date the trial court found this suit had been begun), if the jury found the value on the first date exceeded the value on the latter date.

On further consideration of the measure of damages to the bondholders, we do not find in the circumstances any particular warrant for postponing the fixing of the last named date to the time when the suit was actually begun. Rather, we think, that date should be fixed as of the time when the bondholders, represented by the trustee, could have obtained dominion over the mortgaged land. Inasmuch as these bondholders owned only $43,000 of the $45,000 bonds secured by the mortgage and $2,000 was held by the original mortgagee, plaintiff would be entitled to only 43/45 of the value of the security. So that the true measure of damages to the bondholders represented here would be 43/45 of the difference in (1) the value of the land on March 1, 1929, and (2) the value of the land when it came to the bondholders or when they could have taken dominion over it with knowledge that the original trustee had breached his trust, if the land was worth less on the latter date than on the former date. Just what that date is will be disclosed by the evidence on another trial. Unless it is fixed by the evidence beyond dispute, so that it can be stated by the court, it will be the province of the jury to fix it upon a preponderance of the evidence. There is some contention, too, that defendants are entitled to credit for some interest or some rentals, or both, collected for the benefit of the bondholders between March 1, 1929, and the date when the bondholders got dominion over the mortgaged property. If that should

appear in the evidence, defendants should receive such credit through a proper instruction to the jury on that point.

The judgment of the district court is reversed and the cause remanded for a new trial in harmony with this opinion.

REVERSED.

CHARLES S. REED, APPELLEE, V. NEW YORK LIFE INSURANCE COMPANY, APPELLANT.

FILED JUNE 26, 1936. No. 29643.

Insurance. Insured, though totally disabled for more than three consecutive months, *held* not entitled to recover, where disability was neither total nor permanent when he claimed benefits under a policy raising presumption of permanence after three months' disability.

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

Brown, Fitch & West, for appellant.

Reed, Ramacciotti & Robinson and *R. L. Hrushka, contra.*

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

EBERLY, J.

This is an action to compel the payment of certain "total and permanent disability" benefits under two insurance policies issued by defendant, under which plaintiff was insured. From a judgment for plaintiff, the defendant appeals.

The two insurance policies in suit each insure the plaintiff to the extent of $2,000, with double indemnity in case of accidental death. The policies are in full force and effect. Each policy on its face provides, in addition to the ordinary provisions contained in a life insurance policy: "And upon receipt of due proof that the insured

is totally and presumably permanently disabled before age sixty, as defined under 'Total and Permanent Disability,' the company agrees to pay to the insured $20 each month, and to waive payment of premiums, as provided therein."

Plaintiff, it appears, was born on June 4, 1896.

On the second page of each policy, under the head of "Total and Permanent Disability," appear the following provisions:

"Disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, provided such disability occurred after the insurance under this policy took effect and before the anniversary of the policy on which the insured's age at nearest birthday is sixty.

"Upon receipt at the company's home office, before default in payment of premium, of due proof that the insured is totally disabled as above defined, and will be continuously so disabled for life, or if the proof submitted is not conclusive as to the permanency of such disability, but establishes that the insured is, and for a period of not less than three consecutive months immediately preceding receipt of proof has been, totally disabled as above defined, the following benefits will be granted:

"(a) Waiver of Premium. The company will waive the payment of any premium falling due during the period of continuous total disability, the premium waived to be the annual, semiannual or quarterly premium according to the mode of payment in effect when disability occurred.

"(b) Income Payments. The company will pay to the insured the monthly income stated on the first page hereof ($10 per $1,000 of the face of this policy) for each completed month from the commencement of and during the period of continuous total disability. If disability results from insanity, payment will be made to the beneficiary in lieu of the insured.

"In event of default in payment of premium after the insured has become totally disabled as above defined, the policy will be restored and the benefits shall be the same as if said default had not occurred, provided due proof that the insured is and has been continuously from date of default so totally disabled and that such disability will continue for life or has continued for a period of not less than three consecutive months, is received by the company not later than six months after said default.

"The total and irrecoverable loss of the sight of both eyes or of the use of both hands or of both feet or of one hand and one foot shall constitute total disability for life.

"Before making any income payment or waiving any premium, the company may demand due proof of the continuance of total disability, but such proof will not be required oftener than once a year after such disability has continued for two full years. Upon failure to furnish such proof, or if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived."

The evidence discloses, without dispute, that the plaintiff was taken ill on March 4, 1933, and thereafter remained under the constant and continued care of his physician until July 9, 1933. He was first able to work part time on June 20, 1933. With reference to his actual condition, his physician testifies:

"Q. During the period from the first date that you have given, and until the time that you say he returned to work, do you personally know whether or not he was, during said period, totally disabled? A. I would say for carrying on any particular work he would be totally disabled during that period of time, he was still confined to his home and practically bedridden the latter part of May, and came in a few times the first two or three weeks in June, but it was at my advice he did not return to his regular employment until he regained his strength and normal activities."

Plaintiff's first demand for payment of total and permanent disability benefits was orally made in July, 1933. He testifies:

"Early in July, after Dr. Best had told me he thought I was going to be all right, * * * I called Mr. Forbes (cashier of defendant company in Omaha) and I told him I thought that my total disability had stopped, and I wanted him to send me the blanks upon which to make claim on my insurance."

These blanks were not sent to plaintiff, and on July 27, 1933, the request was repeated by him in writing. This letter was answered by the home office, under date of August 9, 1933, to the effect, viz.:

"Under the terms of your above numbered policies, disability benefits become effective upon receipt at the company's home office of due proof that the insured *is* totally and permanently disabled, as provided.

"Inasmuch as it is evident from your conversation with Mr. Forbes that you were no longer totally disabled, you will appreciate that the company cannot consider that you are totally and permanently disabled within the meaning of the policies and consequently cannot favorably consider claim."

Thus, the decisive question in this case is whether or not the plaintiff is entitled to recover as "totally and permanently" disabled, under the definition of the policies issued to him. No notice in writing was ever served on the insurer by the insured, as stipulated in the policies, nor was any attempt made to comply with this provision as to notice until plaintiff had ceased to be totally disabled. The language of the policy relating to the subject of total and permanent disability, which we have quoted, is clear. We find no ambiguities therein. Under such circumstances, "Contracts of life insurance, like other contracts, must be construed according to the terms that the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense." *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489.

The indemnity provisions here under consideration are, in express terms, limited to "total and permanent disability." They are not policies insuring against "temporary total disability." True, to enable the assured to secure full measure of protection intended to be afforded, these insurance contracts provide that, in effect, where for more than three consecutive months immediately preceding receipt of proof assured has been totally disabled, and the proof submitted is not conclusive as to the permanency of such disability, he will be paid indemnity as permanently disabled until the situation is cleared up and, by proof, the actual facts are made to appear. These provisions were manifestly for the benefit of the assured. They enabled him to establish a presumptive total and permanent disability, when otherwise his proof would be inconclusive and subject to question. Their purpose was not to increase the contractual liability of the insurer to cover "temporary total disability." In essence, if not in form, the peculiar provisions now under consideration are tantamount to a stipulation as to the weight of certain evidence or proof, to be efficacious only until the real facts are established.

It follows, in the instant case, that, when plaintiff first made application for disability benefits, the proof established that, while for a period of time he had been temporarily totally disabled, he never was actually totally and permanently disabled, nor, at the time of the commencement of this action, was he entitled to a recovery on that basis.

We are strengthened in this conclusion by the terms of the last paragraph in the policies devoted to the subject of "total and permanent disability," hereinbefore quoted, and which we now repeat, viz.: "Before making any income payment or waiving any premium, the company may demand *due proof of the continuance of total disability.*" (Italics ours.)

In *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489, 491, wherein the assured never recovered but departed this life while still disabled, the supreme court of the United

States, in construing a similar "income disability clause" to the one presented in the instant case, said, in part:

"Here the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of *proof* of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums *becoming due after the receipt of such proof.* The provision to that effect is wholly free from the ambiguity which the court thought existed in the Marshall policy. Compare *Brams v. New York Life Ins. Co.*, 299 Pa. St. 11, 14, 148 Atl. 855. It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted. *Mutual Life Ins. Co. v. Hurni Packing Co.*, 263 U. S. 167, 174; *Stipcich v. Metropolitan Life Ins. Co.*, 277 U. S. 311, 322. This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings."

In *Rose v. New York Life Ins. Co.*, 127 Ohio St. 265, 187 N. E. 859, the supreme court of Ohio had for consideration the identical disability provisions which are embraced in the policies in the instant suit, with circumstances practically the same as presented in our present record. The discussion of that court is, therefore, illuminating as applied to the instant case. The following appears on pages 271, 272 and 273 of the *Rose* case:

"The other and more fundamental point upon which plaintiff insists is that the language of the new disability clause is subject to a construction which would allow him to recover. Referring to the clauses of the new contract, quoted *supra,* he says that, if proof of loss had been made during the period of disability, the company would have paid the benefits accruing from the beginning of that period to its end. Arguing from this premise, he contends

that the true import of the contract is 'health insurance' rather than insurance against total and permanent disability. In support of this contention, he claims that the language of the disability contract is ambiguous; that, unless it means what he says it means, the additional premium which he paid for the new 'riders' on the old policies was exacted for no adequate, additional benefit; and that, in selling the new contract, agents of the company passed out company literature which tended to corroborate his claim.

"The following language of the policy he contends is ambiguous: 'Or if the proof submitted is not conclusive as to the permanency of such disability, but establishes that the insured is, and for a period of not less than three consecutive months immediately preceding receipt of proof has been, totally disabled, as above defined, the following benefits will be granted.'

"The requirement of proof which establishes that the insured 'is' disabled would seem upon its face to necessitate the submission of such proof during the continuance of the disability, but the plaintiff contends that the succeeding words, 'immediately preceding receipt of proof has been totally disabled,' imply that proof may be filed within a reasonable time after the disability has ceased. Considering the contract as a whole, however, there is no ambiguity unless an assumption is first made that the agreement is one to pay for temporary disability. But we may not read a meaning into the clear language of the contract and then find ambiguity in the words which deny that meaning.

"Indeed, plaintiff's case rests wholly upon the theory that the policy provides payments for temporary disability, since a disability ended before proof of it is made must of necessity be temporary.

"When, however, we turn to the language of the disability contract, we find in large type at its beginning the words, 'Total and Permanent Disability.' Thereafter the agreement provides for the payment of monthly income

and the waiver of premiums upon proof that the insured is totally and *presumably* permanently disabled. The contract definition of total disability includes the loss of both hands, both feet, both eyes, or of one hand and one foot. But bodily injury or disease, incapacitating the insured for any work or occupation or business for remuneration or profit, is also within the definition.

"Now, of course, total disability appears forthwith upon proof of the loss of both hands, but in many cases total incapacity for work or business could only be *known* to be permanent after the person concerned was dead. It was therefore necessary, as a matter of practice, that the policy establish some criterion upon which a presumption of permanent disability might be based, so as to enable the payment of benefits during the insured's life.

"The contract accordingly provides for proof of permanent disability in two classes of cases: (a) That class in which the insured is and will be continuously disabled for life, for example, having both hands cut off; and (b) that class in which 'the proof submitted is not conclusive as to the permanency of such disability,' but in which there is a presumption of permanency, that is, in which the proof 'establishes that the insured is and for a period of not less than three consecutive months immediately preceding receipt of proof has been totally disabled.'

"If the presumptively permanent disability cease after payments begin, the contract provides for their discontinuance. If the cessation of disability be shown before the payments begin, plainly no payments need be made.

"Thus analyzed, the language used becomes wholly clear and entirely free from ambiguity."

In *Wetherall v. Equitable Life Assurance Society,* 273 Mich. 580, 263 N. W. 745, a case involving an insurance policy containing provisions for disability benefits for total and permanent disability, and on many points identical with the provisions here in suit, and where a plaintiff brought an action to recover monthly compensation during the full period of disability, after he had recovered from his total

disability, the Michigan supreme court announced the rule:

"Insured, though totally disabled for many months, *held* not entitled to recover, where disability was neither total nor permanent when he claimed benefits under policy raising presumption of permanence after three months' disability."

See, also, *Gottlieb v. New York Life Ins. Co.*, 136 Misc. Rep. 194, 240 N. Y. Supp. 568; *Jones v. New York Life Ins. Co.*, 158 Wash. 12, 290 Pac. 333.

The conclusion follows, in the instant case, that inasmuch as the evidence discloses, without doubt, that assured was not totally and permanently disabled when demand was first made upon the insurance company for benefits, and when action was first instituted on his claim, no recovery may be sustained in his behalf. Thus, the trial court erred in the entry of judgment herein and in overruling appellant's motion for a new trial.

Therefore, the judgment of the district court is reversed, and the action dismissed.

REVERSED AND DISMISSED.

MAY WILCOX V. THOMAS ASHFORD.

FILED JUNE 26, 1936. No. 29616.

ERROR to the district court for Thurston county: MARK J. RYAN, JUDGE. *Affirmed.*

Thomas & Thomas, for plaintiff in error.

Robert G. Fuhrman, contra.

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

FITZGERALD, District Judge.

November 10, 1931, defendant in error filed an action in the district court for Thurston county, Nebraska, to quiet title in him of certain lands in said county, and to

perpetually restrain Frank Skinner, defendant therein, and all persons claiming through or under him, from asserting any right to the said land. Personal service was made on defendant Skinner, which summons was indorsed, "Equity, temporary injunction issued," and required defendant to answer December 14. Defendant therein failed to answer, and on January 4, 1932, the petition was called for hearing before the court, and after the production of evidence the court found in favor of plaintiff as prayed, and in its decree described the land by metes and bounds and permanently enjoined defendant and any one claiming by, through or under him from entering upon or in any manner attempting to take possession of the said lands.

Frank Skinner, the defendant in that action, claimed title to part of the said land by means of a conveyance in the state of Iowa, and claimed that the land was a part of the state of Iowa, and on October 10, 1932, he and his wife made and delivered to their daughter, May Wilcox, plaintiff in error in this proceeding, a deed to part of the lands described in the decree in Ashford v. Skinner above referred to. About the 17th of February, 1935, plaintiff in error, relying on said deed, took possession of the land described therein, and on the 20th of February, 1935, defendant in error filed in the district court for Thurston county a verified petition against May and Eugene Wilcox, her husband, who has since died, praying that they be adjudged in contempt of court for violation of the decree in Ashford v. Skinner. An order was signed by the court in Thurston county citing May Wilcox, plaintiff in error, to appear and show cause March 16, 1935. She appeared by counsel and sought to resist the jurisdiction of the court, and upon her objections being overruled, the matter was continued for hearing to March 23, 1935. On March 16 counsel produced testimony of Frank Wilcox, a son of plaintiff in error, which clearly established the fact that plaintiff in error was occupying the premises in question, and was ignoring the decree of the district court for Thurston county, Nebraska, on the assumption that that

court had no jurisdiction over either the person of plaintiff in error or the land in question. The trial court found against plaintiff in error, found her guilty of contempt, and ordered her into close custody of the sheriff of Thurston county unless and until she made restitution of the land in question.

Whether or not the court had jurisdiction in the matter is the only question before this court at this time, as the acts which were found to be contemptuous are either admitted or so clearly established as to admit of no dispute.

Mrs. Wilcox complains of several rulings and findings of the trial court as erroneous, and we will consider them as nearly as may be in the order in which they are raised in her brief.

The first point raised is that, as she was not made a party to the injunction proceedings, she is not bound by the orders therein. We cannot sustain her in this, as it has too frequently been held that one who has knowledge of an injunction and is in privity with the party enjoined is bound thereby. The bill of exceptions clearly shows that she had direct information from the judge of the trial court that she was bound by the injunction decree.

Next she contends that the contempt proceedings were not properly instituted. The transcript and bill of exceptions, however, reveal that the citation for contempt is within the provisions of section 20-1072, Comp. St. 1929, and defendant in error herein had the right thereunder to institute those proceedings exactly as he did.

We now come to the contention that the district court for Thurston county, Nebraska, had no jurisdiction over the land, because there is a suit by the United States, pending in the United States district court, against both parties to this proceeding and involving the land in question. However, long before the action of the United States was commenced, the state court for Thurston county took jurisdiction of the land, found as a matter of fact that the land in question was accretion land in the state of Nebraska, and belonged to defendant in error herein. That finding

and the decree based thereon have never been set aside or appealed from, and must control unless and until the United States court says otherwise. The mere fact that an action has been started in the United States court cannot allow chaos to mount into the saddle and ride rough shod over the orders and decrees of the state court. The United States court has taken this view of the matter where it denied an injunction sought by plaintiff in error against defendant in error in this action, as shown by the bill of exceptions.

The point advanced by plaintiff in error that the summons served on Frank Skinner was indorsed, "Equity, temporary injunction issued," was properly treated by the trial court, as the indorsement on the summons was not misleading in any way. In fact, it was a direct warning that the action carried an injunctive feature, and that feature is the one that gave rise to this proceeding.

Plaintiff in error contends that the land in question was not accretion and could not be accretion to Indian land, but the trial court in Ashford v. Skinner found, and there is evidence revealed in the bill of exceptions on which to base the finding, that it was accretion land belonging to Ashford. We and plaintiff in error are bound by that finding.

The point raised by the plaintiff in error that there was no such land as section 36-27-9 and section 31-27-10 is, we hold, without merit. There was no such description in the records of Thurston county, but the land was not there when the records were compiled, and it now is there. The decree of the court described the land by metes and bounds, and if the river comes to rest long enough for Thurston county to add to its records, those records will no doubt give the title as used by Ashford in his petition to quiet title.

We find no error in the proceedings and orders of the trial court in its effort to enforce its decree, and the case should be and is

AFFIRMED.

ABE BORDY, APPELLANT, V. GOODMAN-BUCKLEY TRUST COMPANY ET AL., APPELLEES.

FILED JUNE 26, 1936. No. 29662.

1. **Corporations.** Primarily the authority to mortgage corporate real estate is vested in the board of directors and no officer has such authority by virtue solely of his office.
2. ———. Officers of a corporation cannot pay their individual debts by a transfer or encumbrance of corporate property.
3. ———. A court of equity will not permit mere corporate forms to serve as a cloak for fraud, and, in a proper case, will look behind the corporate entity and consider the real parties in interest, when necessary to promote justice; but this will not be done where to do so would promote an injustice.

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

Monsky, Grodinsky, Marer & Cohen and *E. H. Evans*, for appellant.

Halligan, Beatty & Halligan and *Lowell C. Davis, contra.*

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and KROGER and IRWIN, District Judges.

KROGER, District Judge.

Plaintiff commenced an action to foreclose a real estate mortgage executed by the Goodman-Buckley Trust Company of North Platte, Nebraska. The petition was in the usual form, and to this petition Fred L. Burke, trustee in bankruptcy of the defendant trust company, filed an answer in which he alleged that the note and mortgage in suit were executed without authority, that the obligation to the plaintiff was the individual obligation of E. R. Goodman and N. E. Buckley, president and secretary of said trust company, respectively, and that there was no consideration to the trust company for the execution of said note and mortgage. The trial court found that the obligation was the individual debt of E. R. Goodman and N. E. Buckley, and that no consideration moved from plaintiff to the defendant trust company for said note and

mortgage, and entered a decree dismissing plaintiff's action and canceling the note and mortgage sued upon and releasing the real estate from the lien of the same. From this decree, plaintiff prosecutes this appeal.

There is little or no controversy as to the facts. So far as material to this case, it appears that E. R. Goodman and N. E. Buckley were operating three separate businesses under the names of Goodman-Buckley, a copartnership consisting of E. R. Goodman and N. E. Buckley; Goodman-Buckley Company, a corporation, the stock of which was owned by E. R. Goodman and N. E. Buckley and their wives; and Goodman-Buckley Trust Company, a corporation, organized under the laws of this state pertaining to trust companies, and the stock of which was owned by E. R. Goodman and N. E. Buckley, excepting some qualifying shares held by their wives and a Mr. Rasmusson. In addition, N. E. Buckley transacted some of his personal business under the name of Bratt, Goodman & Buckley. All of these businesses were conducted in the same quarters in the city of North Platte and, during the times herein mentioned, N. E. Buckley was actively engaged in the management of the various concerns.

On February 4, 1931, plaintiff went to N. E. Buckley and informed him he wished to invest some money and gave to Buckley his check for $3,000 and took therefor an ordinary promissory note in like amount, due in three months, bearing interest at 6 per cent. and signed by E. R. Goodman and N. E. Buckley. On May 4, 1931, plaintiff gave N. E. Buckley an additional $1,500 and took a similar note, due August 4, 1931, for the principal sum of $4,500. Some time later, plaintiff gave Buckley another $1,000 and took a similar note, dated July 1, 1931, due July 1, 1932, in the principal sum of $5,500, bearing interest at 6 per cent. and signed by E. R. Goodman and N. E. Buckley. In each instance, plaintiff's checks were deposited in the bank to the credit of Goodman-Buckley, the partnership. In March, 1932, plaintiff informed Buckley that he was desirous of making a different loan and asked for his

money and on March 7, 1932, was paid $300 and on March 21 was paid $200, reducing the principal note to $5,000. Plaintiff testifies that he told Buckley that he intended to invest his money in a real estate mortgage, and it was at this time that Buckley offered to give plaintiff a mortgage on the city property involved in this action. This mortgage was given on April 1, 1932, and is executed by the Goodman-Buckley Trust Company, by E. R. Goodman, president, and N. E. Buckley, secretary, and covers property that was owned by the trust company. The board of directors of the trust company never authorized the execution of the note and mortgage, but some time during the summer of 1932 Buckley prepared minutes of a purported meeting at which the execution of the instruments was allegedly authorized and these minutes were signed by E. R. Goodman, N. E. Buckley and G. S. Goodman, who is the wife of E. R. Goodman. The mortgage was placed on record on April 8, but was not shown as a liability on the books of the Goodman-Buckley Trust Company until August 31, 1932. It further appears from the evidence that, on the same day the mortgage was shown on the books of the trust company, there was transferred to the trust company by the Goodman-Buckley Company, a mortgage known as the First Christian Church mortgage in the principal sum of $8,525.

Since this case is being tried *de novo*, a careful examination has been made of the pleadings and evidence, and we find that, at the time of investing his money in 1931, the plaintiff, who was a business man, 41 years of age, and experienced in the making of loans, knew that he was dealing with Goodman-Buckley, the partnership, and accepted their note as their individual obligation; that in the spring of 1932 he evidently became disturbed as to the soundness of his investment and some three months before its maturity demanded payment; that, when he received the note and mortgage in suit, he knew that the property was not the individual property of E. R. Goodman and N. E. Buckley, but that it was the property of the trust

company; that no consideration moved from plaintiff to the defendant trust company for the note and mortgage, and that the note and mortgage were executed by the officers of the trust company without lawful authority from the board of directors so to do.

Plaintiff, both in his oral argument and in his brief, strenuously contends that the transfer of the First Christian Church mortgage furnished the necessary consideration, but the answer to that contention is that the transfer of the First Christian Church mortgage was likewise without consideration and unauthorized, as that mortgage was owned either by the Goodman-Buckley Company or the Goodman-Buckley Trust Company, and not by Goodman-Buckley, the partnership. It is obvious that the officers of a corporation cannot pay their individual debts by the transfer or encumbrance of corporate property, and, in this case, it is immaterial which corporation the First Christian Church mortgage belonged to as, in any event, the transfer would be unauthorized.

It is next argued that the release by plaintiff of his claim against the partnership furnished an adequate consideration for the note and mortgage executed by the defendant trust company. There is no merit in this contention for the reason that the execution of the note and mortgage by the trust company was not authorized by its board of directors, but the entire transaction was an attempt by the officers of the trust company to pay their individual obligation with trust company assets.

Plaintiff next contends that, since Goodman and Buckley were the owners of each of the companies through which they were transacting business, and freely transferred the assets of one company to the books of another, a court of equity should look beyond the corporate entity and consider the real substantial parties in interest, and argues that, if that is done in this case, the court should find that all the business transacted by Goodman-Buckley, Goodman-Buckley Company and Goodman-Buckley Trust Company was, in reality, the business of E. R. Goodman and N. E.

Buckley, as they were the principal and, for all practical purposes, the only stockholders. In advancing this argument, plaintiff overlooks the rights of creditors of the various enterprises, and while a court of equity will look behind the corporate entity and consider the real parties in interest when necessary to promote justice, this will not be done where to do so would promote an injustice.

From the entire record, we are convinced that the findings and ruling of the trial court are correct and the judgment is

AFFIRMED.

PETER PARKERT, JR., ET AL., APPELLANTS, V. DEPARTMENT OF PUBLIC WORKS ET AL., APPELLEES.

FILED JUNE 26, 1936. No. 29687.

1. **New Trial.** The statement by a juror, during the deliberation in the jury room, of his personal knowledge of a fact not in dispute, is not ordinarily misconduct requiring a new trial.
2. ———. Proof of statements by jurors in the jury room in the nature of gossip and not bearing on any of the issues in the case is not sufficient to avoid a verdict, unless it be shown that the statements were of such a character that prejudice may be presumed.
3. **Appeal.** To obtain a review of alleged improper remarks of counsel in his argument to the jury, it is necessary that objection be made at the time and preserved in the bill of exceptions; counsel cannot remain quiet and seemingly acquiesce in remarks of opposing counsel in his argument to the jury, and after verdict obtain a new trial because of acts or statements not objected to at the time.
4. ———. Where a verdict is based on conflicting evidence, it will not be disturbed, unless clearly wrong.

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

Abbott, Dunlap & Corbett, for appellants.

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

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and KROGER and IRWIN, District Judges.

KROGER, District Judge.

Appellee in this case commenced a condemnation proceeding in the county court of Dodge county to take certain land of the appellants for a federal-state highway. From the award of the appraisers an appeal was taken to the district court where a jury returned a verdict in the sum of $1,740.50 against the appellee. From the overruling of their separate motions for a new trial, the appellants bring the case to this court for review.

The record shows that appellants are the owners of the southwest quarter of section 13, township 19, range 7, in Dodge county, Nebraska, subject to the right of way of the Chicago & Northwestern Railway Company, being approximately 153.82 acres after deducting the right of way; that said farm is improved with an exceptionally fine dwelling, but that practically all of the other improvements, such as barns, sheds, etc., are on another tract of land lying immediately south of the tract in question; that the right of way of the Chicago & Northwestern Railway Company crosses said land from east to west in such a manner as to leave approximately 50 acres on the north side of said right of way and the remainder on the south side thereof. The record also shows that federal-state highway No. 8 formerly ran along the south side of the southwest quarter of said section 13 and that in April, 1934, it was relocated across that part of the land lying immediately south of the Chicago & Northwestern Railway Company's right of way and, in the relocation and construction of said highway, 5.1 acres of appellants' land was appropriated for right of way proper and 3.8 acres for borrow-pits, making a total of 8.9 acres that were taken. Appellants asked damages for the value of the land taken,

for the cost of constructing and maintaining a fence along said highway and for general damages to the whole of their farm. Appellee disputed the value which appellants put upon their land, and contended that the remainder of appellants' farm was not injured by the construction of the new highway, but, on the contrary, that it was benefited in that it gave appellants better drainage for their farm.

Appellants assign numerous errors as grounds for reversal, but these may be summarized as: (1) Misconduct of the jury in their deliberations; (2) misconduct of the attorney for appellee in his argument to the jury; and (3) the verdict is not sustained by sufficient evidence.

In support of their claim that there was misconduct of the jury in their deliberations, appellants filed affidavits from eight of the jurors. These affidavits are practically identical in form and substance and set out that, in fixing the amount of damages and in awarding damages, the jury made no allowance of general damages to the remainder of said land by reason of the land actually taken for highway purposes, and that in deliberating on said question various matters were stated and argued, not covered by the testimony, and that at least two of the jurors made statements as to their prior knowledge of the land and its character.

We have carefully examined the record and conclude that many of the things complained of were merely idle gossip that had no bearing on the issues of the case and could not have had any influence on the final results. Others were matters of opinion that are legitimate deductions which the jurors could draw from the evidence introduced. As to the charge that two of the jurors, during the deliberations, stated that they had known appellants' land for a long time and knew of their own personal knowledge that part of the land appropriated for said highway had bad drainage sometime or immediately prior to the construction of said highway and in the past had been a swamp, it is sufficient to say that appellant Peter Parkert, Jr., while testifying in his own behalf, stated

that a part of the land occupied by the roadway and borrow-pits was low land, and that at one time had a horseshoe swamp thereon, and that, within the period of three years immediately preceding the trial of this case, there had been times when it had been difficult to carry on farming operations on a portion thereof, but contended that this condition had been largely corrected by the construction and lowering of a culvert in the railroad right of way some four years prior to the trial of this case. Since the facts stated by the jurors, of which they claimed to have had personal knowledge, were not in dispute, the conduct of the jurors in stating such facts, while improper, was not prejudicial to the appellants. See *Douglas v. Smith*, 75 Neb. 169, 106 N. W. 173.

It is next contended that there was misconduct on the part of appellee's attorney in the argument of the case. It appears that during his argument appellee's attorney quoted a portion of an opinion of this court in a case involving facts similar to those in the case at bar, and it is claimed that the portion quoted was misleading and prejudicial to appellants' case. This feature of the case is presented to this court by affidavits in the bill of exceptions. There was no record made at the time, but the affidavits were filed in support of the motion for new trial. So far as the record shows, appellants' counsel made no objection to the conduct of the appellee's attorney at the time of the trial. In this state of the record, this objection is disposed of by the case of *Kriss v. Union P. R. Co.*, 100 Neb. 801, 161 N. W. 414, where this court held that counsel cannot remain quiet and seemingly acquiesce in remarks of opposing counsel in his argument to the jury, and after verdict obtain a reversal because of matter not objected to at the time.

And, finally, it is contended that the verdict of the jury is not supported by the evidence. This court has held that there are two elements of damage involved in a case of this character: First, the market value of the land actually appropriated; and, second, damages suffered by diminution

in the value of the remainder of the land, less any special benefits received. *Regouby v. Dawson County Irrigation Co.*, 126 Neb. 711, 254 N. W. 389. The evidence as to the value of the land appropriated, as well as to the damages suffered by the remainder of the land, was in conflict, appellants' witnesses placing the value of the land at between $175 and $250 an acre and damages to the remainder at from $25 to $35 an acre, while appellee's witnesses placed the value of the land appropriated at between $100 and $175 an acre and the damages to the remainder as being offset by special benefits received. It is apparent that the principal difficulty of the witnesses in agreeing upon a value of the land arises from the fact that the improvements on the property are exceptional and were constructed at a cost of over $30,000. From a careful examination of all of the testimony, it cannot be said that there was not sufficient competent evidence on which the verdict of the jury was based, and, under the numerous holdings of this court under such circumstances, the verdict of the jury will not be disturbed, unless clearly wrong.

No prejudicial error having been found in the record, the judgment of the trial court is

AFFIRMED.

HOWARD L. BRITT, APPELLANT, V. WILLIAM BYRKIT: GREAT AMERICAN INDEMNITY COMPANY, APPELLEE.

FILED JUNE 26, 1936. No. 29538.

1. **Judgment:** VACATION. A district court has power to vacate or modify its own judgment at any time during the term at which such judgment is rendered, and upon prompt application and a tender in good faith of an answer disclosing a meritorious defense may vacate such a judgment upon such terms as are just.
2. **Receivers:** ACCOUNTING. In the absence of circumstances that cause an accounting by a receiver impossible of attainment in the proceedings in which he acts, no action to adjudicate such receiver's default may be maintained against the surety on

his bond until there has been a final settlement of his account and an adjudication of the amount of his default by the court having charge of the receivership.

3. ———: ———. Surcharges against a receiver arising from his negligence in failing to rent property under his control as receiver, or from his wrongfully having reduced the rent upon such property, or from his having used such property for his personal benefit are a part of the estate under receivership, and recovery of such surcharges either from the receiver or from the surety upon his bond must be obtained by procedure required for the recovery of money actually received by such receiver.

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

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

George R. Mann, Dwight W. Dahlman and *George I. Craven, contra.*

Heard before GOSS, C. J., ROSE and DAY, JJ., and ELDRED and TEWELL, District Judges.

TEWELL, District Judge.

This action was brought upon a receiver's bond. From trial to a jury and verdict and judgment for the plaintiff for only the sum of $25, the plaintiff appeals. The defendant cross-appeals.

In August, 1930, one Robert J. Christian brought an action to foreclose a mortgage lien upon a house and lot in Lincoln, Nebraska, then owned by Fay Britt, wife of the plaintiff herein. On September 17, 1930, one William Byrkit was duly appointed receiver of the mortgaged premises. On November 23, 1931, a decree of foreclosure was entered in that action, which established a tax sale certificate as a first lien, the mortgage to Christian as a second lien and a second mortgage as a third lien. Byrkit qualified as receiver, and the Great American Indemnity Company, defendant in this action, was the surety on his bond. The property was sold under the decree of foreclosure in September, 1932, for the sum of $3,565, and the sale later confirmed. The proceeds of the sale together

with rents collected by the receiver paid the tax lien and a portion of the amount due upon the first mortgage lien. The balance due upon the first mortgage lien and the entire amount due upon the second mortgage lien remain unpaid, but no judgment for the deficiency has been entered. Byrkit acted as receiver from the time of his appointment in September, 1930, until June 23, 1932, when he was removed by court order upon complaint of Christian, plaintiff in the foreclosure action, and another person was appointed receiver. At the time of his discharge, Byrkit rendered an account of moneys received by him as rent in the sum of $785 and gave an itemized account of expenditures made by him for repairs on the property in the sum of $343.28, and requested his discharge. From the balance of $441.72 the order of the court approving Byrkit's final account allowed him $150 for his services as receiver and also $50 for the services of an attorney, but provided that his discharge should not relieve him from any tort liability toward any one incurred while acting as receiver, and that his account should not be considered as final if it developed that the receiver had not fully accounted. No further proceeding against Byrkit in the foreclosure action was ever had after the approval of his account and his discharge. No order of court in the foreclosure action permitted this action to be brought.

In this action the Great American Indemnity Company and Byrkit are jointly sued upon the bond given by Byrkit as receiver in said foreclosure action. The plaintiff herein is assignee of the rights of Fay Britt. The summons issued for service upon Byrkit was returned without service upon him and he was never served with process. He made no appearance in this action, although present at the trial as a witness. The summons served upon the Great American Indemnity Company, hereinafter called the defendant, fixed answer day as March 12, 1934. No appearance was made by the defendant until March 23, 1934, when it filed, without leave of court, a motion. On the same day, but after such motion had been filed, the plaintiff secured a dismissal

of this action as against Byrkit and the rendition of a judgment by default against the defendant for the sum of $1,095. On September 21, 1934, upon application of the defendant and after a hearing at which the plaintiff was represented, the court, during the same term of court in which the judgment by default was rendered, set aside the judgment by default and allowed the defendant to file an answer tendered with its application.

The plaintiff complains of the order of the trial court that vacated the judgment by default heretofore mentioned. Cases cited by the plaintiff in support of this complaint either are not applicable to the facts herein, or are cases in which the trial court refused to vacate a default judgment. A district court has power to vacate or modify its own judgments at any time during the term at which such judgment is rendered, either upon application or upon its own motion, and upon prompt application and a tender in good faith of an answer disclosing a meritorious defense may vacate such judgment and permit defense to be made upon such terms as are just. *Lacey v. Citizens Lumber & Supply Co.*, 124 Neb. 813, 248 N. W. 378; *Coates v. O'Connor*, 102 Neb. 602, 168 N. W. 102; *Netusil v. Novak*, 120 Neb. 751, 235 N. W. 335. The trial court upon the showing made by the defendant properly vacated the default judgment.

The defendant, which cross-appealed, challenges the right of the plaintiff to maintain this action and states as its reason that the unpaid lienholders in the foreclosure action have a special lien upon funds in the receiver's hands. To support this contention the defendant cites *Jacobs v. Gibson*, 9 Neb. 380, 2 N. W. 893; *Marshfield Oil Co. v. Zank*, 208 Wis. 139, 242 N. W. 479; High, Receivers (4th ed.) 794, sec. 643. Whether or not the rule stated as the above mentioned reason why the plaintiff cannot maintain this action is applicable to the facts before us need not be discussed. The conditions of the bond upon which this suit is based are that the receiver shall "faithfully discharge his duties as receiver, and obey all orders of the court in

respect thereto, and shall duly account for what shall come into his hands or control as such receiver." In the absence of circumstances causing the existence and amount of a receiver's liability very impracticable or impossible of determination in the proceedings in which he was appointed, in which case a court of equity will provide a remedy against the surety on the receiver's bond, no action may be maintained against the surety on such receiver's bond until there has first been a final settlement of the receiver's account and an adjudication of his default. *State v. Germania Bank,* 103 Minn. 129, 114 N. W. 651; *French v. Dauchy,* 134 N. Y. 543, 31 N. E. 1041; *Moore v. Hartford Accident & Indemnity Co.,* 170 Okla. 344, 40 Pac. (2d) 658; *Coe v. Patterson,* 122 App. Div. (N. Y.) 76; 53 C. J. 415.

No adjudication of the receiver's default was entered in the foreclosure action. He paid all that he was directed to pay. The conditions of his discharge above mentioned adjudicate no default. The application of this rule prevents the maintenance of this action by the plaintiff and would prevent its maintenance by any unpaid lienholder in the foreclosure action until an accounting by the receiver has been had and an adjudication of his default made in the foreclosure action. The reasons for this rule are both varied and in accord with a legal procedure that will best afford relief for an injury such as is alleged by the plaintiff, prevent an injustice to the surety on such a bond, and at the same time preserve the estate under receivership within the control and jurisdiction of the court appointing the receiver. That the rule is a correct one is indicated by the manner in which it supplements, logically accords with, and aids in the enforcement of other rules, a few of which we mention, but have no occasion to declare and do not declare in this opinion. These are as follows: (1) The compensation, if any, to be awarded the receiver or his attorney, as well as the credit, if any, to be given the receiver for expenditures made by him without direction of court, is each affected by the question of whether or not he has complied with his obligations as receiver, and thus

the amount of his default affected; (2) the surety is not liable for any amount for which the receiver is not liable; (3) the surety is not a party to the action in which the receiver was appointed; (4) the obligation of the surety is one to be enforced, ordinarily, in an action at law; (5) any amount charged against the receiver, as well as any amount secured by a surcharge against him, belongs to all persons having an interest in the estate of which he is receiver in a priority to be directed by the court in the action in which the receiver was appointed; (6) the extent of the liabilities of the surety upon a receiver's bond is restricted to the terms of the bond; (7) the liability of the receiver is official, except where he is personally at fault; (8) a judgment obtained against a receiver in his official capacity creates no personal liability, and no execution may issue upon a judgment against the receiver, except by direction of the court having charge of the receivership; (9) the receiver is an officer of the court, and cannot be sued without the consent or subsequent ratification of the court appointing him, except as provided by statute; (10) the surety upon a receiver's bond is not liable for the conduct of the receiver in a capacity other than that of receiver.

The damages claimed by the plaintiff largely relate to an alleged failure of Byrkit to exercise due care in renting a portion of the property, to his having wrongfully reduced the rent upon a portion of the property, and to his having used a portion of the property for his personal benefit. Any surcharge against a receiver arising from any of these causes becomes a part of the estate under receivership as much as if the receiver in his official capacity had collected the amount of such surcharges, and are subject to the rules relating to the final settlement of the receiver's account, before action therefor may be maintained, if at all, against the surety. *Schwartz v. Keystone Oil Co.*, 164 Pa. St. 415, 30 Atl. 297.

The amount involved in this case is not a large amount, and the expenses thereof, including that of a bill of ex-

ceptions of over 300 pages, is quite large. While these facts may urge such a disposition of this case as will end the controversy between the parties, the harm that could follow the establishment of a rule that would permit of such disposition is so great as to impel a different action.

For reasons above stated, the judgment of the trial court is reversed and this cause remanded, with instructions that it be dismissed without prejudice to whatever rights, if any, the plaintiff may still have to maintain proceedings in the foreclosure action against the receiver for an accounting, and an adjudication of the amount, if any, of his default.

REVERSED.

THEODORE OSTERMAN ET AL., APPELLANTS, V. CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEE.

FILED JUNE 29, 1936. No. 29780.

Waters. Sections 46-132, 46-501, 46-502, 46-504, 46-507, 46-508, and 46-620, Comp. St. 1929, construed together, with reference to the facts in the instant case, and *held* to be mandatory regulations governing irrigation, which in effect limit the location and construction of irrigation canals and ditches, as well as the lands irrigated by the same, to the basin containing the source of the water used, and to require that all unused waters shall be returned to the stream from which diverted; that these principles thus legislatively declared constitute the controlling public policy of the state in the conservation of public waters and in the protection of public interest.

APPEAL from Department of Roads and Irrigation: *Reversed, with directions.*

P. S. Heaton, E. J. Patterson, Cook & Cook, S. S. Diedrichs, L. C. Davis, B. J. Cunningham, Hoagland, Carr & Hoagland, Prince & Prince, Cleary, Suhr & Davis, Matschullat, Matschullat & White and *R. H. Beatty*, for appellants.

Paul F. Good, Ralph O. Canaday and *Stiner & Boslaugh, contra.*

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

EBERLY, J.

This is an appeal to this court in a special statutory proceeding before the department of roads and irrigation, under the provisions of chapter 81, art. 63, Comp. St. 1929 (section 81-6301 *et seq.*). The final orders entered by that department, here sought to be reviewed, were orders which granted to the Central Nebraska Public Power and Irrigation District (hereinafter designated as the "Tri-County District") four applications for allowance of water rights on the North Platte and Platte rivers, viz.:

(1) Application No. 2351, for storage of 509,500-acre feet of the waters of the Platte river in two reservoirs to be constructed and known, respectively, as the upper and lower Plum creek reservoirs, situated in the north part of Gosper county, Nebraska; the diversion works under this application are planned to be located in the Platte river in Lincoln county, Nebraska, below the junction of the North and South Platte rivers, and above Brady Island. This will hereafter be referred to as the "Maxwell Diversion."

(2) Application No. 2354, for use of waters diverted at the Maxwell Diversion point, between that point and the mouth of Plum creek at various points for generation of hydro-electric power, and further, after such use, in part to be so disposed of as to be added to waters available for irrigation of the land hereinafter described.

(3) Application No. 2355, for the diversion of direct flow waters at the rate of 3,571 cubic feet per second for irrigation purposes in Gosper, Phelps, Kearney and Adams counties, in Nebraska. For that purpose the diversion points were fixed as Maxwell Diversion, above described, to use the same canal as will be used to carry water into the Plum creek reservoirs; a diversion from the Platte river in Gosper county, Nebraska, in section 2, township 8, range 21, close to the mouth of Plum creek; and a diversion

from the Platte river in section 17, township 7, range 51, Kearney county, a short distance below the city of Kearney.

(4) Application No. 2374, for the construction of a channel or "on river" reservoir in the bed of the North Platte river at a point a few miles above Keystone, in Keith county, Nebraska.

The appellants in this case are too numerous to be named in this opinion. With respect to the character of their claims, these parties naturally fall into one of two divisions, viz.: (1) "Appropriators," whose rights arise out of, and are based upon, the state irrigation laws; and (2) "riparians," whose claims are incident to, and arise out of, ownership and possession of lands bordering upon the Platte river or through which it runs. For convenience and brevity, the terms "appropriators" and "riparians," as thus defined, will hereafter be employed in this opinion as denominating the appellants in this suit.

Accepting the suggestion of counsel for appellants, made in argument at the bar of this court, we have concluded to narrow the issues to the single controlling question as to the right of the Tri-County District, under the restrictions of our laws, pursuant to the privileges thus granted and received by it, to annually assemble and concentrate the waters of the Platte river in the amount of 600,000-acre feet, and transport 60 per cent. of same through and across the divide or watershed which separates the Platte river system from the basins of the Blue and Republican rivers (both tributaries of the Kansas river and constituting a part of its system), and therewith irrigate lands situated wholly outside the Platte river valley and beyond the watershed thereof.

This procedure we adopt because of the diversity of interests, and parties representing the same, as disclosed by the record in this case, and is expressly without prejudice to the rights of all parties as to their several contentions made in this action, but not now expressly determined.

The uncontradicted evidence of the chief engineer, testifying as to the disposition of the waters to be controlled,

accumulated, and applied in power and irrigation, by and through the water privileges covered by the four applications here in suit, in part, is as follows:

"Q. How much in the original plans and as revised, how many acres do you plan to irrigate? A. 500,000. Q. And what part of that acreage is north of the divide south of the Platte river? A. Approximately 60 per cent. south of what we call the ridge and 40 per cent. north. Q. That would be about 300,000 acres on the south side and 200,000 acres on the north side of the ridge? A. Yes, sir. Q. And how much water do you propose in those plans, acre feet of water, do you propose to take each year from the Platte river? A. We figure on applying one-acre foot per acre on the land. Q. So you will take 500,000-acre feet of water? A. Take a little more than that because there will be some seepage and evaporation losses. Q. Do you intend to apply the same one acre foot on the land on the north side that you do to the land on the south side of the divide? A. Yes, sir. Q. And you feel that will be sufficient south side of the divide? A. Yes, sir; that matter has been gone into very thoroughly and reports are all on file. * * * Q. Just describe generally what the arrangement is in reference to the operation of the reservoirs and power plants. A. First, have a diversion east of North Platte, carry it down Plum creek and dump approximately 80 feet there and have a spill-way back into the Platte river where we can take all the water down the canal or can spill part into the river and carry that down Midway canyon, dam that and have a tunnel to carry the water over to Plum creek and north to Elwood, have a dam approximately 115 feet high and with the excavation gives us 140 drop for the power plant and below that have a second reservoir with a dam of about 115 feet high and a drop of 140 feet and that water is turned back into Plum creek and carried on down to our canals for irrigation and with a cross-over structure we can turn it back into the river. * * * Q. What is your estimate of the amount of water you are going to take out of the Platte river? A. For irrigation? Q. Yes? A.

For irrigation it will run about one and three tenths acre foot per acre on the land and if we put in the Plum creek reservoir we will have an additional loss for evaporation out of that. * * * Q. Then instead of 500,000 you will take out about 700,000-acre feet? A. Anyway 600,000-acre feet. * * * Q. Of this 600,000 that you propose to take out of the Platte river, how much do you propose to take over onto the south divide between the Republican and the Platte? A. Under irrigation about 60 per cent. south of the divide, at least more than half. * * * Q. * * * That will mean practically 360 or 400,000-acre feet taken out of the Platte valley for good, wouldn't it? A. Yes; I would consider it that way."

In view of this testimony, as outlined above, the "canals" to be constructed in the accomplishment of the ultimate object of this project, whether primarily devoted to the development of power, for storage, or for the application of the waters to land by direct irrigation, must be deemed "irrigation canals," as defined by our statute. Comp. St. 1929, sec. 46-507. This section provides: "Any canal constructed for the purpose of developing water power, or any other useful purpose, and from which water can be taken for irrigation, is hereby declared to be an 'irrigation canal' and all laws relating to irrigation canals shall be deemed applicable thereto."

As a preliminary question, the right to relief by the "riparians" is, in effect, challenged by the Tri-County District, substantially for the reason that the Platte river in Nebraska being an "interstate stream," along the banks of which meander lines have been run by the federal government in its survey of the public lands, this precludes the attachment or existence of riparian rights in the waters thereof. Obviously a person may not be heard to complain, either in a court of law or before an administrative tribunal, as to the infringement of a right which in fact he does not possess, nor of an alleged injury that occasions the complainant no damage.

This proposition necessitates a consideration of the situ-

ation of the riparian objectors. The Platte river, on which they reside, is formed by the junction of the North and South Platte rivers near North Platte, Nebraska, and extends from that point to the eastern boundary of the state. The valley which borders this stream is level, and has an easterly slope of from five to six feet per mile. The bed of the Platte river is sandy. To the north of the Platte river is situated a natural reservoir in the sand hills affording a temporary storage in excess of 500,000,000-acre feet. These waters gradually escape to the Platte valley by subterranean outlets and join similar waters received by the Platte valley from the tributaries of that stream. On the north side of the Platte this body of water proceeds easterly in a definite flow substantially conforming to the Platte river channel, and substantially underlying the entire valley. On the south side of the channel while the general direction of the mass of this flowing body of water still roughly conforms to the direction of the Platte river channel, yet some 56,000-acre feet are estimated as being annually diverted therefrom and passing through and under the watershed to the Republican and Blue rivers. This subterranean flow retained in the Platte valley, in its course, continues relatively close to the top of the soil. At times, in a measure it receives replenishment from rains, from the waters carried in the channel of the river, and constitutes natural subirrigation for the entire valley, and especially the lands situated contiguous to the Platte river channel.

The evidence in the record is without dispute that prior to the irrigation development in the Platte river basin, due to this practically unlimited subterranean flow, crops of corn and small grain, hay and alfalfa were assured irrespective of the dryness of the season. The water carried by the channel was ample for domestic use, and was even sufficient to temper the hot winds of the summer season. This situation made cultivated portions of the Platte valley a beautiful ribbon of green extending across the state. Truly, this river, in the language of Mr. Justice Holmes in

New Jersey v. New York, 283 U. S. 336, 342, "is more than an amenity, it is a treasure." In this treasure more than 100,000 people have by residence within its watershed a direct and substantial interest. It would be a sad commentary on our political organization, upon the department of roads and irrigation, and upon this reviewing court, if in rationing this necessity of life this beautiful valley should be left with a dry river bed and ruined farms because of any mistaken theory that the protection of its natural fertility did not constitute a public interest within the policy of our laws.

The riparian objectors in this proceeding are representatives of titles initiated by settlement as early as 1857, and for which government patents had been issued earlier than 1870. Their lands bordered on the Platte river channel, and, at common law, were entitled to the customary rights as such. It is obvious that the challenge by the Tri-County District to the competency of these riparians is based on certain statements in the opinion of this court in *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N. W. 781. These statements relate to the application of the rights of riparian proprietors to the larger streams of the state, such as may be classed as "interstate" rivers, and along the banks of which meander lines have been run by the government in its survey of public lands.

The opinion in *Crawford Co. v. Hathaway, supra,* was released February 4, 1903. The author was Justice Holcomb. The *locus in quo* was the White river, which this opinion thus refers to (p. 350): "The stream is a narrow one, ordinarily flowing but a small volume of water, the bed thereof belonging to the contiguous landowner." It follows that the subject-matter then before this court in the *Hathaway* case in no manner presented or involved the question of a "meandered stream." As to the question thus involved, Judge Holcomb further says: "A final determination of the question, however, is not here made, as this should be left to be decided in a proper case, where the subject is fairly presented and considered after oppor-

tunity for thorough investigation." At the close of the opinion (p. 375) Judge Holcomb states: "We have herein discussed some matters having an indirect bearing on the main issues involved in the case. The court, however, must not be understood as being committed to any proposition not expressly decided." The point under consideration appears in paragraph 8 of the syllabus in the following language: "As to those streams of water flowing through the state which may be classed as interstate rivers, and along the banks of which meander lines have been run by the government in its survey of the public lands, the question is left open as to whether or not the waters of such streams may not be treated as waters of navigable rivers, to which riparian rights of an adjoining landowner would not attach as against the right of the public to use the waters thereof by its appropriation and application to beneficial purposes."

Sedgwick, J., in a separate opinion in such *Hathaway* case, says, in part: "The question whether the law of riparian ownership applies to 'the larger streams of the state' appears to depend upon whether the owner of the land is held to own to the thread of the stream or only to the banks, and the former was determined to be the law of this state in *McBride v. Whitaker*, 65 Neb. 137. I am not satisfied with the discussion of the extent of lands that may be called riparian, and do not see how it is involved in this case."

The opinion in *McBride v. Whitaker*, 65 Neb. 137, 90 N. W. 966, was handed down June 4, 1902. It involved Platte river lands "bounded by the river bank, as indicated by a meandered line following along the bank of the stream as shown upon the plat." In that case, the following principles were approved by an undivided court:

"Grants of land bounded upon a river not navigable carry with them the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the bank or margin of the river; the rule of the common law being that pro-

prietors of land adjoining public rivers not affected by the flow of the tide own the soil *ad filum aquæ.*

"A grant of land bounded upon a nonnavigable river, made by the general government with reference to the plat of the survey, which shows a meandered line along the river bank, conveys to the grantee title to such unsurveyed islands or parts of islands as lie within that limit."

At the time the opinion in the *Hathaway* case was handed down, an appeal in *McBride v. Whitaker, supra,* was pending in the supreme court of the United States. This appeal was determined on April 10, 1905, by the affirmance in all respects of the judgment of the supreme court of Nebraska. See *Whitaker v. McBride,* 197 U. S. 510. Justice Brewer of the supreme court of the United States, in this case, said in part (p. 512): "A meander line is not a line of boundary, but one designed to point out the sinuosity of the bank or shore, and a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser. *Railroad Co. v. Schurmeir,* 7 Wall. (U. S.) 272; *Hardin v. Jordan,* 140 U. S. 371; *Horne v. Smith,* 159 U. S. 40."

It follows that abutting owners on the Platte river, when they obtained title from the government which was initiated prior to 1889, also acquired title to its bed and were entitled to the rights of riparian owners of land and to the use of the waters flowing therein.

But, an additional reason for awarding these riparians the right to appear in this present proceeding is to be found in their situation. A peculiarly valuable portion of their lands is the subirrigation which, as we have seen, nature constituted a part thereof. While subterranean channels may not exist or be completely identified, these subterranean waters come to and flow under their lands from definite sources and en route to definite termini. The lateral boundaries of this body of water may not be certainly located, but its existence as a body of water finding its way through the soil of the riparian land is completely

established. We are committed to the rule: "The owner of land is entitled to appropriate subterranean waters found under his land, but his use thereof must be reasonable, and not injurious to others who have substantial rights in such waters." *Olson v. City of Wahoo*, 124 Neb. 802, 248 N. W. 304.

It follows that subterranean irrigation is a valuable right, and that in this case the riparians are competent by interest to participate in this proceeding and challenge the right of the Tri-County District to sustain its applications here in suit.

Recurring to the determinative question, we find the objectors, who have been herein denominated "appropriators," and those who are designated as "riparians" united in interest, and also united in opposing the contentions of the Tri-County District.

It is to be remembered that Nebraska was first settled along the eastern borders and in its river valleys. These lands were not arid lands, nor, indeed, may the entire state be properly designated as an arid state.

Accordingly, in 1866 there was duly enacted by the territorial legislature, as section 1, chapter VII of the Revised Statutes of that year, the following: "So much of the common law of England as is applicable, and not inconsistent with the Constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory, is adopted, and declared to be law within said territory." 2 Complete Session Laws of Nebraska, 1866-1877, p. 12. This act, in substance, continues in full force and effect. Comp. St. 1929, sec. 49-101.

In compliance with the terms of this enactment, this court has consistently supported this doctrine: "The common-law rules as to the rights and duties of riparian owners are in force in every part of the state, except as altered or modified by statutes." *Meng v. Coffee*, 67 Neb. 500, 93 N. W. 713. See, also, *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N. W. 781.

The principle was also clearly announced, and consistently maintained, that "The purpose of the law as to use of water by riparian owners is to secure equality therein, as near as may be, to each, by requiring each to exercise his rights reasonably, and with due regard to the right of other riparian owners to apply the water to the same or other purposes." *Meng v. Coffee,* 67 Neb. 500, 93 N. W. 713.

The language of the above rule necessarily implies that the right to use water at common law is limited strictly to riparian lands. This is in accord with the weight of authority. 3 Farnham, Waters and Water Rights, p. 1902. This necessitates the further conclusion that at common law there was in general no right to transport waters beyond or over the divide or watershed that inclosed the source from which obtained.

However, the Tri-County District contends that section 46-508, Comp. St. 1929, permits diversion of water from one watershed to another. In the light of legislative history, we are unable to agree with this contention. Our first enactment on the subject of irrigation is chapter 68, Laws 1889. This act, entitled "An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes," etc., embraced a complete drainage code. It is to be noted that section 1, art. 1 of the act, provided:

"The right of the use of running water, flowing in a river or stream or down a canyon, or ravine, may be acquired by appropriation by any person or persons, company or corporation organized under the laws of the state of Nebraska; provided, that in all streams not more than fifty feet in width, the rights of the riparian proprietors are not affected by the provisions of this act."

Section 6 of the same article is as follows:

"The water appropriated from a river or stream shall not be turned or permitted to run into the waters or channel of any other river or stream than that from which it is taken or appropriated."

This has been said to have been adopted from California.

It appears at the time of the enactment of this statute the law in California on this subject was substantially that, while the use of waters of streams for irrigation is permitted, the riparian proprietor is recognized as having the superior right, and the waters are not permitted to be diverted by the irrigators beyond the watershed; but the surplus is to be returned to the original stream. 1 Wiel, Water Rights, p. 849; 1 Kinney, Irrigation, p. 782; 2 Farnham, Waters and Water Rights, p. 1572; 3 Farnham, Waters and Water Rights, p. 1903; *Wiggins v. Muscupiabe Land & Water Co.*, 113 Cal. 182, 45 Pac. 160; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442; *Southern California Investment Co. v. Wilshire*, 144 Cal. 68, 77 Pac. 767; *Anaheim Union Water Co. v. Fuller*, 150 Cal. 327, 88 Pac. 978; *Clark v. Allaman*, 71 Kan. 206, 80 Pac. 571; *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S. W. 733; *Matagorda Canal Co. v. Markham Irrigation Co.*, 154 S. W. (Tex. Civ. App.) 1176.

It is obvious, in view of the source of the enactment, and the express terms of section 6, art. 1, that the act of 1889 in no manner authorized the conveyance of waters over and beyond the watershed for the purposes of irrigation.

Four years later the legislature of 1893 enacted an act "to promote the development of water power for manufacturing and other industrial purposes," and to amend certain sections of the consolidated statutes of Nebraska of 1891. Laws 1893, ch. 40. By its terms, section 6, art. 1 of the irrigation law of 1889, was amended by attaching thereto an exception, in the following language: "Unless such stream exceeds in width one hundred (100) feet, in which event not more than seventy-five (75) per cent. of the regular flow shall be taken." This now appears as section 46-508, Comp. St. 1929.

In 1895, chapter 69 of the session laws of that year was duly enacted, which repealed the irrigation law of 1889, as amended. By its terms the law of Wyoming was largely adopted. However, six sections of the "Raynor's Irrigation

Law" (1889) were not repealed by the act of 1895, and one of these is section 6, article 1 of the law of 1889, as amended in 1893. However, the act of 1895 contained the following pertinent provisions:

Sec. 42. "The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as heretofore provided."

Sec. 43. "The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purposes but when the waters of any natural stream are not sufficient for the use of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes."

Sec. 59. "The owner or owners of any irrigation ditch or canal shall carefully maintain the embankments thereof so as to prevent waste therefrom, and shall return the unused water from such ditch or canal with as little waste thereof as possible to the stream from which such water was taken or to the Missouri river."

It is obvious that section 59 quoted, which is now section 46-620, Comp. St. 1929, is not amendatory of section 6, art. 1, ch. 69, Laws 1889, as amended in 1893 (now section 46-508, Comp. St. 1929), but is to be regarded as part of the act of 1895, complete within itself, and having the force and effect of an additional regulation for the construction, maintenance and operation of irrigation canals. It is also obvious that the words "or to the Missouri river" can have no application to the issue to be determined in the instant case. So, also, as concerns section 42 (now section 46-502) and section 43 (now section 46-504), as well as section 46-508, the controlling principle of con-

struction is: "In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time or order of arrangement prevails." 59 C. J. 999.

It follows that performance of the conditions imposed by section 46-620, Comp. St. 1929, is expressly made mandatory in the operation of all irrigation ditches, and in addition its requirements prescribe a necessary, practical limitation to the extent that water may be removed from the source of supply. Water unconfined will not run up hill. The divide or watershed must therefore not be crossed by an irrigation ditch or canal and the waters applied to lands whose situation is such that prevents the unused waters from being returned to the source from which they were taken. In fact, section 46-620 was in effect a substantial reenactment of section 6, art. 1, ch. 69, Laws 1889, because it is inconceivable that its prohibitions would ever be applied to any but unused waters. It is quite obvious that the legislative intent in both enactments was to preserve the unused waters for the benefit of the source from which obtained. These statutes are more than mere arbitrary commands. They evidence reason and purpose. They establish public policy on the subject of irrigation. Courts will consider the purpose of a statute as a whole, and seek to carry out, and not defeat, such purpose. *School District of Omaha v. Gass, ante,* p. 312, 267 N. W. 528.

Section 46-132, Comp. St. 1929, empowering irrigation districts to provide for drainage of lands embraced within their limits which are or have been subirrigated, and to return such drainage waters to the stream from which its canal is taken, in event the same are not again used for irrigation, is obviously another example of the legislative recognition of the established policy of the state.

It is manifest, therefore, that section 46-620, Comp. St. 1929, construed in connection with section 46-508, as an express regulation governing the operation of irrigation canals and ditches, necessarily implies such location and

construction of the matters regulated as will enable a full performance of the requirements specifically directed. This, as a practical matter, in view of existing conditions, necessarily limits the location of the canals to within the watershed of the stream that furnishes the source of supply.

It follows, therefore, that under the established policy of this state, water for irrigation and power purposes taken from the Platte river or its tributaries may not be lawfully diverted over and beyond the southern watershed of that stream and applied to lands situated without the basin of the Platte river; and that the department of roads and irrigation was wholly without authority to grant applications numbers 2351, 2354, 2355, and 2374, for that purpose. The orders of the department of roads and irrigation approving and granting the applications above enumerated are, therefore, each set aside, annulled, and revoked, and the cause is remanded to such department with directions, if desired, to grant leave to amend said applications by limiting the use of the waters taken thereunder to power purposes and to irrigations of lands situated within the Platte river watershed.

REVERSED.

FLOYD CLARK V. STATE OF NEBRASKA.

FILED JULY 1, 1936. No. 29729.

Homicide: INSTRUCTIONS. "On the trial of one charged with having committed the crime of murder in the first degree, it is the duty of the court to instruct the jury only on such degrees of homicide as find support in the evidence." *Williams v. State*, 103 Neb. 710, 174 N. W. 302.

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

Thomas E. Dunbar, for plaintiff in error.

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

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and BLACKLEDGE and LANDIS, District Judges.

GOSS, C. J.

Defendant Clark was charged with murder in the first degree, was convicted of manslaughter, and was sentenced to serve ten years in the penitentiary.

Clark assigns many errors, among them that the court instructed the jury on first degree murder; another, that the court instructed the jury on second degree murder; whereas, defendant contends, there was no evidence to support the statutory elements of murder in the first degree or murder in the second degree.

So much of the statute on murder in the first degree as is applicable follows: "Whoever shall purposely and of deliberate and premeditated malice * * * kill another; * * * every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury." Comp. St. 1929, sec. 28-401.

Murder in the second degree is defined as follows: "Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree; and, on conviction thereof, shall be imprisoned in the penitentiary not less than ten years, or during life." Comp. St. 1929, sec. 28-402.

Manslaughter is defined as follows: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter; and, upon conviction thereof, shall be imprisoned in the penitentiary, not more than ten years nor less than one year." Comp. St. 1929, sec. 28-403.

The information charges that Clark made the felonious assault upon Jerry Jelinek and that Jelinek as a result thereof died on July 15, 1935. The evidence indicated that the alleged assault occurred July 10, 1935, about 7 in the

evening, in the rear of a saloon known as the "Mug House" in Nebraska City. Clark was a worker on the river improvements. Late in the afternoon he went to the Mug House. Jerry Jelinek, Jack Pierson and others were there. Jelinek had a quarrel over the rolling of dice and invited Jack Pierson out behind the saloon to fight. They went out and Jelinek and Pierson fought for a time. Pierson was smaller than Jelinek and did not allow the latter to clinch with him. Some one ordered the fighting to stop and Pierson took advantage of the opportunity to leave. Then Jelinek and Clark, who had gone out to watch, continued the fight. Clark testified that Jelinek came up behind him and struck at him and he knocked Jelinek down, which ended his connection with the quarrel. The testimony of others evidently convinced the jury that Clark kicked Jelinek in the abdomen and ruptured his bladder, distended with beer, as the evidence shows, and that resulting peritonitis caused his death. It will serve no useful purpose to review the evidence further. Suffice it to say that evidence presents a typical manslaughter case, if it can be believed that defendant's blows caused the death. At the most, it was the result of a drunken quarrel between two persons who were able to satisfy themselves only with physical combat when full of beer. Jelinek was noisy and quarrelsome, and witnesses testified that Clark was a very decent fellow when sober but belligerent when under the influence of liquor.

The act of Clark lacked the elements of purpose and of deliberate and premeditated malice required as elements of first degree murder, and lacked the elements of purpose to kill and malice required in murder in the second degree. The court should not have submitted to the jury those degrees of homicide.

"On the trial of one charged with having committed the crime of murder in the first degree, it is the duty of the court to instruct the jury only on such degrees of homicide as find support in the evidence." *Williams v. State*, 103 Neb. 710, 174 N. W. 302.

"Where the evidence does not prove a higher grade of homicide than manslaughter, it may be prejudicial error to submit to the jury the issue of murder in the second degree, though the trial results in acquitting accused of the graver offense and in finding him guilty of the lesser." *Whitehead v. State,* 115 Neb. 143, 212 N. W. 35. See *Botsch v. State,* 43 Neb. 501, 61 N. W. 730; 30 C. J. 398; *Runyan v. State,* 116 Neb. 191, 216 N. W. 656; *Pembrook v. State,* 117 Neb. 759, 764, 222 N. W. 956.

It was prejudicially erroneous to instruct the jury on first and second degree murder. Such instructions had a tendency to mislead and confuse the jurors. It may be conceived, also, that it may have been an inducement to the jury to find the defendant guilty on the least of the three charges when, if that were the only charge submitted, they might have found him not guilty.

Other alleged errors are not discussed as they are not likely to arise upon a new trial.

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

REVERSED.

CLARA PAVEL, APPELLANT, V. JOSEPH J. HOTOVY ET AL., APPELLEES.

FILED JULY 1, 1936. No. 29614.

1. Trusts: TRUSTEES: REMOVAL. A court of equity has power to remove a trustee for hostility between himself and the beneficiaries, which, in combination with other circumstances, interferes with the proper administration of the trust.
2. ———: ———: ———. Equity does not permit a beneficiary who harbored and vented unwarranted hostility toward trustees, and thus provoked temporary outbursts of ill nature on their part, to make acrimony an equitable ground for removing them from office as a matter of right.
3. ———: ———: ———. It is the duty of trustees in control of trust property to report their fiduciary transactions and accounts to the beneficiary, but a harmless delay in this respect is not a ground for removing them from office.

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

McKillip & Barth, for appellant.

Coufal & Shaw and *E. A. Faytinger, contra.*

Heard before GOSS, C. J., ROSE and DAY, JJ., and ELDRED and TEWELL, District Judges.

ROSE, J.

This is a suit in equity by a beneficiary of a trust to remove the trustees from office. May 8, 1931, Matt Hotovy deeded to two of his sons, Joseph J. Hotovy and Ludvik F. Hotovy, in trust for grantor's daughter, Clara Pavel, and her children, 160 acres of improved farm land in Seward county. The deed directs the trustees to hold the real estate described therein during the life of Clara Pavel; to collect the rentals therefrom; to pay the taxes and other necessary expenses in connection with the operation of the farm, including repairs; to pay the net income to her annually during her life; to convey the real estate to her children upon her death. The trustees are empowered to execute such leases and other instruments as are necessary to the proper execution of the trust. No beneficiary is permitted to encumber or dispose of any interest or right created by the trust deed when by its terms the entire estate is to remain exempt from the claim of any creditor.

Clara Pavel, the principal beneficiary, is plaintiff. The trustees named, Joseph J. Hotovy and Ludvik F. Hotovy, are defendants. A tenant, Leonard Rerucha, is also a defendant.

The execution of the deed and the creation and terms of the trusts are pleaded in the petition, which states that plaintiff is the mother of five children between the ages of 2 and 11 years and alleges:

"That said trustees are the brothers of the plaintiff and there exists between them and the plaintiff extreme antagonistic, inharmonious and unfriendly relations.

"That the plaintiff and her husband are farmers; that

they have no lands to cultivate. They desire to move upon said premises and said defendants refuse to permit them to occupy the same and till said lands which were conveyed expressly to the plaintiff for her use and benefit.

"That there are two dwelling-houses on said premises. The plaintiff desires to occupy one as a home for herself and family, but she has been denied and refused the privilege so to do."

Other complaints are that the trustees refused to make a satisfactory accounting; failed to collect rentals due; permitted waste of crops and improper use of the buildings; allowed tenants to cut trees and remove large quantities of wood.

Defendants admitted that the trust deed was executed; that the trustees named therein accepted the trust and that they proceeded to administer it. Otherwise the answer to the petition is a general denial. By supplemental answer, after the trial began and before a decision was rendered, defendants alleged that the tenant Rerucha vacated the premises February 26, 1935; that the trustees leased the farm to Joseph Brabec for the term beginning March 1, 1935; that, after Rerucha left, plaintiff wrongfully moved her family onto the premises without the consent of the trustees in violation of their rights and the rights of the new lessee.

Upon a trial of the cause there was a decree in favor of defendants. The suit of plaintiff was dismissed. She was ordered to vacate the premises and she and her agents were enjoined from further interfering with the trustees in the discharge of their duties as such. Plaintiff appealed.

Plaintiff argues that personal hostility between her and the trustees combines with other circumstances to prevent the proper administration of the trust for the best interests of the trust estate and that therefore the trustees should be removed by the court and others appointed. In this connection the general doctrine invoked by plaintiff has been stated as follows:

"A court of equity has power and authority to remove

a trustee from his office, when any substantial personal disability exists in the trustee, when he fails to perform the duties of his position, when he has misconducted himself in office, when hostile relations exist between the trustee and his beneficiaries of such a nature as to interfere with the proper execution of the trust, or under any other conditions which render his removal necessary for the best interests of the trust estate, particularly where it appears that the trustee's personal interests conflict with, or are antagonistic to, his duties as trustee under the terms of his trust." *Burnham v. Bennison,* 121 Neb. 291, 236 N. W. 745.

From the standpoint of business qualifications and integrity, the evidence furnishes no reason for the removal of the trustees. They have personally no pecuniary interest in the trust estate. Their duties as fiduciaries do not conflict with any property interest of their own. On the issues of hostile relations between plaintiff and her two brothers, who are trustees, the testimony is voluminous. While the evidence has all been critically examined, the statements of fact found and the conclusions reached must necessarily be brief. The purposes of the trust are obvious. The father of plaintiff was the grantor in the deed. He intended to give his daughter for life the net income from an improved farm of 160 acres and to provide for its protection from the claims of creditors. Upon her death the farm, kept in repair and free from encumbrance, is to be conveyed to her children. The deed, the trust and the services of the trustees are the means provided for effectuating grantor's purposes.

Plaintiff and Joe Pavel were married in 1921. The wife then received from her father some property for housekeeping and farming and $2,000 in cash, and her husband received from his father an improved 160-acre farm mortgaged for $10,000. The lien was reduced to $8,000 by the gift to plaintiff from her father. This farm became the home of plaintiff and her husband, Joe Pavel. He was not a successful farmer. He did not pay the mortgage. In addition thereto he owed his father $3,000. He issued no-

fund checks. He assaulted an unmarried sister of his wife, a daughter of grantor and a sister of the trustees. For these offenses he was punished in the county court of Seward county. He lost his farm. His father took it back and later dispossessed plaintiff and her husband. They were left without a home. The improvidence of Joe Pavel and his offenses created personal hostility toward him in the minds of the father of his wife and her brothers, grantor and trustees, but this feeling did not extend to plaintiff herself. The selection of trustees who would properly administer the trust and protect the trust estate and the interests of plaintiff and her children, under the circumstances, would naturally be the aim of grantor who was familiar with existing conditions. The attribute of courage would quite likely be considered a qualification of trustees.

The pecuniary situation of plaintiff without a home of her own was a source of anxiety and worry to her. Her testimony shows her hostile attitude toward the trustees, but this does not necessarily determine the issue. The proper inference from the evidence as a whole is that she generally caused the irritation manifested by the trustees. At different times she importuned them to lease the trust estate to her and to permit her and her family to occupy and operate the farm. Their refusals to comply with her wishes were sometimes harsh. She was told that she could not farm and that her husband would not. They did not want him on the place. Interviews on this subject usually resulted in quarrels and ended in disappointment and crying on her part. Under the trust deed the selection of a tenant was a duty requiring the discretion and judgment of the trustees. Her attempted interference with this duty and her unavailing efforts to procure a lease and the right to occupy the premises aroused her own antagonism and prompted much of the trustees' conduct of which she complains. Equity does not permit a beneficiary who harbored and vented unwarranted hostility toward her trustees, and thus provoked temporary outbursts of ill nature

on their part, to make acrimony an equitable ground for removing them as a matter of right. While the evidence indicated that the trustees should have been more kind to and considerate of their sister than they were, under the distressing circumstances in which she found herself, there is no sufficient evidence of hostility, in connection with other circumstances, to remove them from their fiduciary offices.

Complaint is made on the ground that the trustees did not account to plaintiff or pay her annually the net income from the farm. Accurate accounts were in fact kept. There was delay in reporting them to plaintiff, but they were later made available to her. It is the duty of the trustees in control of trust property to report their fiduciary transactions and their accounts to the beneficiary. *Baird v. Lane,* 115 Neb. 413, 213 N. W. 512; *Howell v. Poff,* 122 Neb. 793, 241 N. W. 548. A harmless delay in this respect, however, is not a ground for the removal of the trustees. Plaintiff did not receive any income for the years 1932 and 1933, but, under the trust deed, she was only entitled to net income. Taxes, insurance premiums and other necessary expenses were to be first paid. The rentals were consumed or retained for legitimate expenses. The barn was reroofed. The house was painted and other necessary improvements were made. This was in harmony with the purpose of grantor to protect the life estate of plaintiff and preserve the estate in remainder for her children. There is nothing in the evidence to indicate that the trustees profited personally by any improvement made by them or by failure to report accounts or pay annual net income. On this feature of the case there is no sufficient ground for the relief sought by plaintiff.

Other charges against the trustees are not supported by sufficient evidence to justify their removal from office.

AFFIRMED.

EAST LINCOLN LODGE NO. 210, ANCIENT FREE AND ACCEPTED MASONS, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED JULY 1, 1936. No. 29852.

1. **Municipal Corporations:** TAXATION: EXEMPTIONS. Section 2, art. VIII of the Constitution, empowers the legislature to exempt from taxation certain classes of property. Pursuant to that power, the legislature has exempted from taxation "property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain, or profit to either owner or user."
2. ———: ———: ———. The power of the city council of the city of Lincoln, under its home rule charter, to assess and levy taxes does not extend to property that is exempt from taxation.
3. ———: ———: INJUNCTION. A tax levied upon property that is exempt from taxation is one levied for an unauthorized purpose, within the meaning of section 77-2115, Comp. St. 1929, and the collection of such tax may be enjoined.

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

Edward C. Fisher and *Ralph W. Ford,* for appellant.

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

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and BLACKLEDGE and LANDIS, District Judges.

GOOD, J.

This is an action to enjoin the collection of alleged void taxes assessed against plaintiff's realty. To the petition a general demurrer was interposed and sustained by the trial court. Plaintiff refused to further plead, and judgment of dismissal followed. Plaintiff has appealed.

In the petition it is alleged that the city of Lincoln, for each of the years from 1930 to 1935, levied and assessed taxes against the real property of the plaintiff; that during all of said time said property was used exclusively for religious, educational and charitable purposes and was not owned or used for financial gain or profit to either the

owner or user, and was, therefore, exempt from taxation. The principal question raised by the demurrer is whether the facts alleged are sufficient to warrant the granting of injunctive relief.

Pursuant to the provisions of section 2, art. VIII of the Constitution, the legislature enacted section 77-202, Comp. St. 1929, which reads: "The following property shall be exempt from taxes: * * * property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user."

The taxes in question were levied by the officials of the city of Lincoln, pursuant to the provisions of the city's home rule charter. Section 4, art. IX of that charter, reads: "The city council shall constitute the board of equalization for the city, and shall have power as such board to equalize all taxes and assessments, and to correct any errors in the listing or valuation of property, and to supply any omissions in the same." Comp. St. 1929, sec. 15-805. Section 5, art. IX of such charter, provides: "The city council sitting as a board of equalization shall hold a session of not less than three nor more than thirty days annually commencing on the first Tuesday after the third Monday in June, and shall have power: First. To assess all property real and personal not assessed and which is not exempt." Comp. St. 1929, sec. 15-806.

From the petition it appears that the property in question was, in fact, exempt from taxation, pursuant to the provisions of the statute above quoted. The truth of the allegations of the petition are admitted by the demurrer. For the purpose of this proceeding, we must assume that the property was not subject to taxation. Also, by the quoted charter provision, the city council has power, as a board of equalization, to assess only property that is not exempt from taxation.

Defendants contend that injunction is not the proper remedy; that plaintiff should have appeared before the board of equalization and claimed exemption from taxation,

and, if aggrieved by the action of the board, should have appealed to the district court. Where a property owner claims that his real estate is exempt from taxation and makes appearance before the board of equalization and raises such question, it is then incumbent upon him to follow up that proceeding by an appeal to the district court, if he is aggrieved by the action of the board. Defendants contend, however, that it was the duty of plaintiff to appear and make such claim before the board of equalization. For aught that appears, the plaintiff had no knowledge that the city had levied a tax against its property. It is a rule that, when property is not subject to taxation, the owner may assume that the law will be observed, and he is not required to make protest to the taxing board or follow any statutory procedure to obtain relief. *Sioux City Bridge Co. v. Dakota County,* 61 Neb. 75, 84 N. W. 607.

Defendants further contend that plaintiff had an adequate remedy at law by paying the tax and then filing claim for a refund. We think the rule is not applicable where the tax is absolutely void. Defendants cite and rely upon *Watson v. Cowles,* 61 Neb. 216, 85 N. W. 35. In that case plaintiff brought an action to vacate a tax sale and to quiet his title against taxes levied for several years against his property, on the ground that it was exempt. The opinion held that the evidence showed it was exempt for one year but not entirely exempt for other years, and granted relief for the one year in which it was exempt.

Defendants also cite *Mt. Moriah Lodge, A. F. & A. M., v. Otoe County,* 101 Neb. 274, 162 N. W. 639, and *North Platte Lodge, B. P. O. E., v. Board of Equalization,* 125 Neb. 841, 252 N. W. 313. In each of those cases there was an appeal from the board of equalization, and the question there presented was whether or not the property was, in fact, used exclusively for educational or charitable purposes. Under such circumstances, where the question was one of fact, it was the duty of the property owner to make a showing of facts which would exempt his property. In the instant case, the petition alleges all the facts required

to show that the property is exempt, and these facts are admitted by the demurrer. There is no disputed question of fact in the instant case. This case, rather, falls within the rule announced in *Plattsmouth Lodge, A. F. & A. M., v. Cass County*, 79 Neb. 463, 113 N. W. 167, wherein the facts were stipulated that the property fell within the exempt class. However, that was an appeal from the board of equalization and is not in point.

Defendants also cite *Philadelphia Mortgage & Trust Co. v. City of Omaha*, 63 Neb. 280, 88 N. W. 523, as holding that there is an adequate remedy at law. That was an action to have title to certain real estate quieted in the plaintiff and freed from a certain tax lien. There a tax had been legally levied, and the property was not exempt. By a fraudulent act the treasurer had marked the taxes paid on the tax records, when, in fact, they had not been paid. It was held in the opinion: "An injunction will not be granted to restrain the collection of taxes, unless the assessment is void or levied for an illegal or unauthorized purpose." There the tax was levied for a legal and authorized purpose and had never been paid. The plaintiff in that case had loaned money upon a mortgage on real estate in the unfounded belief that the tax had been paid. The case is not in point.

Whether an injunction will lie depends on whether a tax is absolutely void, or whether it is merely illegal because of some irregularity. In *Burlington & M. R. R. Co. v. York County*, 7 Neb. 487, plaintiff sued to enjoin the collection of alleged void taxes. The court found part of the taxes void and enjoined that part. In the opinion it was held: "The power to levy a tax must be clearly and distinctly given by law, and if the limits fixed by the statute are transcended by levying a sum in excess of that authorized by law, such excess may affect titles acquired by a sale of the property for such illegal tax. But this will not excuse a party praying for an injunction from tendering the amount of taxes justly due from him." In the opinion it was said, quoting from Cooley on Taxation (p. 491): "'It is a familiar rule

that, in the execution of the power to tax, the municipalities must confine themselves closely within the power conferred,' and 'that the provisions of the statute must be strictly pursued.' * * * The proposition will not be controverted, that it is absolutely essential to valid taxation that the taxing officers must be able to show legislative authority for every levy of taxes."

In *Touzalin v. City of Omaha*, 25 Neb. 817, 41 N. W. 796, plaintiff sued to enjoin collection of alleged void taxes. It was alleged that the city had levied a tax for special benefits against certain real property owned by plaintiff, and that the property was not within the taxing district. A demurrer to the petition was interposed and sustained. This court reversed the judgment. In the opinion it was said (p. 824): "If, however, the tax is void, in other words, is levied without authority of law, the forms of law nevertheless being used to cast a cloud upon the title to the party's real estate, and thereby diminish its value, the power of the legislature to close the doors of the courts to aid the taxpayer is very doubtful. A void tax is no tax. How then can the statute debar the taxpayer from enjoining the unlawful sale of his property to pay such alleged taxes? The law might as well authorize the seizure of the property of A by force and violence, and without authority, to pay the debts of a municipality, as to seize and sell such property under a void assessment. In either case the taxpayer may invoke the aid of the courts to protect him from wrong and oppression. The rule is, that where public officers are proceeding illegally under claim of right they may be enjoined."

In *Hemple v. City of Hastings*, 79 Neb. 723, 113 N. W. 187, the city of Hastings attempted to levy a tax upon property that had been subdivided and was adjacent to the city limits, but which had never been actually incorporated into the city. The court held: "The levy of city taxes upon property outside its boundaries is without authority, and such taxes are illegal and void as to such property, and their collection may be restrained by injunction."

State v. Several Parcels of Land, 78 Neb. 703, 111 N. W. 601, was similar to the last above cited case. There the city of Plattsmouth levied a tax upon property that was not within the corporate limits. The opinion held: "Such tax is one levied for an 'unauthorized purpose,' within the meaning of section 15 of the scavenger act * * * and may be adjudged void in a proceeding brought under the act." In the opinion it was said (p. 706): "If the taxes were levied in the belief that the property was subject to city taxation, they were based upon mistake; if they were levied by the city authorities with knowledge that the property was outside the city limits, and not subject to city taxation, they were based on fraud." Another similar case is *Thatcher v. Adams County*, 19 Neb. 485, 27 N. W. 729, where a school district levied a tax to pay the indebtedness of the original district which had been subdivided. The school district attempted to levy taxes upon realty that was not within the original district, to pay a bonded indebtedness. It was held: "Such taxes, if levied, would be for an 'unauthorized purpose,' within the meaning of section 144 of chapter 77 of the Compiled Statutes, 1885, and their collection might be restrained, or the creation of an apparent lien therefor prevented, by an injunction."

It is true that section 77-2115, Comp. St. 1929, among other things, provides: "No state, county or city general tax shall be declared void, in whole or in part, except upon a showing that the property in controversy was exempt from taxation, or that the levy was for an illegal or unauthorized purpose." In the instant case the petition discloses that the taxes were levied upon property that was exempt and that such taxes were levied for an unauthorized purpose.

In *Philadelphia Mortgage & Trust Co. v. City of Omaha*, 65 Neb. 93, 90 N. W. 1005, it was said (p. 96): "If a tax or assessment is absolutely void in itself, so as to be no tax, but a mere pretense under color whereof rights are affected and titles clouded, an action to quiet title and remove the cloud is maintainable."

If the facts alleged in the petition are true—and for the purposes of this proceeding we must accept them as true—plaintiff's property was absolutely exempt from taxation for the years in which the taxes were levied. Any tax levied against exempt property is one levied for an unauthorized purpose. Moreover, the city council was without power to levy a tax upon exempt property. It could no more do so than it could levy a tax on property without the corporate limits of the city. The petition states facts sufficient to warrant the granting of injunctive relief. The trial court erred in sustaining the demurrer.

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

REVERSED.

CARL BUTHMAN V. STATE OF NEBRASKA.

FILED JULY 1, 1936. No. 29736.

1. **Larceny.** In a prosecution under section 28-515, Comp. St. 1929, it is neither necessary to allege in the information nor to prove the value of the property described.
2. **Criminal Law:** SENTENCE. The record reveals that plaintiff in error was properly sentenced under section 28-515, Comp. St. 1929, and not under section 29-2217, Comp. St. 1929, commonly described as the habitual criminal statute.
3. **Larceny:** PROOF. Evidence that one drove cattle from a barnyard by cutting the wire fence, to a point on the public road a quarter of a mile distant, and loaded them in a truck fastening them, is sufficient to sustain a conviction, although afterwards the cattle were released because the truck broke down.
4. **Criminal Law.** Defects in an information which might have been attacked by a motion to quash are waived by a general demurrer.

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

Joseph L. Gagnon and *Armstrong & McKnight,* for plaintiff in error.

William H. Wright, Attorney General, and *Daniel Stubbs, contra.*

Heard before GOSS, C. J., GOOD, DAY and PAINE, JJ., and BLACKLEDGE and LANDIS, District Judges.

DAY, J.

Carl Buthman brings this proceeding in error to review a judgment of conviction in the district court of the crime of cattle stealing. He was sentenced to ten years in the penitentiary.

(1) One assignment of error is that the state failed to prove that the cattle stolen were of some value. Section 28-515, Comp. St. 1929, provides that whoever steals a cow, steer, bull, heifer, or calf of any value shall be punished. The question presented here has been passed upon by this court several times. In *Cochran v. State,* 122 Neb. 79, 239 N. W. 471, it was held that it was not necessary for the information to state the value of the cow. A similar statute was considered by the court in *Halbert v. State,* 116 Neb. 1, 215 N. W. 459, in which case it was held that a statute which denounced the stealing of chickens of "any value" did not require that the information charge that the chickens had some value. In *Graham v. State,* 123 Neb. 63, 241 N. W. 786, the statute condemning the stealing of hogs of "any value" was considered, and it was held not necessary to set out that the hogs were of some value. The statute relating to the theft of automobiles was considered in *Mares v. State,* 112 Neb. 619, 200 N. W. 448, and it was held that under section 28-528, Comp. St. 1929, it is neither necessary to allege in the information nor to find in the verdict the value of the property described. A fair consideration of these authorities leads us to the conclusion that in a prosecution under section 28-515, Comp. St. 1929, it is neither necessary to allege in the information nor to prove the value of the property described. There is evidence in this case that the defendant loaded six or seven white-faced cattle of the average weight of 700 pounds. This evidence fulfills the requirement of the

statute which defines the crime as the stealing of cattle of "any value."

(2) The plaintiff in error assumes that he was sentenced under the habitual criminal statute, section 29-2217, Comp. St. 1929, and alleges that the information did not charge that he had been previously convicted, and that no evidence was introduced as to such previous convictions. It is not necessary for a decision of this case to determine the requirements as to the information and proof necessary under the habitual criminal statute, because it appears that the defendant was not sentenced under this section of the statute but rather under section 28-515, Comp. St. 1929. The penalty provided under the latter section is imprisonment in the penitentiary for not more than ten years nor less than three years. The penalty under the habitual criminal statute is not less than ten years. Before passing sentence, it appears that the trial judge made an investigation which disclosed that the plaintiff in error had been twice convicted of a felony and sentenced not less than a year on each charge. The trial judge apparently took this into consideration in passing sentence upon the charge of cattle stealing, but the record negatives the contention that the sentence was under the habitual criminal statute. A similar situation was presented in *Booth v. State,* 122 Neb. 544, 240 N. W. 753, in which the trial court ascertained immediately before passing sentence that the defendant had previously been convicted of other criminal offenses. But it was held that he was sentenced under the statute relating to arson, and the sentence was, as in this case, within the court's discretion and warranted by his past record.

Closely related to the foregoing complaint is the contention of the plaintiff in error that the sentence of ten years under the circumstances is excessive. This defendant had been convicted upon two previous occasions and sentenced to the penitentiary for more than a year upon each conviction. He was convicted in this case of loading six or seven cattle, the property of another, into a truck in the

night-time. He was found guilty by the jury of backing a truck into a ditch along the public road, going into a pasture, cutting the wires of the fence, and driving the cattle out and loading them in this truck. The driving-shaft of the truck broke so that he was not able to move them from the side of the road, but under the circumstances of the case, and the fact of the two previous convictions, which are not denied, it is not considered by this court that the sentence is excessive.

(3) The sufficiency of the evidence to sustain a conviction is assailed. The argument is that, since the cattle were not moved in the truck, there was no violation of the statute. It seems to be the argument that there was no necessary asportation or carrying away of the cattle. The evidence in the case, which was disputed but which the jury has resolved against the defendant, is that he drove the cattle from a barnyard a quarter of a mile to the truck, where they were loaded in the truck and the end closed. In getting them out of the premises of the owner, the wires of the fence were cut, and the cattle were in the exclusive control and dominion of the defendant in moving them from the owner's property, and certainly when they were loaded in the truck and the end-gate closed, his possession of them was complete and in violation of the rights of the owner. It is argued that merely to chase an animal without catching it, or to entice it a few yards by dropping corn before it is not larceny, however felonious the intent, because no absolute and exclusive adverse possession is acquired by the wrong-doer. 36 C. J. 750, is relied upon to support this contention. But the facts in the case do not bring it within the rule. One who removes cattle from the premises of the owner, as in this case, by cutting the fence, and loads them in a truck, closing the end-gate, has the same under complete control, and there is a sufficient asportation to satisfy the law. The rule is succinctly stated in *McIntosh v. State,* 105 Neb. 328, 180 N. W. 573, 12 A. L. R. 798: "Any removal of the property, after the same is under the complete control of the taker, from the

spot where found, with the requisite intent of the taker to steal, is sufficient asportation to satisfy the law." The cattle in this case were under the complete control of the defendant from the time when he commenced to drive them from the barnyard, and the fact that one escaped from him in loading them upon the truck does not alter this fact. The evidence as outlined above is sufficient to support a conviction in this case.

(4) Another assignment of error relates to the admission of testimony of the sheriff and deputy sheriff of Richardson county as to conversations with the truck-driver prior to the time of the alleged commission of the crime. The plaintiff in error does not indicate the testimony to which he takes exception, but states in his brief that it is the conversations which the sheriff and deputy sheriff had with Currier, the truck-driver. This has made it necessary to examine the testimony of the sheriff and deputy sheriff.

A careful examination of the testimony reveals that the sheriff received a tip from the truck-driver to watch for his truck. The testimony then details what was done by these officers up until the time of the arrest of the defendant. It does not appear that there was any error committed by the trial court in the reception of the evidence of the sheriff or deputy sheriff.

(5) The plaintiff in error alleges that the ruling of the trial judge in overruling his demurrer to the information was erroneous for the reason that the information charged that the crime was committed on the 16th day of September, "19235," an impossible date. The original complaint filed stated the correct date. The information was prepared by filling in a form which had a blank for the date, and the printed figures "192—." In filling in the form, 35 was added after the printed figures without striking out the 2. The plaintiff in error relies upon *McKay v. State,* 90 Neb. 63, 132 N. W. 741, to support his contention. In that case, it was held: "An information is fatally defective if it charges the commission of the offense as subsequent

to the date upon which the information is filed, or on an otherwise impossible date." This paragraph of the syllabus was modified upon rehearing by eliminating the word "fatally." *McKay v. State,* 91 Neb. 281, 135 N. W. 1024. In the cited case, McKay was prosecuted under an information filed April 28, 1910, which charged that he feloniously killed Albert Brown on the 7th day of December, 1910. It appears that the crime charged occurred December 7, 1909. This information was assailed with a motion to quash and a demurrer, both of which were overruled. After the jury were impaneled and the opening statements were made, a witness was called for the state, whereupon the defendant objected to the introduction of any evidence for the reason that the information charged the commission of the crime on an impossible date. The prosecuting attorney then amended the information by changing "1910" to "1909." The defendant objected to going to trial for the reason that the information as amended had not been served upon him as required by statute. This was made the basis of the judgment of reversal. While the first opinion held the information void, this was modified on rehearing so that it was held merely defective.

The case at bar differs in some respects from the cited case. In this case, only a general demurrer was filed. In the *McKay* case, a motion to quash as well as a demurrer was filed. The defect in the present case was apparent on the face of the record and could have been, but was not, excepted to by a motion to quash. Comp. St. 1929, sec. 29-1807. Section 29-1811, Comp. St. 1929, provides: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment." In harmony with this provision, it is held that defects in an information which might have been attacked by a motion to quash are waived by a general demurrer. *Green v. State,* 116 Neb. 635, 218 N. W. 432; *Huette v. State,* 87 Neb. 798, 128 N. W. 519. It would be unthinkable to reverse this judgment for a defect in the information which was not the subject of controversy at any stage of the proceedings.

There are other good and sufficient reasons for affirming the judgment. While it is true that the common law required much particularity in alleging the time of an offense, the strictness of the common-law rule has been relaxed where time is not of the essence of the offense. *Palin v. State,* 38 Neb. 862, 57 N. W. 743. Time is not of the essence of the offense charged here. There is no dispute in the record as to the time the circumstances occurred which are charged as constituting the offense. No substantial right of the defendant was prejudiced by the defect in the information. Neither he, nor the jury, was misled by the typographical error.

Section 29-1501, Comp. St. 1929, provides: "No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected: * * * for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense; nor for stating the time imperfectly."

There are cases, some of which are cited in the brief of the plaintiff in error, which adhere to the old common-law rule. But the rule adopted by legislative enactment seems the more practical, especially when it is not prejudicial. In *White v. State,* 23 Wyo. 130, 147 Pac. 171, a similar error occurred, where with "190—" printed in the form, the figures "13" were added, making the impossible date of "19013." Under a statute similar to ours, it was held not fatally defective. See the opinion in the same case on rehearing, *White v. State,* 23 Wyo. 142, 148 Pac. 342. In the latter opinion, it was said:

"It would hardly be contended that any one would read this information and understand it otherwise than as intended to charge the commission of the offense in the year 1913, notwithstanding that the figure '0' was not erased or that the figure '1' was not typewritten over it instead of immediately following it. But if the court must be so insensible to the common understanding of men and read the statement of the year in this information as 19013,

then we are clearly of the opinion that in that respect the information is no more objectionable than if the time of the commission of the alleged offense had been entirely omitted. Indeed we think that is the effect of stating the year as 19013, a date beyond the practical comprehension of any person living today, so that the information may properly be considered as failing to state the year, and, therefore, omitting to state the time of the commission of the offense, and thus bringing the case within the provisions of section 6165 as to such an omission."

This argument is appealing, but it seems preferable to base the decision here upon the other ground. There is no prejudicial error in the record, and the judgment is

AFFIRMED.

ALICE WILLIAMS, APPELLANT, V. AGNES VOLZ ET AL., APPELLEES.

FILED JULY 1, 1936. No. 29610.

Deposits in Court. The proceeds of an insurance policy paid into court constitute, in this case, a constructive trust in the hands of the court, to be distributed as the demands of equity require.

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

Walter G. Badham, for appellant.

Wayne E. Sawtell, contra.

Heard before GOOD, EBERLY and PAINE, JJ., and CLEMENTS and THOMSEN, District Judges.

PAINE, J.

This is an equity action between two sisters over the proceeds of a $1,000 mutual insurance policy upon the life of their mother. At the close of plaintiff's testimony the trial judge, upon motion of defendant, dismissed petition of plaintiff, who appeals.

As the opinion in this case will turn on a question of evidence, we will set out the facts. The mother, Anna

Kenney, took out a policy of $1,000 on her life April 12, 1904, and carried it until her death on November 1, 1934. The policy was issued by the Women's Catholic Order of Foresters, of Chicago. The monthly assessment was $3.38, and later was raised to $3.73.

At the time of her death the said Anna Kenney had no real or personal property, and left no estate of any kind.

The rules of the insurance order required that, when the insured desired to make a change in the beneficiaries she should fill out a form, which appeared in the policy, and send that to the company, whereupon the old policy was canceled and a new policy was issued to the new beneficiaries.

The beneficiaries have been changed by this insured perhaps a half dozen times, and in November, 1932, the mother was living with her daughter, Agnes Volz, one of the defendants, and this daughter had been paying two-thirds of the monthly premiums and was dissatisfied with the amount going to her in the policy then in force because of her payment of such a large portion of the premiums, such policy then in force being dated April 21, 1926, and providing for $300 to go to each of the three sisters, to wit, Agnes Kenney Volz, Catherine Kenney Hislop, and Alice Kenney Williams, and the balance to Reverend Flanagan, director of the Father Flanagan's Boys' Home at Omaha, for masses. Alice Williams was glad to pay only one-third of the premiums, yet was dissatisfied with the amount of $300 going to her under the policy then in force, because she had loaned her mother, during the years 1931 and 1932, sums of money which amounted at the time the mother died to about $260. The mother and these two daughters talked these matters all over, and it was orally agreed between them that the mother would change the beneficiaries and give Alice and Agnes each $475, and leave $50 for masses, and thereafter the two sisters, Agnes and Alice, would divide the premiums equally between them. On November 28, 1932, the mother signed the change of beneficiary form, and the policy was surrendered and a

new one issued to carry this agreement into effect. From that date until the date of the mother's death, these two sisters each paid their half of the premiums by each paying the assessment every other month and taking a receipt therefor.

On November 28, 1932, the mother was living with Agnes, but in October, 1933, she moved and made her home with Alice, and on October 30, 1933, had a very severe stroke, which paralyzed one side, one-half her tongue and mouth were paralyzed, food would run out of her mouth, and she could not use her hands, even to hold her rosary beads.

There is testimony of a close friend of Mrs. Kenney for many years, who testified that she had called on her for years, and that after she had the stroke of paralysis she was unable to understand a word that Mrs. Kenney said, and that her mind was just the mind of a child.

On April 26, 1934, the mother was taken back to live with her daughter Agnes, where she remained until her death. On Monday after the mother's death Alice discovered for the first time that the insurance policy had been sent back to the company for another change of beneficiaries; that a new policy for $1,000 had been issued on June 25, 1934, which gave Alice only $100 in the place of $475, as agreed, and gave to her sister Agnes, with whom the mother was living at the time of the change, $750, and gave to her brother, Lawrence, $100, and still left $50 for masses. This shows that just two months after the mother was taken back to live with Agnes this change in the amounts payable to the two sisters had been brought about. The plaintiff brought this action in equity, asking that the insurance company pay the money due on the policy into court, which the insurance company promptly did, and that the disposition of it be made by the court.

In the petition it is charged that Agnes and her brother, Lawrence, prevailed upon the mother, who was then in a helpless condition mentally and physically, to wrongfully surrender the policy and have the new one issued, raising

the amount going to Agnes from $475 to $750, but the evidence was lacking on this point.

In the trial in the lower court, six notes signed by the mother for money loaned her by Alice were introduced in evidence, also a receipt for $5 paid for the ambulance to take the mother to St. Catherine's Hospital, also a copy of the policy, showing the change of beneficiaries by the mother on June 25, 1934. During the taking of the evidence of the plaintiff and her husband and a neighbor, Catherine Gilbert, the defendants constantly made objections to the reception of evidence, basing the objections upon section 20-1202, Comp. St. 1929. The court overruled the many objections, saying, "Well, I will receive the evidence and hear you later," and the defendants, for the purpose of preserving this objection, refused to cross-examine the plaintiff or her husband when they were on the stand, on the ground that defendants did not wish to be bound by their evidence, and therefore did not go into any transactions with the deceased at all. As soon as the plaintiff rested, the defendants made a long objection, based upon section 20-1202, Comp. St. 1929, and upon that ground asked that the plaintiff's petition be dismissed, which motion was sustained by the trial court.

Counsel contend that this brings before this court, as the question of law involved which will determine our decision in the case, whether this section of the statute applies to the facts in this case.

Section 20-1201, Comp. St. 1929, says that every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases. If an attempt is made to keep him from testifying on the ground that he is incompetent, then a definite law must be found which will exclude his testimony. Such a law is section 20-1202, Comp. St. 1929, which reads: "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"—then follow the exceptions. This section appeared in our statutes as early as 1866, and was rewritten in 1883, and has been cited hundreds of times in the Nebraska Reports, there being nearly four pages of annotations following this provision, which was section 1314, in Cobbey's Annotated Statutes, 1911, and in the 25 years since then it is rather difficult to find a Nebraska Report without reference to this section.

In 1 Wigmore, Evidence (2d ed.) on pages 865 to 911, are listed the various forms of this law from nearly all of the states, as well as the Philippines and Hawaii. There are less than a half dozen states which do not have this disqualification statute in some form. The purpose of the law is good, and it was intended to prevent an undue advantage on the part of the living over the dead, who can no longer defend himself against the misrepresentations and falsehoods of the survivor, and the rule has been of inestimable value in barring fraudulent claims against estates.

On the other hand, attempts to carry the rule too far may also result in harm for which there is no relief. An examination of Nebraska cases shows a few cases in which the broad statement of the rule has been limited by our court. Commissioner Irvine, in *Wylie v. Charlton,* 43 Neb. 840, 62 N. W. 220, says that the interest of Mrs. Wylie as an heir, not being an interest adverse to the representatives of the deceased, would not of itself be sufficient to exclude her testimony when offered against the representatives. He indicates that the common-law rule, rendering incompetent all persons interested in the result of an action, is not adapted to conditions of today, and that this statute should be construed as if it read that no person having a direct legal interest in the result of an action shall be permitted to testify when the party interested adversely to the witness' interest is the representative of a deceased person.

Commissioner Pound, in *Williams v. Miles,* 68 Neb. 463, 94 N. W. 705, follows the case of *McCoy v. Conrad,* 64 Neb. 150, 89 N. W. 665, and says that persons who would take as heirs or next of kin in case of intestacy are not disquali-

fied under this section from testifying as to transactions and conversations with the deceased in a contest over an alleged will. In *Brown v. Forbes,* 1 Neb. (Unof.) 888, Commissioner Albert said the person's testimony should be excluded when the adverse party is an executor, administrator, or legal representative of a deceased person.

A rather complete and critical discussion of this rule is found in 12 Neb. Law Bulletin, 282, which closes with a statement of the hardships worked under the rule and the difficulty of its application.

The case at bar does not stand alone, for we find many opinions in which beneficiaries have sought to profit under similar conditions. In *Gledhill v. McCoombs,* 110 Me. 341, 86 Atl. 247, 45 L. R. A. n. s. 26, an action was brought by the mother of Edwin Gledhill against his wife to recover the proceeds of a life insurance policy of $10,000 payable to his estate. He gave the policy to his mother before his marriage, and told her it was hers and for her to take care of it. It is held that, while the life insurance policy was payable to his estate, it may still be made the subject of a gift. The policy did not belong to the estate, and the administrator had no right to the policy, but was simply the agency to collect and conduct the proceeds to the true owner, the mother. The plaintiff mother was held not to be a creditor of her son nor of his estate.

In *Supreme Council, Royal Arcanum v. Tracy,* 169 Ill. 123, 48 N. E. 401, Thomas P. Tracy became a member of the Royal Arcanum of Chicago, and received a benefit certificate of $3,000. His wife had advanced him cash, and he turned the certificate over to her and surrendered it to her because of her advance to him of $1,500. He later made a claim to the association that he had lost the certificate, and had a new certificate issued to him. This new certificate was based upon a false affidavit on his part. It was a fraud upon the wife and the organization, and his daughters, to whom the new certificate was made payable, are mere volunteers, as the wife had a vested interest in the certificate.

In the case of *Stronge v. Supreme Lodge, Knights of Pythias,* 189 N. Y. 346, 82 N. E. 433, Irvine was seriously ill, and made an agreement with his sister-in-law that if she would give up her home in New York and take a cottage in New Jersey, and take him there and nurse him, he would make her the beneficiary of his insurance policy. She did just as she promised, and he had his insurance certificate transferred to her. Irvine recovered somewhat and went to Texas, and while there he tried to cancel the certificate that was in his sister-in-law's possession. She would not surrender it to him. The lodge would not issue a new one until the old one was canceled, but finally agreed that, if he would put up an indemnifying bond to indemnify the lodge against the old certificate, they would issue him a new one. This is all shown by the correspondence, but before he had put up the bond he died.

We admit that the by-laws and rules of the organization give the right to the insured to change to a new beneficiary at any time, but this applies to a case where a beneficiary has been voluntarily and gratuitously designated, and who has acquired no interest whatever in the certificate. We find cited in the opinion the case of *Conselyea v. Supreme Council, American Legion of Honor,* 3 App. Div. 464, affirmed 157 N. Y. 719, in which case a certificate was given by the husband to his wife as part of his settlement with her in a separation agreement, and he agreed not to change the beneficiary, and the wife agreed on her part to pay all the premiums due on the policy, which she did. Then the husband tried to cancel his insurance by withdrawing from membership in the order. It was held that he could not do that.

Garner v. Townes, 134 Miss. 791, 100 So. 20, is a case somewhat in point. J. K. Townes brought suit against the appellant, Elizabeth Garner, a minor, and the Equitable Life Assurance Society to cancel an assignment of a $5,000 life insurance policy on his life, which assignment to Elizabeth was made by his father. The insurance company replied, claiming no interest in the matter whatever. On

December 16, 1909, the son borrowed $3,500 of his father, and assigned the policy to his father. The assignment was in writing, absolute in form, acknowledged by the son, but was given only as security for the debt. In January, 1913, the son paid off the loan from his father in full, and the insurance policy was surrendered to the son by the father, who promised to immediately reassign the policy back to the son, and a day or so later he went to the office of a justice of the peace, taking the policy along for the purpose of executing a reassignment of the policy, but the office of the justice was closed. Soon thereafter the father went to Battle Creek, Michigan, and soon died. It then appeared that on March 26, 1913, about three months before the son paid his father, and while the policy was assigned to his father, the father had assigned the policy to Elizabeth Garner, his granddaughter, as a gift. The legal questions involved are: First, whether the son was a competent witness of these facts in his own behalf; second, whether the evidence of the son was admissible to prove that his assignment of his policy, which was absolute in form, was only intended as collateral security for a loan from his father. The Code renders a person incompetent to testify as a witness to establish his own claim against the estate of his deceased father. But the estate of the father was not a party to the suit. Before his death the father had transferred all his right in the policy by the delivery of the policy to the son when the debt was paid, or he had divested himself of all interest in the policy by assigning it to his granddaughter. He had done one or the other, or both of them, and in any event neither the father nor his estate had any interest in the policy. One of these assignments must stand, but both of them cannot stand. If the son succeeds in his suit he will not thereby establish any claim against the estate of his father, as the estate is not interested, directly or indirectly, nor is it involved in any way in this cause of action. In other words, if the son succeeds in this lawsuit, the estate of his father will not be diminished. We are of the opinion, under this state of facts,

that the son so situated is a competent witness under the statute to testify in this case.

To summarize the case at bar, we find that about November 28, 1932, the sisters made an agreement to share the premiums equally and receive an equal amount of the insurance when the mother died. The mother became paralyzed, childish, and entirely helpless, and Agnes took the mother into her home on April 26, 1934. On May 2, 1934, Alice had an attorney write the insurance order, notifying them of the agreement between the sisters as to sharing the premiums and proceeds, and asking the insurance order to make no change in beneficiaries. In spite of this, Agnes sent in the policy and on June 25, 1934, had a new one issued, giving her $750 and her sister Alice only $100, and concealed this new plan from her sister, and permitted her to continue to pay one-half the assessments until the mother died, November 1, 1934.

In this case the deceased had no estate, and had absolutely no interest in the insurance, for she could not get any of the proceeds of this policy, which was payable only after her death.

Such a valid agreement could have been made to the same effect, even if all of the insurance had been payable to one of these sisters. The fact that the mother was present, or that she assisted in their agreement by changing the amounts going to these beneficiaries, does not change the legal effect of the contract as to the two sisters.

Plaintiff insists that the rule of evidence (Comp. St. 1929, sec. 20-1202), is the only question involved. If that were true, as equity will not suffer a wrong to be without a remedy, and regards that as done which ought to be done, then equity will prevent a rule of evidence designed to prevent fraud from being used as an instrument for injustice. 21 C. J. 203.

But, in our view of it, the rule of evidence is not the only question involved. We believe that the proceeds of this policy, having been paid into court by the insurance order, constitute a constructive trust to be applied by the court

in carrying out whatever agreement the court shall find, after a new trial, was made between these sisters.

In *Sorensen v. Sorensen,* 56 Neb. 729, 77 N. W. 68, it is stated, in referring to this rule of evidence, that, if there is reasonable doubt in the mind of the court, then the witness and the evidence are competent. This well expresses the situation. There being grave doubts as to its application to this case, we find the evidence should have been admitted, and it was prejudicial error to dismiss plaintiff's petition. The judgment of the trial court is

REVERSED.

FISK TIRE COMPANY, APPELLANT, V. HASTINGS WAREHOUSE & STORAGE COMPANY ET AL., APPELLEES.

FILED JULY 1, 1936. No. 29705.

1. **Appeal.** Where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon in the supreme court on appeal.
2. ———. When a party moves for a directed verdict at the close of all the evidence, he cannot complain of an adverse ruling thereon in this court on appeal when he fails to allege it as error in his motion for a new trial.
3. ———. Where a case is tried on a theory acceptable to both parties without objection thereto appearing in the record, the verdict of the jury will not be interfered with if there is sufficient evidence to support it.

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

Harry F. Russell, R. O. Canaday and *Cloid J. Wilson,* for appellant.

James D. Conway, contra.

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and BLACKLEDGE and LANDIS, District Judges.

CARTER, J.

Plaintiff brought this action against the defendants to

recover on a note for $500 and two checks in the amounts of $200 and $159.50. The verdict of the jury was for the defendants and judgment was entered thereon. From the overruling of its motion for a new trial, plaintiff appeals.

Defendants in their answer admitted the execution and delivery of the note and checks in question and alleged as a defense that they were given as evidence of a conditional agreement to pay, their promise to pay being contingent upon the payment of the amounts due thereunder to defendants by Guy Kimports, who was doing business as the Galloway Tire & Battery Company, and Kimports not having paid any of the amounts due, there was no liability on the part of defendants.

It appears from the record that for some time prior to July, 1931, Kimports had been handling the tires and other products of the Fisk Tire Company, the plaintiff herein. Having failed to pay his account promptly, plaintiff made arrangements with defendants to ship its merchandise to them for delivery to Kimports as he required it in his business. All the shipments involved in this action were sent to defendants on a collect-on-delivery basis. Kimports obtained tires and accessories from defendants from time to time and gave his checks in payment thereof which were never paid because of insufficient funds. The representative of plaintiff later came to Hastings and accepted the note and checks sued upon from the defendants as a settlement of its claim against the defendants. Defendants contend that it was agreed that the note and checks were to be paid only when Kimports paid the amounts to them. This was denied by plaintiff's witnesses. The verdict of the jury determined this matter favorable to the defendants.

Plaintiff contends that the terms of the note and checks could not be disputed by parol evidence and that the defendants have failed to plead or prove a defense. Whether or not this contention is true in this case, it can avail the plaintiff nothing. Plaintiff did not object to the parol evidence offered. While it is true that plaintiff moved for a

directed verdict at the close of all the evidence, it failed to complain of the action of the court in overruling it in its motion for a new trial. This court has held many times that such alleged errors must be set forth in the motion for a new trial before they can be considered by this court.

There remains only the question whether the evidence was sufficient to sustain the verdict. The evidence was very conflicting. The case was presented on a theory acceptable to both parties. No error in the instructions is charged. The jury believed the story as told by the defendants. We are not in a position to say that their verdict was clearly wrong. The trial court rightfully overruled plaintiff's motion for judgment notwithstanding the verdict and its motion for a new trial. We are obliged to hold, under the record before us, that the trial court committed no error prejudicial to the rights of the plaintiff. The judgment is therefore

AFFIRMED.

FIRST STATE SAVINGS BANK OF BEATRICE, APPELLEE, V. WILBUR MARTIN: HOME STATE BANK OF DEWITT, APPELLANT.

FILED JULY 1, 1936. No. 29695.

1. Mortgages: RELEASE: REINSTATEMENT. Where an existing mortgage lien has been discharged and released by the holder and a deed taken by him without knowledge of the existence of an intervening judgment lien against the property, equity will generally treat it as a mistake of fact and the lien of the mortgage will be restored where it is shown that no one is injured by the mistake but the party himself, and no one has changed his position by reason thereof.
2. ———: ———: ———. In such a case, an action for damages against the abstracter who overlooked the intervening lien is not an adequate remedy at law, and the equity powers of the court may be invoked to obtain relief.
3. ———: ———: PRESUMPTION. Ordinarily, it is presumed that one must have intended to keep alive his mortgage title, where

it was essential to his security against an intervening lien; and this presumption applies although the party through ignorance of such intervening lien may have actually discharged the mortgage and canceled the notes and really intended to discharge them.

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

Stanley Bartos and *Otto E. Placek*, for appellant.

Rinaker & Delehant and *M. S. Hevelone, contra.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and CARTER, JJ., and KROGER and IRWIN, District Judges.

IRWIN, District Judge.

This is a suit in equity brought by the First State Savings Bank of Beatrice, Nebraska, a corporation, herein referred to as the Beatrice bank, against Wilbur Martin and Home State Bank of DeWitt, Nebraska, a corporation, herein called DeWitt bank, to have reinstated as a first lien a certain real estate mortgage made by the defendant Martin to the Beatrice bank and released by said bank and, after reinstatement, for foreclosure.

On May 23, 1929, the Beatrice bank loaned to the defendant Martin $3,300 and as security therefor took a mortgage on certain real estate then owned by Martin in Beatrice, Nebraska. On May 24, 1929, the mortgage was recorded in the office of the register of deeds of Gage county, and it is conceded that it was then a first lien on the property. Martin became in default under his mortgage and the Beatrice bank demanded settlement of his indebtedness. Considerable correspondence passed between the Beatrice bank and Martin, who was generally represented by his son, in which Martin proposed that, if he were unable to obtain a loan from another source sufficient to liquidate the debt to the Beatrice bank, he would deed the property over to the bank. He was unable to obtain the proposed loan and thereafter the Beatrice bank had prepared and submitted to him a warranty deed. Martin exe-

cuted and acknowledged the deed and returned it to the bank through the mail without instructions. The deed contains the usual covenants of warranty as to title and against encumbrances, except the mortgage of the Beatrice bank. The deed and abstract which the Beatrice bank then held were turned over to B. W. Stewart, an abstracter, and who is also an attorney, and he was instructed to examine the records of the property in question and, if he found no intervening liens after the Martin mortgage to the bank, to then file the deed, extend and certify the abstract and return it to the bank. The abstracter examined the records in the offices of the register of deeds, county treasurer and clerk of the district court. He failed to discover a transcript of judgment in the office of the clerk of the district court, the judgment being in favor of the DeWitt bank and against the defendant Martin.

It is conceded by all parties that on January 19, 1934, there had been docketed in the office of the clerk of the district court for Gage county, Nebraska, a judgment in the principal amount of $493.24 which the DeWitt bank had obtained on December 14, 1933, in Madison county, Nebraska, against the defendant Martin.

The abstracter, having failed to locate the judgment, filed the deed from Martin to the Beatrice bank in the office of the register of deeds of Gage county, Nebraska, on June 6, 1934, extended and certified the abstract as of June 7, 1934, and returned it to the bank. Thereafter the bank had the abstract examined by its attorneys and received a report thereon showing merchantable title to the property in the Beatrice bank subject only to its own mortgage. The Beatrice bank then had executed and filed a release of the mortgage from Martin to the bank. It, however, retained the note and mortgage and also the recorded release of its mortgage. On July 28, 1934, the attorneys for the DeWitt bank wrote the Beatrice bank and advised that on January 19, 1934, there had been filed in Gage county the transcript of a judgment of the DeWitt bank against Martin, and on August 1, 1934, the Beatrice

bank filed its petition asking the relief hereinbefore stated. The defendant Martin defaulted and, on the issues joined between the Beatrice bank and the DeWitt bank, the trial court found in favor of the Beatrice bank and entered its decree canceling the release of the mortgage, reinstating the mortgage as a first lien and decreeing foreclosure. A motion for a new trial was overruled, and the DeWitt bank appeals.

The DeWitt bank, appellant, contends that the trial court erred in finding that the Beatrice bank was free from negligence in failing to discover the record of the DeWitt bank judgment. We are unable to agree with this contention. A careful reading of the record will disclose that in this regard the Beatrice bank not only was free of any culpable negligence, but also that it exercised such a degree of vigilance as the circumstances required. It caused the public records to be searched by a bonded abstracter, who is also an attorney, and instructed him that the deed from Martin to the Beatrice bank was to be placed of record only on the condition that he found no liens intervening between the mortgage from Martin to said bank and the recording of the deed. It had the abstract extended, certified and examined by its attorneys, from whom it received a report showing a merchantable title in the Beatrice bank and subject only to its own mortgage, prior to the time it caused the release of the Martin mortgage to be executed and filed for record. The chief aim and purpose of our recording statutes is the protection from loss of innocent purchasers and encumbrancers who have changed their position to their detriment without notice, actual or constructive, of prior liens or conveyances. In a case of this nature where no one has been injured by the mistake but the party complainant and no one has changed his position by reason of the act which has been performed in consequence of a mistake of fact, relief cannot be properly denied upon the theory that a high degree of vigilance has not been exercised by complainant. If there was any failure on the part of the Beatrice bank to exercise due care in

discharging its first mortgage it should, we think, be considered with reference to its effects on the rights of others, and, so considered, cannot be properly regarded as that type of culpable negligence which appropriately affords a bar to equitable relief.

The DeWitt bank relies on the case of *Farrell v. Bouck*, 60 Neb. 771, 84 N. W. 260; *id.*, 61 Neb. 874, 86 N. W. 907; and last reported *id.*, 72 Neb. 875, 101 N. W. 1018, in which this court said: "One who, through culpable inertness, fails to make inquiry when it is his duty to do so, is not in a position to have a release of a mortgage canceled on the ground of mistake." A careful reading of that case will, however, disclose that the facts therein are not analogous to the facts in the instant case.

Another error assigned by the DeWitt bank, appellant, is the finding of the trial court that the Beatrice bank did not have actual knowledge of the DeWitt bank's judgment. This presents the only controverted question of fact in the entire record. It is claimed by the Beatrice bank that its officers and agents had no knowledge of the DeWitt bank's transcript of judgment until it received the letter from the attorneys for the DeWitt bank dated July 28, 1934. The DeWitt bank contends that on March 23, 1934, Mr. Shoemaker, an officer of the DeWitt bank, had a conversation with Mr. Reeves, the cashier of the Beatrice bank, concerning the judgment. From a careful reading of all of the evidence we find, as did the trial court, that at the time the Beatrice bank released the mortgage made to it by Martin, it had no actual knowledge that the judgment of the DeWitt bank intervened between its mortgage and the title conveyed to it by the Martin deed.

As to the contention of the DeWitt bank that the Beatrice bank has an adequate remedy at law, this court in the recent decision in *Union Loan & Savings Ass'n v. Simmons*, *ante*, p. 260, 267 N. W. 449, said: "Appelant further contends that appellee has an adequate remedy at law by maintaining an action for damages against the abstracter and his bondsman. It must be borne in mind that, under

the authorities herein cited, appellee has a first lien on the real estate in question. The mistake of the abstracter brought about a situation on the public records that clouded the certainty of appellee's priority. This uncertainty appellee asks a court of equity to remove. An action for damages would provide no remedy at all. The position taken by appellant would require appellee to surrender its first lien and accept in lieu thereof a cause of action for damages. This contention is without merit. Clearly the appellee has no adequate remedy at law to have the priority of its mortgage lien determined and is entitled to invoke the powers of a court of equity to obtain relief."

Having found that the Beatrice bank did not have actual knowledge of the DeWitt bank's judgment at the time it released its mortgage, and that whether or not the Beatrice bank was negligent in failing to discover the record of the judgment is immaterial if the rights of innocent parties are not involved, the case seems to come squarely within the general principle that: "It is presumed, as matter of law, that the party must have intended to keep on foot his mortgage title, when it was essential to his security against an intervening title, or for other purposes of security." 2 Jones, Mortgages (7th ed.) sec. 873. It is apparent from the record that the Beatrice bank did not intend to take title subject to the judgment held by the DeWitt bank.

We do not lose sight of the rule that, ordinarily, when one having a mortgage on real estate becomes the owner of the fee the former estate is merged in the latter, for it is held in *Wyatt-Bullard Lumber Co. v. Bourke,* 55 Neb. 9, 75 N. W. 241, and in *Citizens State Bank v. Petersen,* 114 Neb. 809, 210 N. W. 278, as follows: "But the mortgagee may in such case keep his mortgage alive when it is essential to his security against an intervening title. If there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that

which would prove most advantageous to himself." And in *Edney v. Jensen*, 116 Neb. 242, 216 N. W. 812, this court said: "Ordinarily, it is presumed that one must have intended to keep alive his mortgage title, where it was essential to his security against an intervening title; and this presumption applies although the party through ignorance of such intervening title may have actually discharged the mortgage and canceled the notes and really intended to extinguish them."

The Beatrice bank always held the first lien and discharged its lien under a mistake of fact such as a court of equity may be called upon to rectify. That the intention of the bank was not to subject its lien to the lien of the judgment of the DeWitt bank is clearly shown. The rights of innocent parties are not involved and the DeWitt bank did not change its position by reason of the act of the Beatrice bank. Under all of the circumstances of this case, we are of the opinion that the findings and judgment of the trial court are correct.

AFFIRMED.

HENRY W. STOWERS, EXECUTOR, APPELLEE, V. EVETT M. STUCK: ARCHIE C. JONES, APPELLANT.

FILED JULY 8, 1936. No. 29592.

1. **Mortgages:** DEFICIENCY JUDGMENTS. The general saving statute preserves a right of action on a claim for deficiency judgment in a suit to foreclose a mortgage not due nor in litigation at the time the legislature, without a special saving clause, passed the act of 1933 repealing the statutory provision which permitted such a judgment.
2. **Parol Evidence:** ASSUMPTION OF MORTGAGE. "The grantee in a deed containing a clause that the grantee assumes and agrees to pay certain mortgages on the land is ordinarily not estopped from denying such recital, and may show by parol evidence that, in fact, he never made such an agreement." *Peters Trust Co. v. Miskimins*, 115 Neb. 88, 211 N. W. 615.
3. ———: ———. The mere fact that grantee in a deed did not

resort to reformation of it to eliminate a clause reciting that he assumed a mortgage on the land purchased by him does not necessarily prevent oral proof, on motion for a deficiency judgment in a foreclosure suit, that he did not assume the mortgage.

4. ———: ———. The sustaining of an objection to a question eliciting from a witness oral proof that grantee in a deed, reciting that he assumed a mortgage on the land purchased by him, did not assume the mortgage, *held* erroneous in a foreclosure suit.

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

McNeny & Sprague, for appellant.

H. A. Brubaker, contra.

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

ROSE, J.

Plaintiff brought this suit in equity September 21, 1933, to foreclose on land in Nuckolls county a 6,000-dollar mortgage dated February 17, 1925. Archie C. Jones, one of the defendants, had purchased the land October 8, 1926, subject, according to the deed, to the mortgage of $6,000, which he assumed as part of the consideration. November 13, 1933, there was a decree of foreclosure directing the sale of the mortgaged premises for the delinquent debt of $6,556.93, interest and costs, unless paid within 20 days. Defendants took a stay of execution for nine months. Plaintiff purchased the land at sheriff's sale September 17, 1934, under the decree of foreclosure, for $4,000, and the sale was confirmed October 29, 1934. A deficiency judgment was entered in favor of plaintiff and against defendant Archie C. Jones for $3,500 on March 13, 1935, from which the latter appealed.

Is the deficiency judgment invalid or erroneous? Jones takes the position that an amendatory act of the legislature took from the court of equity power to render the deficiency judgment in the suit to foreclose the mortgage. Prior to the amendment, a statute empowered the district

court to enter judgment for the unpaid portion of the debt after a foreclosure sale. Comp. St. 1929, sec. 20-2141. The former provision, however, was amended to make the following change in the law:

"When a petition shall be filed for the satisfaction of a mortgage, the court shall have the power only to decree and compel the delivery of the possession of the premises to the purchaser thereof." Comp. St. Supp. 1935, sec. 20-2141.

The amendment was passed with an emergency clause and went into effect April 26, 1933. Laws 1933, ch. 41, sec. 1. As a result, the original provision authorizing a deficiency judgment in an equity suit to foreclose a mortgage, if the amendment alone is considered, seems to have been repealed.

Plaintiff contends, notwithstanding the amendment quoted, that his right of action on his claim for the deficiency was preserved by the following general saving clause applicable to the repeal of statutory provisions:

"Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute." Comp. St. 1929, sec. 49-301.

In support of this contention plaintiff cites the case announcing the following rule:

"Section 20-2141, Comp. St. 1929, as amended by chapter 41, Laws 1933, taking away the power of the court to enter deficiency judgments in equity actions, is not applicable to a suit pending at the time it went into effect by virtue of the general saving clause act, section 49-301, Comp. St. 1929." *Helfrich v. Baxter,* 128 Neb. 281, 258 N. W. 532.

The general saving clause provides that "Such repeal shall in no manner affect pending actions" founded on the provisions repealed. Plaintiff's action was not pending at the time of the repeal. The amendment went into effect April 26, 1933, and the petition was not filed until September 21, 1933. Under the general saving clause, does the

repeal affect "causes of action not in suit that accrued prior to any such repeal?" Plaintiff's action was not in suit and a cause of action for the debt had not accrued when the amendment was passed. On the face of the mortgage the debt of $6,000 was not payable until March 1, 1935. A mortgage clause permitted mortgagee to exercise an option to declare the entire debt due after default in interest instalments and taxes. In the petition alleging such default, it is stated:

"By reason of said default the plaintiff had the option which he now exercises to declare the whole amount secured by the mortgage due and collectible and has the right to foreclose said mortgage."

This declaration was made when the petition was filed, when the cause of action first accrued, September 21, 1933, which was after the amendment was passed. A cause of action or claim for a deficiency judgment did not accrue prior to the accrual of the cause of action to foreclose the mortgage. The date of the foreclosure sale was September 17, 1934. It was not previously known what the deficiency would be. The amendatory or repealing act had long been in force.

It has been held on principle that the general saving clause preserves the right of action on a claim for a deficiency judgment, though the debt secured by the mortgage was not due when the amending or repealing act was passed. In an opinion by former Chief Justice Sullivan, in which he considered an act of 1897, purporting to take from a mortgagee the right to recover a deficiency judgment, he said:

"There is, so far as we can discover, no reason at all why the legislature, in enacting the general saving statute, should make a distinction between contracts upon which an action may be maintained at once and those not yet due. Each class of contracts seems entitled to exactly the same consideration and in our opinion both are within the meaning of the clause, 'Causes of action not in suit.' The qualifying clause, 'that accrued prior to any such repeal,'

has reference, not to the time when the right to institute an action accrued, but to the time when the obligation out of which the action arose came into existence. This construction of the general saving law is consonant with reason and brings the act of 1897 into entire harmony with the provision of the federal Constitution inhibiting the enactment of any law impairing the obligation of contracts." *Burrows v. Vanderbergh,* 69 Neb. 43, 95 N. W. 57.

The law thus announced was followed in *Hunter v. Lang,* 5 Neb. (Unof.) 323, 98 N. W. 690; *Daniels v. Mutual Benefit Life Ins. Co.,* 73 Neb. 257, 102 N. W. 458. See, also, note in 45 L. R. A. n. s. 247. Following these precedents, the conclusion necessarily is that the deficiency judgment against Jones in the case at bar is not invalid for want of power of the court below to render it, the right of action on the claim therefor having been preserved by the general saving statute as formerly construed.

It is further contended that the trial court erred in excluding proof that Jones, who purchased the mortgaged land, did not assume the mortgage and that the recital of assumption in the deed was contrary to the contract of purchase actually made.

The mortgagors were Albert W. Kling and Dollie A. Kling and the mortgagee was Randel G. Stowers. The suit was brought by "Henry W. Stowers, as executor of the estate of Randel G. Stowers, deceased." Jones bought the land from the Klings and accepted the deed containing the recital that he assumed the mortgage. His answer to plaintiff's petition contains the following paragraph:

"This defendant did not assume said mortgage debt or any part thereof and did not agree to pay said mortgage debt or any part thereof as part of the consideration of said land; that the words in said deed, 'which grantee assumes together with interest from March 1, 1927, as part of consideration herein,' were inserted in the deed without the consent or knowledge of this defendant by a mistake of the notary who drew the deed, and without any agreement therefor between this defendant and the said defend-

ants Kling and said clause in said deed appears therein by mutual mistake of all parties to said deed."

In an attempt to prove this defense, Jones, a witness in his own behalf, was asked the following question:

"Was there any agreement on your part with Mr. Stowers or Mr. Kling—you made the trade with him—to assume this Stowers' mortgage?"

To this question there was an objection as follows:

"Incompetent, irrelevant and immaterial, seeking to contradict the plain terms of written instruments, inadmissible."

The objection was sustained. There was an offer to prove the issuable fact which counsel sought to elicit and much more. An objection to the offer was also sustained. While the form of the question and the offer of proof not elicited by it were open to criticism on technical grounds, they plainly advised the court of equity of the purpose to prove the defense that Jones did not assume the mortgage and that consequently he was not liable for a deficiency judgment. In the trial before the court without a jury, justice might have been administered and a second trial avoided by liberal rulings on evidence. There was no substantial ground for sustaining the objection to the inquiry. Proof that Jones did not assume the mortgage, because such proof would contradict the deed, was not inadmissible under the general rule that a written instrument cannot be contradicted by parol evidence. Plaintiff was not a party to the deed and as to him Jones was not required to reform the written instrument before challenging the assumption clause as no part of the contract actually made. The following principles are in harmony with former decisions:

"The grantee in a deed containing a clause that the grantee assumes and agrees to pay certain mortgages on the land is ordinarily not estopped from denying such recital, and may show by parol evidence that, in fact, he never made such an agreement." *Peters Trust Co. v. Miskimins*, 115 Neb. 88, 211 N. W. 615.

In the same case the opinion states that the mere fact no steps were taken to reform the deed to make it conform to the contract does not necessarily prevent oral proof that grantee did not assume the mortgage as recited in the assumption clause—citing, *Hare v. Murphy*, 60 Neb. 135, 82 N. W. 312; *Green v. Hall*, 45 Neb. 89, 63 N. W. 119; *Durland Trust Co. v. Payne*, 106 Neb. 135, 182 N. W. 1016.

In these views of the law the trial court erred in rejecting proof that Jones did not assume the mortgage. For this error the judgment below is reversed and the cause remanded for further proceedings.

REVERSED.

FRANK H. SHAMBAUGH, APPELLEE, V. GREAT NORTHERN LIFE INSURANCE COMPANY, APPELLANT.

FILED JULY 8, 1936. No. 29712.

1. Insurance. 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.
2. ———. An insured cannot recover for disability, first occurring eight or ten days after accidental injury, under a policy providing for indemnity against disability, resulting from accidental injury, provided such disability is continuous from the date of accident.

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

Shuman & Overcash, for appellant.

Harold E. Coates, contra.

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and BLACKLEDGE and LANDIS, District Judges.

GOOD, J.

Plaintiff sued on a policy of accident insurance, to recover for alleged total and partial disability benefits. Defendant admitted the issuance of the policy and that it was

in force, but denied that plaintiff's disability, either total or partial, was within the terms of the policy. The trial resulted in a judgment for plaintiff, and defendant has appealed.

The cause was submitted upon a brief and oral argument by counsel for defendant. Plaintiff failed to file brief or present oral argument.

The policy provides for the payment of disability benefits caused "solely from bodily injuries effected, directly and independently of all other causes, through accidental means." The policy further provides that, "if such bodily injuries, independently and exclusively of all other causes, wholly and continuously disable the insured *from the date of accident* from performing any and every kind of duty pertaining to his occupation, for one day or more and so long as the insured lives and suffers said total disability, but subject to Part I, the company will pay" (the indemnity provided for), and further provides: "Or, if such bodily injuries, independently and exclusively of all other causes, wholly and continuously disable the insured *from date of accident* from performing one or more important daily duties pertaining to his occupation, or for like continuous disability following total loss of time, the company will pay for the period of such partial disability, but not exceeding three months, and subject to Part I, a monthly indemnity," as provided in the policy. (Italics ours.)

In his petition plaintiff alleges that on the 28th day of November, 1933, he sustained a scratch on the back of his neck; that about the 8th day of December following he became partially disabled, and on the 12th day of December became totally disabled for a period of about two months. The cause was submitted upon the evidence on behalf of plaintiff, together with a stipulation of the parties, so there is no conflict.

The evidence discloses that the scratch on the back of plaintiff's neck was about one-fourth of an inch long; that plaintiff did not know whether it caused any hemorrhage or that it pierced the skin; that about eight days there-

after he noticed some irritation; that on the 10th of December he was partially disabled and on the 12th became wholly disabled; that the wound became infected, and there was general septicemia, or blood poisoning. The evidence also discloses that between November 28 and December 10 plaintiff, who is a physician and surgeon, was treating a number of patients who were suffering from various kinds of infection. The evidence does not disclose when the scratch on plaintiff's neck became infected, nor the source of the infection. A physician, who attended plaintiff during his illness, testifies that it could have come from the scratch, but his general testimony indicates that it must have occurred later.

The policy provides that the insurance "covers loss or disability caused by pyogenic infection, the direct result of external inoculation through bodily injuries covered by the policy, subject to all its terms and provisions." Since the evidence fails to show that the septicemia, or blood poisoning, was the direct result of and caused by the accidental scratch on the back of plaintiff's neck, we think that disability resulting from septicemia is not covered by the policy. The evidence discloses that from the 28th day of November, the date on which, plaintiff alleges, the scratch on his neck occurred, he performed his duties, the same as usual, for a period of 10 or 12 days.

The language of the policy seems clear and unambiguous. Its provisions are not illegal or contrary to public policy. The parties have a right to make such a contract as the one in controversy. It is a rule that, 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. *Omar Baking Co. v. Employers Liability Assurance Corporation,* 130 Neb. 365, 264 N. W. 873.

In *Himelbloom v. Metropolitan Life Ins. Co.,* 128 Neb. 52, 257 N. W. 525, it was said (p. 55): "The right of competent persons to enter into lawful contracts is fundamental. Parties to contracts may express their agreements in their own language unless specific forms are prescribed by

law. It is not the province of courts to make contracts for parties or to extend by interpretation written language therein beyond its proper import."

In the instant case the plain import of the language of the policy is that the insured may recover for disability, either partial or total, only when the disability is the result of an accidental injury, and where the disability is continuous from the date of such injury.

In *Southern Surety Co. v. Penzel,* 164 Ark. 365, 261 S. W. 920, it was held: "Under an accident policy indemnifying insured against injury wholly disabling insured 'from date of accident,' insured could not recover for total disability caused by blood poisoning developing three days after the accident."

In *Martin v. Travelers Ins. Co.,* 310 Mo. 411, 276 S. W. 380, a similar policy provision was involved. In that case disability did not develop until the third day after the accidental injury. It was held that insured was not entitled to recover. Other cases holding to the same effect are: *Penquite v. General Accident, Fire & Life Assurance Corporation,* 121 Kan. 174, 246 Pac. 498; *Thompson v. General Accident, Fire & Life Assurance Corporation,* 155 La. 31, 98 So. 746; *Laventhal v. Fidelity & Casualty Co.,* 9 Cal. App. 275, 98 Pac. 1075; *Coburn v. Maryland Casualty Co.,* 224 Ky. 377, 6 S. W. (2d) 471; *Johnson v. Travelers Ins. Co.,* 269 N. Y. 401, 199 N. E. 637; *Williams v. Preferred Mutual Accident Ass'n,* 91 Ga. 698, 17 S. E. 982; *Masonic Protective Ass'n v. Farrar,* 73 Ind. App. 19, 126 N. E. 435; *Kennard v. Travelers Protective Ass'n,* 157 Va. 153, 160 S. E. 38; *Mullins v. Masonic Protective Ass'n,* 181 Mo. App. 394, 168 S. W. 843; *Herwig v. Business Men's Accident Ass'n,* 234 S. W. (Mo. App.) 853; *Smith v. United States Nat. Life & Casualty Co.,* 101 Cal. App. 79, 281 Pac. 413; *Feitel v. Fidelity & Casualty Co.,* 147 La. 52, 84 So. 491; *Letherer v. United States Health & Accident Ins. Co.,* 145 Mich. 310, 108 N. W. 491; *Walters v. Mutual Benefit Health & Accident Ass'n,* 208 Ia. 894, 224 N. W. 494.

It is clear that plaintiff's disability did not occur on the

date of the accidental injury, nor for eight or ten days thereafter. His disability does not fall within the terms of the policy. He is not entitled to recover. The allegations of plaintiff's petition and his testimony disclose that he has no valid claim against the defendant for disability, either total or partial, arising from the accident which occurred on November 28, 1933.

We have not overlooked the opinion of this court in *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18, 184 N. W. 903, which was rendered by a divided court. In that case the plaintiff received an injury and was at least partially disabled immediately thereafter for three days; then apparently recovered so as to carry on his occupation as a physician for some two weeks; thereafter became entirely disabled and died as the result of sarcoma, which was caused directly by the injury. Without approving or disapproving that opinion, the facts are so entirely different that we feel it is not authority in the instant case.

The judgment of the district court is reversed, and the cause dismissed.

REVERSED AND DISMISSED.

HARBINE BANK OF FAIRBURY, APPELLEE, V. CAROLINE MCCUNE, APPELLANT.

FILED JULY 8, 1936. No. 29622.

1. **Husband and Wife.** A married woman's contract can only be enforced against the separate estate she possessed at the date of entering into the contract.
2. ———. When a bank gives an extension of time upon the indebtedness of a husband and wife by taking a new note therefor, such extension is a sufficient consideration to support the wife's contract to bind her separate estate therefor.

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

E. A. Wunder, for appellant.

Rain & Rain, contra.

Heard before GOOD, PAINE and CARTER, JJ., and CLEMENTS and THOMSEN, District Judges.

PAINE, J.

A married woman signed a promissory note containing the married woman's clause, but denied that the bank extended any credit on her separate estate, and claimed that she had no property, and that the note was given for an indebtedness of her husband. Jury waived; trial had to court and judgment entered against her for $2,293.56, from which she appeals.

The plaintiff brought suit May 1, 1934, against Caroline McCune and her husband upon a promissory note given plaintiff bank by the defendants on November 17, 1930, for $1,775, which note contained a married woman's clause, pledging payment of the same upon the faith and credit of her separate property, estate, and business. It was further alleged that several payments of interest had been made.

On November 21, 1934, Caroline McCune filed her answer, alleging that she married A. C. McCune on November 28, 1906, and that on November 17, 1930, she was a married woman, not engaged in any trade or business on her sole or separate account. She also denies that any credit was given upon her signature, or with reference to, or upon the faith and credit of, her separate business, and denies that she has any property, real or personal, and alleges that the obligation represented by the note was the entire obligation of her husband, but does not plead fraud of any sort in obtaining her signature to the note, and asks that the action be dismissed. The reply was a general denial.

On November 19, 1934, default was taken against the husband, A. C. McCune, and judgment entered against him for $2,205.28, with interest at 10 per cent. from March 18, 1935. On April 2, 1935, a jury was waived and the case went to trial against the wife on the petition, answer and reply, and a judgment was entered against

her. The bill of exceptions discloses that the plaintiff offered in evidence as exhibit No. 1 the note sued upon, which was received in evidence, and then rested.

The evidence of the defendant, aside from oral evidence, consisted in offering exhibit A, a note given plaintiff bank by the defendant and her husband on January 26, 1923, for $1,545; exhibit B, a note between the same parties, dated September 1, 1925, for $1,000; exhibit C, dated February 29, 1926, for $941.40; exhibit D, dated August 28, 1929, for $1,617; each note containing a married woman's clause.

Caroline McCune testified that the indebtedness arose out of farming debts, made mostly in 1921, and accumulated interest thereon, and testified that the amount represented by each note was that carried forward from the previous note, and that all of this indebtedness was that of her husband, incurred in his farming operations. She further testified that she had simply signed the notes because the bank asked her to. She admitted that she was the daughter of Jacob Dein, who owned considerable property, and that her father died June 29, 1929, and that she signed the note, exhibit D, for $1,617 on August 28, 1929. She admitted that she had a one-tenth interest in her father's estate, but said that, as her mother was still alive and gets all of the income of it for life, she had never received a cent from her father's estate, and had no control or possession of any of the property. She denied that she ever intended to represent to the plaintiff bank that it should extend credit to her husband on the interest that she had in her father's estate. She denied positively that she ever told Mr. McLucas, of the plaintiff bank, that she would bind her interest in her father's estate for her husband's debt. In the plaintiff's rebuttal, Harold McLucas testified most positively that Mrs. McCune told him that she had an interest in her father's estate, and that she would pledge that interest for the payment of the note in suit.

The evidence establishes the fact that the note in suit is the last of a long series of notes, all of which have been

signed by Mrs. McCune under a married woman's clause, and that two of them were signed after the death of her father, who was an extensive farmer and landowner, and who left the income of his property to his wife for life, and after that it was to be divided equally between his ten children, of whom Mrs. McCune was one.

Defendant contends that, in order to constitute her separate estate, she must be entitled to the possession of some particular part thereof, and that when she signed the note in suit she had at best only a contingent interest in her father's estate, for the will provides that certain tracts of land shall be sold and reduced to cash, which cannot be done until after the death of the life tenant.

In discussing the law relating to the contentions of the parties, we will first set out the statute relating thereto, being section 42-202, Comp. St. 1929, which reads: "A married woman, while the marriage relation subsists, may bargain, sell and convey her real and personal property, and enter into any contract with reference to the same in same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property."

Justice Gantt, in *Davis v. First Nat. Bank*, 5 Neb. 242, said, in effect, that this statute legalizes her contracts, and if she contracts with reference to and upon the faith and credit of her separate property she should be bound to make good such contracts.

The next illuminating case is found in the opinion of Judge Norval in *Grand Island Banking Co. v. Wright*, 53 Neb. 574, 74 N. W. 82, and the much longer dissent of Commissioner Ryan, concurred in by Commissioner Irvine, in which all the early cases are reviewed, and it is held that in Nebraska it is a question of fact whether a married woman intended to bind her separate estate.

Judge Sullivan held in *Kocher v. Cornell*, 59 Neb. 315, 80 N. W. 911, that a married woman's contract could only be enforced against the separate estate she possessed at the date of entering into the contract. In *Biltwell Tire & Bat-*

tery Co. v. Book, 112 Neb. 647, 200 N. W. 868, this court, in an opinion by Chief Justice Morrissey, definitely held that, if a married woman joined with her husband in the execution of a promissory note which contains a clause by which she expressly charges her separate estate with the payment thereof, she is then bound to the same extent as a *femme sole.*

The only case cited to the contrary is *McRoberts v. Dworak,* 117 Neb. 342, 220 N. W. 587, but, since the briefs were written in the case at bar, the case of *McRoberts v. Dworak, supra,* has been overruled by this court in *Sturm v. Lloyd,* 130 Neb. 89, 264 N. W. 150, which holds that, in the absence of fraud, accident, or mistake, it is error to allow the introduction of parol evidence to contradict the terms of the married woman's clause. See 8 Neb. Law Bulletin, 276.

In the case at bar Harold McLucas testified that he was an officer of the Harbine Bank until June 14, 1930, when it was consolidated with the First National Bank of Fairbury, after which he was vice-president of the consolidated bank; that when the note dated August 28, 1929, became due, suit was started, and Mr. and Mrs. McCune came to see him several times, and finally the new note sued upon was given, and the suit was dismissed, after she had pledged her interest in her father's estate for the payment of the note. Therefore, the evidence disclosed that she repeatedly had pledged her interest in her father's estate, twice by signing notes after his death containing the married woman's clause, and also by her oral promises that, if the bank would dismiss the first suit and extend the time of payment by a new note, she would pledge her interest.

In the case of *Gibson v. Sheen,* 128 Neb. 728, 260 N. W. 186, this court announced that an extension of time of payment of her husband's past-due indebtedness is a sufficient consideration to support a wife's contract to bind her separate estate for the payment thereof.

In the argument, defendant attacks the sufficiency of the allegations of the petition to hold Mrs. McCune. To test

this, the defendant filed a demurrer, but, without waiting for argument or any ruling on the demurrer, the defendant filed an answer, which, in effect, waived her attack upon the sufficiency of the petition.

This court finds that Caroline McCune, defendant, owned property at the time she signed the note in suit.

After hearing all the evidence, the trial court rendered a judgment against the defendant. Considering the advantage which that court had in hearing the evidence from the witness-stand, and finding that the law supports his finding, the judgment of the trial court is hereby

AFFIRMED.

RALPH E. MORSE, APPELLANT, V. GEORGE COCHRAN, APPELLEE.

FILED JULY 8, 1936. No. 29665.

1. **Quieting Title.** Since the amendment of 1921, an action to quiet title may be maintained by any person, whether in actual possession or not, and such cause shall be tried as an equitable action. Comp. St. 1929, secs. 76-401, 76-409.
2. **Adverse Possession.** If one by mistake incloses the land of another and claims it as his own, his actual and uninterrupted possession as owner for the statutory period of ten years will perfect his title.

APPEAL from the district court for Garden county: GEORGE W. IRWIN, JUDGE. *Reversed, with directions.*

E. E. Richards, for appellant.

Hoagland, Carr & Hoagland, contra.

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

PAINE, J.

Plaintiff brought action in equity to quiet title and enjoin defendant from trespassing upon a strip of land in dispute. Upon filing the petition, a restraining order was duly is-

sued. Defendant filed a demurrer, which was argued, and sustained by the court. The temporary injunction was dissolved, and the petition dismissed. Plaintiff appeals.

The petition, which is seven pages long, alleged in substance that Thomas McCormick homesteaded and received a patent on August 29, 1902, to the southeast quarter of section 17, township 16 north, range 42 west, in Garden county, Nebraska, and said McCormick deeded said land to the plaintiff; that the patentee had constructed a fence along his west boundary line, and had also planted a row of trees along said line, and had annually farmed the land up to the fence, and that since plaintiff bought the land on June 7, 1930, he has also tilled it up to said fence; that the plaintiff and his predecessor in title have been at all times for more than ten years, and continuously since August, 1902, in open, notorious, exclusive, adverse, actual, continuous, and uninterrupted possession of all of such lands up to the said west boundary line fence.

Plaintiff alleges that defendant, since July 31, 1934, has been the owner of 80 acres lying west thereof, and the defendant asserts that said west boundary line fence of plaintiff is not the true division line, but defendant claims it should be some two rods east thereof. Plaintiff further says that defendant has trespassed upon his lands by going on this strip of land and plowing furrows, building a fence, threatening to cut down and destroy the row of about 75 big trees planted along said boundary line many years ago, and that unless defendant is restrained he will commit said damage and trespass. Plaintiff therefore prays that defendant be summoned to show cause why the title to said strip of land be not established, quieted and confirmed in the plaintiff; that defendant be restrained from trespassing thereon, and for temporary restraining order until hearing can be had on the application for a temporary injunction.

The demurrer of defendant is as follows:

"1. That the complaint shows on its face that the complainant has an adequate remedy in a court of law and that

a court of equity cannot assume jurisdiction over the rights maintained by claimant in said petition.

"2. That said petition shows on its face that if complainant has any remedy it is by an action of ejectment at law.

"3. That said complaint shows on its face that the only lands which the plaintiff claims to be the owner of are the southeast quarter (SE¼) of section seventeen (17) and the said petition shows that the defendant is the owner of the east half of the southwest quarter (E½ of SW¼) of the same section, and that the controversy is relative to a strip of land along the east side of the east half of the southwest quarter (E½ of SW¼) of said section or the land for which the defendant has the legal title and the defendant cannot trespass upon his own land."

The defendant, in support of this demurrer, argues that in the plaintiff's petition there is no claim of title to any other land than the said southeast quarter, although the two-rod strip which plaintiff claims clearly lies in the 80 acres to the west, which land the defendant owns; that, if the correct boundary line is where defendant built the new fence, two rods east of the row of trees, then the defendant is not a trespasser. Defendant further claims that plaintiff admits in his petition that the title to the strip is in controversy; that before plaintiff can gain title to this strip of land by adverse possession he must bring a suit in ejectment, for defendant is entitled to have the questions litigated in a court of law and to a jury.

Defendant argues that equity has no jurisdiction to settle a question such as this, where the only matter in dispute is the proper location of the division line between adjoining tracts, and not which of two opposing titles is the better. Defendant cites in support thereof: "Ejectment is the proper remedy for the determination of contests as to the title of real estate." 4 R. C. L. 74, sec. 2. Defendant also cites: "Plaintiff seems to have invoked the extraordinary writ of injunction for the sole purpose of obtaining possession when at the time he had a plain and adequate

remedy at law." *Reed v. Wellman* (1920) 104 Neb. 292, 177 N. W. 170. Again, defendant calls our attention to the statement of Judge Barnes in *Hollinrake v. Neeland* (1913) 94 Neb. 530, 143 N. W. 809: "It is not claimed that plaintiff was in actual possession of the land, but it is insisted that he was entitled to such possession." And, again: "Even if defendant's possession of the land was wrongful, the plaintiff was not entitled to an injunction."

The case of *Baty v. Elrod,* 66 Neb. 735, 92 N. W. 1032, is quite in point, for it is there contended that the possession of a disputed strip was not adverse if they did not claim or intend to occupy more land than their deed called for. It is said by this court that such may be the rule in Iowa, but not in this jurisdiction, the rule in Nebraska being that, if one by mistake inclose the land of another and claim it as his own, his actual and uninterrupted possession as owned for the statutory period will work a disseisin, and his title will be made perfect. In the rehearing of this case this holding was not changed.

The plaintiff admits that the rule contended for by defendant in his demurrer was in force in Nebraska up to the time of the passage of the new law on actions to quiet title in 1921, which is section 76-401, Comp. St. 1929, and reads as follows: "An action may be brought and prosecuted to final decree, judgment or order, by any person, or persons, whether in actual possession or not, claiming title to, or an estate in real estate against any person or persons who claim, or apparently have, an adverse estate or interest therein, for the purpose of determining such estate or interest; and canceling unenforcible liens, or claims against, or which appear to be against, said real estate, and quiet the title to real estate." This section clearly gives the right to bring an action to quiet title, whether one is in or out of possession.

Section 76-404, Comp. St. 1929, reads as follows: "It shall be sufficient to allege generally in the petition that the defendants claim or appear to have some interest in, rights or title to, or lien upon said real estate or a part

thereof; and it shall not be necessary to allege the nature of any adverse claim or that the value of plaintiff's title or estate is lessened thereby. No lien of record or mortgage of record, however, shall be affected by such action unless it is particularly described, and payment or other legal reason for its cancelation, or that it is barred by limitation, is specifically alleged."

Section 76-409, Comp. St. 1929, reads as follows: "The court shall try such cause in like manner as other equitable actions and shall enter therein such orders and decrees as the parties may be entitled to. Appeals from final orders may be had as in other actions." This section specifically requires that these actions be tried as equity actions.

In *Williams v. Riley*, 79 Neb. 554, 113 N. W. 136, it is held that, where plaintiff has enjoyed possession for years, equity will restrain a violation of it without that right being first established in law.

Another case very closely in point is *Ayres v. Barnett*, 93 Neb. 350, 140 N. W. 634, in which defendant was trespassing, as in the case at bar. Other cases are: *Cole v. Manners*, 76 Neb. 454, 107 N. W. 777; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 60 N. W. 717; *Welton v. Dickson*, 38 Neb. 767, 57 N. W. 559.

There is one case which is closely in point, i. e., *Sittler v. Wittstruck*, 122 Neb. 452, 240 N. W. 562, which says that the fence in that case was by mistake 40 years ago set a distance to the west of the true boundary, and the plaintiff has been using the land for more than ten years. It is said: "It is a well-recognized principle of law that, where adjacent owners of land construct a fence as a boundary line between their respective tracts, and each uses and occupies the land to the fence, each claiming title to the land on his respective side of the fence for a period of more than ten years, each thereby acquires an absolute title, by adverse possession, to the land on his side of the fence, regardless of whether or not it was on the true boundary."

All of the members of the court who heard the argument

in the case at bar are of the opinion that the petition states a cause of action for equitable relief. The fact that he pleaded much that was entirely unnecessary in his long petition does not change his rights, even though it may have subjected him to attack.

The judgment is reversed, with directions to the trial court to overrule the demurrer, vacate the order of dismissal, allow the temporary injunction, all at the cost of the defendant.

REVERSED.

CAROLENE PRODUCTS COMPANY, APPELLEE, V. WILLIAM BANNING ET AL., APPELLANTS.

FILED JULY 8, 1936. No. 29759.

1. **Constitutional Law.** A statute adopted by the legislature to protect the public health and secure the public safety and welfare must have some relation to those proposed ends, as the rights of property will not be permitted to be invaded under the guise of the exercise of the police power.
2. ———. If such a statute be enacted under the police power of the state which does not tend to preserve the public health, safety or welfare, it is void as an invasion of the property rights of the individual.
3. ———. Section 81-1022, Comp. St. 1929, commonly called the "filled milk" act, is invalid as being an arbitrary and unreasonable regulation of a lawful occupation in so far as it prohibits the manufacture, sale and distribution of a food product composed of evaporated skim milk and cocoanut oil, both of which are wholesome and nutritious.
4. **Food.** The remedy for fraud in the sale of a wholesome and nutritious food product is by legislative regulation and not by a destruction of the business.
5. **Constitutional Law.** Section 81-1022, Comp. St. 1929, is an unreasonable and arbitrary use of the police power of the state and is therefore violative of the Fourteenth Amendment to the Constitution of the United States and of section 3, art. I of the Constitution of Nebraska.

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

William H. Wright, Attorney General, Paul P. Chaney, William C. Ramsey and *Lester A. Danielson*, for appellants.

George N. Murdock and *Bernard R. Stone, contra.*

Crossman, Munger & Barton and *Varro H. Rhodes, amici curiæ.*

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

CARTER, J.

This action was commenced by the plaintiff to secure an injunction to restrain defendants from enforcing section 81-1022, Comp. St. 1929, known as the "filled milk" statute, for the reason that it is unconstitutional and void. From a decree awarding an injunction, defendants appeal.

Section 81-1022, Comp. St. 1929, provides as follows: "It shall be unlawful for any person, firm, or corporation, by himself, his servant or agent, or as the servant or agent of another, to manufacture, sell or exchange, or have in possession with intent to sell or exchange, any milk, cream, skim milk, buttermilk, condensed or evaporated milk, powdered milk, condensed skim milk, or any of the fluid derivatives of any of them, to which has been added any fat or oil other than milk fat, either under the name of said products or articles or the derivatives thereof or under any fictitious or trade-name whatsoever."

Section 81-1024, Comp. St. 1929, provides that a violation of any of the provisions of the act shall constitute a misdemeanor punishable by fine, jail sentence, or both.

The record discloses that plaintiff is a sales company selling filled milk manufactured by the Litchfield Creamery Company of Litchfield, Illinois, such compounds being known as "Carolene" and "Milnut." The testimony shows that these two products were manufactured in the same manner and contained the same ingredients. They were manufactured by taking sweet milk from which substantially all the butterfat had been removed by the ordinary process of separation, evaporating the moisture content thereof until approximately 18 per cent. skim milk solids

remain, and then adding approximately 6 per cent. cocoanut oil. This product was packed and sold in air-tight tin cans bearing Carolene or Milnut labels. On the Carolene label the following is printed: "Carolene net weight 14½ ounces. 'So rich it whips.' A compound of refined nut oils & evaporated skimmed milk. Not less than 18% skim milk solids. Total solids 25½%. Not less than 6% nut oils. Not to be sold for evaporated milk. Carolene. A high-grade wholesome food product, composed of a mixture of: Concentrated skimmed milk and highly refined cocoanut oils. Especially prepared for use in coffee, baking and for other culinary purposes. This product complies in all respects with the Federal Food and Drug Act of June 30, 1906, and is neither adulterated nor misbranded under the provisions thereof. Licensed under patents August 1, 1916, 1193477, October 17, 1922, 1432632, October 17, 1922, 1432633, October 17, 1922, 1432634, October 17, 1922, 1432699. Manufactured for Carolene Products Co., Litchfield, Ill., U. S. A. After the can is opened, under the same conditions of temperature, Carolene will keep sweet longer than either fresh or evaporated canned milks. When whipping, chill first."

The evidence establishes the fact that Carolene was being sold in the city of Omaha and that the defendants, who are officers of the state charged with the duty of enforcing its laws pertaining to the distribution of food products, have prevented and are preventing the sale of this product in the city of Omaha and elsewhere in the state by virtue of section 81-1022, Comp. St. 1929, and will continue to do so unless restrained by the courts.

Plaintiff contends that this act is null and void for the following reasons: (1) Because said statutes deprive the plaintiff of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, which provides in substance that no state shall make or enforce any law which shall abridge any of the privileges or immunities of the citizens of the United States, nor shall it deprive any person of life,

liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and (2) because said statutes are in violation of section 3, art. I of the Constitution of the state of Nebraska, which provides with reference thereto as follows: "No person shall be deprived of life, liberty, or property without due process of law."

A great amount of evidence was taken in this case on the question whether Carolene was a deleterious food product. We will not burden this opinion with a discussion of the evidence but will content ourselves with a statement of the conclusions we have drawn therefrom. The evidence establishes that Carolene is similar in taste, appearance, consistency and manner of packing to evaporated or condensed milk. The cocoanut oil added to the skim milk to take the place of the extracted butterfat is much less expensive than butterfat. Carolene can therefore be sold, and is sold, to jobbers and retailers cheaper than the evaporated or condensed milk. The compound is not delterious in itself but it does not have the same quality or food value as the genuine condensed milk. The evidence of expert witnesses was to the effect that it is lacking in a certain chemical substance known as vitamin A, which is an essential element of a proper dietary. This vitamin may be supplied from other foods. It is admitted that Carolene is not a proper substitute for milk or condensed milk for infants and, if used exclusively for long periods of time, will cause a child to suffer harmful effects. The record shows that it was advertised by retailers in Omaha as "milk" and "Carolene compound," and sold at a less price than condensed milk. This compound is labeled to indicate that it was more or less equivalent to or better than the genuine evaporated milk, although the ingredients thereof were truthfully stated on the labels. We conclude therefore that Carolene is a nutritious and healthful food and in no way deleterious to health in its ordinary use. Under these facts, has the legislature exceeded constitutional limits in passing this act?

It must be conceded at the outset that the act was not passed to prevent an adulteration of milk products, as no distinction is made between the addition of harmless and harmful oils and fats. Its purpose must therefore be the prevention of fraud upon the public through the sale of filled milk as natural milk or its derivatives, whether sold under its true name or under a trade-name.

The legislature, under the policy power, can regulate the production and sale of milk and its derivatives. The power to regulate does not, however, include the power to prohibit the sale of useful and harmless articles of commerce. In order that a statute may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals or general welfare; that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof; and that the latter do in some plain, appreciable and appropriate manner tend toward the accomplishment of the object for which the power is exercised. 12 C. J. 929.

It is the duty of the legislature, of course, to use its judgment in exercising the police power of the state. The presumption is that any such law enacted by it is constitutional, and it is only when the courts determine that an enacted law invades personal and property rights protected by the Constitution that it will not be sustained. The question to be determined herein is whether the act in question does invade constitutional rights. Is the remedy for the alleged wrong unreasonable and arbitrary?

It is the contention of the state that Carolene is harmful to public health because it is lacking in vitamin A. It is not contended that it is harmful because it contains harmful ingredients that are deleterious to public health. Many common foods are lacking in vitamin A. Skim milk contains little or no vitamin A. Cocoanut oil is also practically devoid of vitamin A. It is not, however, unlawful to sell either by itself but is a misdemeanor to mix them together

for sale purposes if the statute before us is valid. It must be borne in mind, however, that the act is not limited to a mixture of vegetable oils and fats with skim milk. The act includes whole milk and cream which are rich in vitamin A, as well as skim milk which lacks it. Under this act, skim milk and its derivatives may be sold even though they contain no vitamin A. On the other hand, skim milk and its derivatives, to which have been added cocoanut oil, the combination of which contains no vitamin A, cannot be sold even though no ingredient deleterious to health was added. Such a statute appears to be unreasonable and arbitrary.

In the very recent case of *Carolene Products Co. v. Thomson,* 267 N. W. (Mich.) 608, the court said: "Prohibition of manufacture and sale of a nutritious food product which is harmless to public health cannot be justified under the police power to preserve public health, because the remedy has no reasonable relation to the purpose unless, at least, it appears that other similar products, dangerous to health, are on the market and that prohibition of all is reasonably necessary to protect the public health because of the impracticability of separating the good from the bad. * * * Extended to other trade, it would enable the legislature to ban many common articles of commerce, such, for example, as syrup not all maple, shoes not all leather, clothes or comfortables with shoddy in them (*Weaver v. Palmer Bros. Co.*, 270 U. S. 402), and the like. * * * We must find and declare, therefore, that the statute is in violation of the constitutional right to do business, secured under the due process clause of the Fourteenth Amendment of the United States Constitution and article II, section 16 of our state Constitution."

In *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, which involved the validity of a statute prohibiting the use of shoddy in the manufacture of bedding, the court said: "Shoddy-filled comfortables made by appellee are useful articles for which there is much demand. And it is a matter of public concern that the production and sale of things necessary

or convenient for use should not be forbidden. They are to be distinguished from things that the state is deemed to have power to suppress as inherently dangerous."

A citizen clearly has the right to engage in any occupation not detrimental to the public health, safety and welfare. Measures adopted by the legislature to protect the public health and secure the public safety and welfare must have some relation to those proposed ends. If it is apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety or welfare, it is unconstitutional as an invasion of the property rights of the individual.

In *People v. Carolene Products Co.*, 345 Ill. 166, 177 N. E. 698, the court said: "The legislature has no authority to pronounce the performance of an innocent act criminal when the public health, safety, comfort or welfare is not interfered with (*Gillespie v. People*, 188 Ill. 176), and may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. *New State Ice Co. v. Liebmann*, 42 Fed. (2d) 913. No question of imitation or fraud is involved in this case and the wholesomeness of Carolene is admitted. In *People v. Price*, 257 Ill. 587, this court said: 'It may be conceded the legislature has no authority to forbid the sale of a known wholesome article of food.' "

Appellants rely upon the case of *State v. Emery*, 178 Wis. 147, 189 N. W. 564, in which the Wisconsin court, in holding a similar act constitutional, said that, where "there is any reasonable basis upon which the legislation may constitutionally rest, the court must assume that the legislature had such fact in mind," and that "the court cannot try the legislature and reverse its decision as to the facts." Subsequently, in the later case of *John F. Jelke Co. v. Emery*, 193 Wis. 311, 214 N. W. 369, the court said: "It prohibits the carrying on of a legitimate, profitable industry and the sale of a healthful, nutritious food. This prohibition can only be justified upon the ground that it is

necessary in order to protect the public health, public morals, public safety, prevent fraud, or promote the public welfare. As already indicated, the public health is not endangered by the manufacture and sale of oleomargarine, and certainly no question of morals is involved. * * * Under the facts proved in this case, whatever the economics of the situation may be, from the standpoint of constitutional right the legislature has no more power to prohibit the manufacture and sale of oleomargarine in aid of the dairy industry than it would have to prohibit the raising of sheep in aid of the beef-cattle industry or to prohibit the manufacture and sale of cement for the benefit of the lumber industry. In some cases a proper exercise of the police power results in advantage to a particular class of citizens and to the disadvantage of others. When that is the principal purpose of the measure, courts will look behind even the declared intent of legislatures, and relieve citizens against oppressive acts where the primary purpose is not to the protection of the public health, safety, or morals. *Yick Wo v. Hopkins,* 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. Ed. 220, and cases cited in notes, p. 541." It therefore appears that the former rule announced in *State v. Emery, supra,* is not approved by the later decisions of the Wisconsin court.

Appellants also rely on *Hebe Co. v. Shaw,* 248 U. S. 297, in which an Ohio statute was upheld that barred the sale of Hebe, a compound of evaporated skim milk and vegetable oil. This case was commented upon by the Michigan court in *Carolene Products Co. v. Thomson, supra,* as follows:

"Its resemblance to this case is quite superficial. It involved a similar milk product, skim milk and oil, but the court declared the oil was of no consequence. It construed the Ohio statute as prohibiting the sale of condensed skim milk in any form, not merely when mixed with oil. It held the act valid, as against the federal Constitution, on the ground that it established a standard of nutritive elements for milk and it was designed to save the public from 'fraudulent substitution of an inferior product that

would be hard to detect.' The court did not indicate the possibilities of fraud nor the possible ineffectiveness of regulation to conserve the public good.

"Its distinctions from this case are apparent. The Ohio act, as construed, established a standard of milk for sale, wholly outlawed an inferior grade of milk but only in manufactured or processed form—condensed skim milk. Our statute is much broader. It established no standard of milk, does not purport to outlaw any kind of milk because it is inferior, is not concerned with whether the product is in manufactured or natural form, but prohibits the sale of any kind of milk, whole or skimmed, and of any milk products whether in natural, manufactured or processed form, and although their sale is otherwise permitted by law, on the single contingency of added foreign oils also legally salable. With such fundamental differences in the acts, the *Hebe* case should not be accepted as controlling because of superficial likenesses."

We are in accord with this view and concur with the holding of the Michigan court that the *Hebe* case is not controlling in the case at bar.

The contention is made that the prohibition of the sale of Carolene and like products should be upheld under the police power because it would prevent the perpetration of fraud on the public. The evidence shows that in a few cases retail grocers kept Carolene on the same shelf with condensed milk, that a few exhibited Carolene to customers who asked for milk or evaporated milk, and some retailers advertised Carolene as milk. We cannot say that a few instances of deception on the part of retailers are sufficient to give authority to the legislature under the police power to prohibit the sale of a product. To so hold would give the legislature power to prohibit the sale of any article on the market, as all are subject to the possibility of being misrepresented. If retailers of a wholesome and nutritious food product practice deception in its sale, the remedy is by regulation and not by a destruction of the business. After a consideration of all the evidence, we fail to find

that the possibilities of fraud are such as would sustain the exercise of the police power of the state in prohibiting the sale of Carolene. The evils of which the state complains can undoubtedly be avoided by reasonable legislative regulation. The fixing of uniform standards in the sale of milk products will provide ample protection for the public. The legislature has the power to prohibit the sale of food products that are dangerous or poisonous but it cannot prohibit the sale of a wholesome and nutritious food product.

We are therefore obliged to hold that section 81-1022, Comp. St. 1929, is unreasonable and arbitrary and violative of the Fourteenth Amendment of the United States Constitution and of section 3, art. I of the Constitution of Nebraska.

The judgment of the trial court will therefore be

AFFIRMED.

FILLMORE COUNTY, APPELLANT, V. JAMES M. BURKE ET AL., APPELLEES.

FILED JULY 8, 1936. No. 29828.

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

John C. Gewacke and *Guy A. Hamilton*, for appellant.

Sloans, Keenan & Corbett, contra.

William H. Wright, Attorney General, Milton C. Murphy and *Lester A. Danielson, amici curiæ.*

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

CARTER, J.

This action was brought by Fillmore county to foreclose a tax sale certificate purchased by it from the county treasurer. While the action was pending the legislature

passed chapter 15, Laws 1935, Special Session, with an emergency clause, providing for instalment payments of delinquent real and personal taxes. The owner of the real estate offered to comply with the act. Plaintiff pleaded that the act was unconstitutional and therefore of no force and effect. The trial court held the act valid and allowed a redemption as provided therein. From this judgment, the county appealed.

The record shows that Fillmore county purchased the tax certificate in question on December 31, 1931, no money being paid to the county treasurer therefor. If the act is valid, the trial court was correct in its ruling, as the defendant is within the provisions of the act. The only question therefore is whether the act is constitutional.

This question is fully covered in the companion case of *Steinacher v. Swanson*, p. 439, *post*, 268 N. W. 317, and is determinative of the case at bar. Upon authority of that case, we hold that chapter 15, Laws 1935, Special Session, is unconstitutional and void. The trial court therefore erred in permitting a redemption under the act.

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

REVERSED.

HENRY STEINACHER, APPELLANT, V. HARRY E. SWANSON, COUNTY TREASURER, APPELLEE: LOGAN A. ROGERS, INTERVENER, APPELLANT.

FILED JULY 8, 1936. No. 29829.

1. **Statutes.** The extraordinary session of the legislature which assembled on October 28, 1935, was properly constituted under the provisions of section 1, art. III of the Constitution as it existed prior to November 6, 1934.
2. ———. The initiative petition adopted by the people of Nebraska on November 6, 1934, amending section 1, art. III of the Constitution, to provide for a unicameral legislature, does

not become operative by its own terms until the first Tuesday in January, 1937.

3. ———: CONSTITUTIONALITY. The title to chapter 15, Laws 1935, Special Session, does not violate section 14, art. III of the Constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."
4. **Taxation**: CONSTITUTIONAL LAW. That part of chapter 15, Laws 1935, Special Session, which provides that under certain conditions delinquent personal taxes may be paid in five equal annual instalments contravenes that part of section 4, art. VIII of the Constitution, which provides in part, "nor shall commutation for such taxes be authorized in any form whatever."
5. ———: ———. That part of chapter 15, Laws 1935, Special Session, which provides that under certain conditions delinquent real estate taxes may be paid in ten equal annual instalments also contravenes that part of section 4, art. VIII of the Constitution prohibiting a commutation for taxes in any form whatever.
6. ———. The words "interest," "penalties" and "costs," as generally used in taxing statutes, are considered as penalties and not a part of the tax.
7. ———: CONSTITUTIONAL LAW. The legislature does not have the power to release or discharge a tax, such action being prohibited by section 4, art. VIII of the Constitution.
8. **Constitutional Law.** Neither may the legislature circumvent an express provision of the Constitution by doing indirectly what it may not do directly.
9. **Taxation**: CONSTITUTIONAL LAW. Under the provisions of section 4, art. VIII of the Constitution, the legislature does not have the power to extend the time of payment of a tax after it has been regularly assessed and levied.
10. **Constitutional Law**: STATUTES: UNIFORMITY. "By section 18, art. III of the Constitution, the legislature is prohibited from passing any act granting to an individual any special or exclusive privileges or immunity, and it is provided that, in all cases where a general law can be made applicable, no special law shall be enacted. *Held*, to prohibit class legislation which does not operate equally and uniformly upon all members of the class brought within its operation." *State v. Hall*, 129 Neb. 669, 262 N. W. 835.
11. **Statutes**: UNIFORMITY. "The legislature may make a reasonable classification of persons, corporations and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class, relative to the subject

of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated." *State v. Hall*, 129 669, 262 N. W. 835.

12. ———: ———. The classification designated in chapter 15, Laws 1935, Special Session, upon which the act was to operate, is unreasonable and arbitrary and inimical to section 18, art. III of the Constitution of Nebraska.

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

John C. Gewacke and *Guy A. Hamilton,* for appellant Steinacher.

Keith K. Turner, for intervener, appellant.

Sloans, Keenan & Corbett and *William I. Aitken, contra.*

William H. Wright, Attorney General, Milton C. Murphy and *Lester A. Danielson, amici curiæ.*

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

CARTER, J.

The plaintiff, as a taxpayer, commenced this action against the county treasurer of Fillmore county praying for an injunction to restrain the defendant from complying with the provisions of House Roll No. 4, now chapter 15, Laws 1935, Special Session, on the ground that said act was unconstitutional and void. The trial court sustained a general demurrer to the petition and dismissed the action. From this judgment, plaintiff appeals.

It also appears from the record that one Logan A. Rogers was granted leave to file a petition in intervention in which he alleges that said act is unconstitutional for the reason that on November 6, 1934, an initiative petition was submitted to and adopted by the voters of the state which provided for a unicameral legislature for Nebraska; that on May 18, 1935, in accordance therewith, an act was passed declaring that the legislature should consist of one house with 43 members, while the special session which convened on October 28, 1935, consisted of two houses con-

trary to the provisions of the Constitution and the statutes of Nebraska then in force. A general demurrer to the petition in intervention was sustained by the trial court and the petition in intervention dismissed. From this dismissal, the intervener also appeals.

We will first discuss the ruling of the trial court on the demurrer to the petition in intervention. It is the contention of intervener that chapter 15 was passed by an extraordinary session of the bicameral legislature at a time when it had been abolished by constitutional amendment. Section 1, art. III of the Constitution, as amended by the initiative petition adopted November 6, 1934, provides, in part, as follows: "Commencing with the regular session of the legislature to be held in January, nineteen hundred and thirty-seven, the legislative authority of the state shall be vested in a legislature consisting of one chamber." By the express statement of the constitutional amendment adopted, it was not to become effective until January, 1937. By its own terms, the amendment to the Constitution was not effective until the commencement of the regular session in 1937. Until it became effective the old bicameral legislature was the regularly constituted legislative authority in this state. The contention of intervener that the extraordinary session of the legislature had no legal existence, because of the amendments referred to, is without merit and the trial court very properly dismissed his petition.

It is contended by plaintiff that the title to the act is defective in that it violates section 14, art. III of the Constitution of Nebraska which provides, in part: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed." The title to the act is, in part, as follows: "An act relating to revenue; to provide for and accelerate the payment of delinquent taxes on real and personal property which have been delinquent for more than one (1) year prior to September 1, 1935, by permitting pay-

ment of all such taxes either by payment in full or in the case of personal property in five (5) annual equal instalments and in the case of real property in ten (10) annual equal instalments, without interest, penalties or other charges added thereto; to provide penalties for defaults; and to amend sections" (here follows a list of amended sections), "and to repeal said original sections, and to declare an emergency."

This act is clearly one which relates to the revenue. Its title sets forth the salient points covered in the body of the act, including the sections of laws amended and repealed. Without going into this subject further, we hold that the title to the act meets all the requirements of that part of the constitutional provision hereinbefore quoted.

The act in substance provides that (1) if a taxpayer on or before September 1, 1936, pays his 1935 real or personal taxes in full with interest and penalties, he may then discharge all of his real or personal taxes which became delinquent before September 1, 1935, by paying only the principal amount thereof without interest, penalties or costs added. (2) If he is not able to pay such delinquent taxes in full in cash, a method is provided by which he may pay his delinquent personal taxes in five annual instalments, or his delinquent real estate taxes in ten annual instalments, all without interest, penalties or costs. These provisions are made to apply where tax sale certificates have been issued to and are still owned and held by a county or other governmental subdivisions. The act, however, does not apply where the delinquent taxes have been sold to a *bona fide* purchaser and a tax sale certificate issued prior to the passage of the act. Neither does it apply where the tax was levied for a special purpose or levied as a special assessment.

It is first contended that the act violates section 4, art. VIII of the Constitution of Nebraska. This section provides: "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."

While it is true that the act in question provides that interest, penalties and costs may be remitted or waived under certain contingencies, it has been established as a legal principle that interest, penalties and costs are no part of the tax and do not, therefore, fall within this provision of the Constitution.

In *Jones v. Williams*, 121 Tex. 94, 45 S. W. (2d) 130, the court said: "The word 'interest' in a delinquent tax act is a penalty for the failure to pay taxes at a designated time and is not part of the tax itself. It is imposed by the legislature in the nature of a fine, and the legislature having the power to impose it also has the power to repeal or cancel it."

In *Biles v. Robey*, 30 Pac. (2d) (Ariz.) 841, the court said: "We think it is obvious that the various impositions made by legislative authority for the failure to pay taxes when due, whether they are called interest, penalties, costs, or anything else, are in reality penalties and not debts. The question has been frequently discussed, and the decisions are almost entirely to the effect that where the original taxes themselves are not regarded as debts upon which legal interest is collectible in the absence of a statute authorizing it, any additional payment required by the legislative authority after a tax has become delinquent is no part of the tax itself, as interest is a part of the ordinary loan, but is a penalty which is merely a part of the procedure used by the state for the purpose of collecting the tax."

Other cases holding to the same effect are: *State v. Koeln*, 332 Mo. 1229, 61 S. W. (2d) 750; *Livesay v. DeArmond*, 131 Or. 563, 284 Pac. 166; *Henry v. McKay*, 164 Wash. 526, 3 Pac. (2d) 145; *State v. Hitsman*, 99 Mont. 521, 44 Pac. (2d) 747.

We therefore conclude that penalties, including interest

and costs, are no part of a tax and that the legislature is not prevented from waiving or remitting such penalties by the provision of the Constitution last above quoted.

Is the act in conflict with that part of section 4, art. VIII of the Constitution which provides "nor shall commutation for such taxes be authorized in any form whatever?" The word "commutation" is defined in Webster's International Dictionary as follows: "A substitution, as of a less thing for a greater; as, commutation of fares, copyright, or rations; specif., the substitution of one form of payment for another, or one payment for many, or a specific sum of money for conditional payments or allowances." An authoritative text-writer defines "commutation" as follows: "Alteration; change; substitution; the act of substituting one thing for another; a passing from one state to another. Also the conversion of the right to receive a variable or periodical payment into the right to receive a fixed or gross payment; a substitution of a less thing for a greater, especially a substitution of one form of payment for another, or one payment for many, or a specific sum of money for conditional payments or allowances, etc.; a substitution of one sort of payment for another, or of a money payment in lieu of a performance of a compulsory duty or labor, or of a single payment in lieu of a number of successive payments, usually at a reduced rate." 12 C. J. 215.

"Commutation" is defined in Words & Phrases (2d) as follows: " 'Commutation' is a passing from one state to another; an alteration; a change; the act of substituting one thing for another; a substitution of one sort of payment for another, or of a money payment in lieu of a performance of a compulsory duty or labor, or of a single payment in lieu of a number of successive payments, usually at a reduced rate."

In *Woodrough v. Douglas County*, 71 Neb. 354, 98 N. W. 1092, our court discussed this identical provision of the Nebraska Constitution. The court said: "Again, commutation is a passing from one state to another; an alteration, a change; the act of substituting one thing for another;

a substitution of one sort of payment for another, or of a money payment in lieu of a performance of a compulsory duty or labor, or of a single payment in lieu of a number of successive payments, usually at a reduced rate."

It is quite apparent that the framers of the Constitution of 1875, the one first containing this provision, and the members of all subsequent constitutional conventions, have been imbued with the idea that all taxpayers are entitled to the same treatment by the government they support. For this reason they have expressly written into our Constitution that the legislature not only shall have no power to release or discharge any one from the payment of his share of taxes, but a commutation for taxes *in any form whatever* is prohibited. (Italics ours.) From an examination of the definitions of the word "commutation" hereinbefore set out, and the use of the words "in any form whatever," contained in our constitutional provision, it is quite apparent that the legislature is prohibited by the Constitution from changing the method of payment of any tax once levied. Clearly, under this constitutional provision, the legislature cannot reduce the amount of the tax, extend the time of payment, or in any manner change the method of payment. The time of payment has been extended by the terms of the act under consideration. The taxing authorities are prohibited from foreclosing their tax liens in those cases falling within the act. We are obliged to hold that chapter 15, Laws 1935, Special Session, contravenes that part of section 4, art. VIII of the Constitution, which provides, "nor shall commutation for such taxes be authorized in any form whatever."

In *County of Lancaster v. Trimble*, 33 Neb. 121, 49 N. W. 938, the court, in a case involving a statute permitting counties to purchase tax sale certificates and foreclose them, except that no action could be brought unless the amount due exceeded $200, held that the statute violated the constitutional provision herein quoted. The court said: "The legislature is without power to release any inhabitant or corporation from his or its proportionate share of

taxes, nor can it confer such authority upon county commissioners. It has authorized them to purchase real estate at tax sale, but has provided for the foreclosure of tax certificates in their hands only when the amount due thereon exceeds a specified sum. The proviso clause of the section of the statute quoted expressly prohibits county commissioners from foreclosing tax liens when the amount of the lien is $200 or less. It, in effect, places it in the power of county commissioners to release the taxes upon lots and lands where the amount of the delinquent taxes thereon is not over $200. All they would have to do to accomplish it is to purchase that kind of property for the county at tax sale. The legislature is powerless to confer such authority. It cannot do indirectly what the Constitution prohibits it from doing directly; that is clear. *Wood v. Helmer,* 10 Neb. 65, 68." On rehearing, *id.,* 34 Neb. 752, 52 N. W. 711, the court said: "It is insisted that, even if the right to foreclose the lien exists, still the amount claimed must exceed $200 to authorize the institution of an action. After a very careful examination of the entire question we are satisfied that our former opinion is right."

In *County of Lancaster v. Rush,* 35 Neb. 119, 52 N. W. 837, a case involving the same statute as was considered in *County of Lancaster v. Trimble, supra,* the court said: "It is urged that the petition did not allege a cause of action, because the amount claimed to be due upon the tax certificate does not amount to $200. The precise question was before the court in *County of Lancaster v. Trimble,* 33 Neb. 121, and the same case upon rehearing, decided at the present term, 34 Neb. 752, and it was held that the proviso clause of section 1, article 4, chapter 77, Compiled Statutes, restricting the foreclosure of tax liens by counties to cases where the amount due on the tax certificate exceeds the sum of $200, is inimical to the provisions of section 1, article 9, of the Constitution. The conclusion there reached is sound. The Constitution requires that all the taxable property in the state shall contribute its proportionate share of taxes, and prohibits the legislature from releasing the

property of an individual from the taxes imposed thereon. The only remedy for the enforcement of the collection of the tax levied on the real estate in question is by foreclosure proceedings, and if such action cannot be maintained because the amount due is less than $200, then said real estate is released from said taxes, and an increased burden will necessarily fall upon other property. We adhere to the conclusion of the court announced in the second hearing, *County of Lancaster v. Trimble, supra,* to the effect that, in addition to the special provisions of statute providing for the foreclosure of a tax lien by a county, the power is conferred by sections 1 and 2, article 5, chapter 77, Compiled Statutes."

It will be noted in the cases last above cited that a law which makes it possible for a taxpayer to escape his tax obligation to the state is violative of section 4, art. VIII of the Constitution. It must be conceded that, if the legislature has the power to extend the time in which taxes must be paid, as was done in the instant case, it could repeat the extensions or extend them for such a duration of time that it would amount to a remission of the tax. Under the cases cited, the legislature is without power to so do. The legislature cannot accomplish indirectly what it may not do directly. As has often been said, it is not what has been done but what can be done under a statute that determines its constitutionality. We submit that, under the act before us, the legislature could effect a complete remission of taxes by the indirect method mentioned. In *County of Lancaster v. Rush, supra,* the statute prevented foreclosure of the tax lien where the amount due thereunder was less than the fixed amount of $200, while in the case at bar the statute prevents the foreclosure of the tax lien by postponing the date when foreclosure can be brought. We hold that the act in question is unconstitutional for the reason that, if it be upheld, it places it within the power of the legislature to circumvent the express prohibition of the Constitution against releasing or discharging any person from the payment of his proportionate share of taxes.

It is quite clear that the act is not violative of section 1, art. VIII of the Constitution, which requires that "taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property," for the reason that the waiver or remission of interest, penalties or costs does not involve a tax. Our Constitution does, however, contain the following provision: "The legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted." Const. art. III, sec. 18.

The general rule is: A law which is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, is not objectionable as wanting uniformity of operation. The classification must be reasonable and not arbitrary. *Cleland v. Anderson,* 66 Neb. 252, 92 N. W. 306; *Livingston Loan & Building Ass'n v. Drummond,* 49 Neb. 200, 68 N. W. 375. In *State v. Hall,* 129 Neb. 669, 262 N. W. 835, the court said:

"By section 18, art. III of the Constitution, the legislature is prohibited from passing any act granting to an individual any special or exclusive privileges or immunity, and it is provided that, in all cases where a general law can be made applicable, no special law shall be enacted. *Held,* to prohibit class legislation which does not operate equally and uniformly upon all members of the class brought within its operation.

"The legislature may make a reasonable classification * * * concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated."

It will be noted that this statute applies only to persons owing delinquent taxes on or before September 1, 1935. It does not apply to real property taxes for which tax sales certificates were theretofore issued to any one other than a county or other governmental subdivision. Neither does it apply to any taxpayer who becomes delinquent in the payment of his real property taxes after September 1, 1935, nor to any taxpayer who fails to demand the benefits of the act prior to the date that the second instalment of his 1935 real estate taxes becomes delinquent. It discriminates between delinquent taxpayers whose taxes are sold to a private person and those sold to the county or other governmental subdivision. It also discriminates against the delinquent taxpayer whose personal taxes became delinquent after September 1, 1935, and those who became delinquent prior to that time, and against those who fail to demand the benefits of the act prior to December 1, 1936. The act discriminates between taxpayers whose delinquent real estate taxes were sold to a *bona fide* purchaser before the passage of the act and those whose delinquent taxes were sold to a *bona fide* purchaser thereafter, the former being excluded from the operation of the act and the latter being included. Neither does it appear in the act that the sale of lands for delinquent taxes is in any way restrained unless and until the delinquent taxpayer complies with the provisions of the act. In view of our decision on other grounds, we will not indulge in a discussion of the question of the inclusion within the act of delinquent taxpayers whose lands were sold for taxes to a *bona fide* purchaser after the passage of the act, and the effect thereon of the constitutional provision prohibiting the impairment of contracts. In our judgment, the act makes an arbitrary classification of persons upon whom the benefits of the act fall.

In *Rosenbloom v. State*, 64 Neb. 342, 89 N. W. 1053, Judge Sullivan, in discussing the question of uniform classification, said: "A further contention of counsel for defendant is that, by reason of the exceptions contained in section 152, the law lacks the essential requirement of

uniformity. The Constitution (art. 9, sec. 1) declares that the legislature may impose a tax upon persons engaged in certain occupations 'in such manner as it shall direct by general law, uniform as to the class upon which it operates.' This provision undoubtedly contemplates that all persons pursuing the same business or calling under the same conditions and circumstances shall be treated alike, and subjected to the same burdens; in other words, partiality and favoritism are forbidden, and equality before the law is made a rule of legislative action. But as was said by the supreme court of Pennsylvania in *Seabolt v. Commissioners of Northumberland County,* 187 Pa. St. 318, 'Classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones, used for the purpose of evading the constitutional prohibition.' In the case of *State v. Farmers & Merchants Irrigation Co.,* 59 Neb. 1, 4, we had occasion to consider this question, and reached the conclusion, after a pretty thorough examination of the authorities, that the 'classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified.' "

In *State v. Fischl,* 94 Mont. 92, 20 Pac. (2d) 1057, a case discussing this identical subject, but which was overruled on other grounds, the court said: "The act, therefore, advances a plan which would operate to reward a taxpayer who has not paid his tax at the expense of one who has. The taxing authorities received the money of the one who paid his taxes and have since withheld it; this taxpayer must suffer for having paid his taxes to the extent that he has been without the use of his money since he paid, while the other, who did not pay, would save by failing or refusing to pay. But as was said respecting the 1923 act, 'the act upon its very face discriminates in favor of one who, although unable to prevent delinquency by pay-

ment, was fortunate enough to have his property struck off at tax sale to the county as against another whose property at the same time was struck off to a citizen. The latter, to effect a redemption, must pay the original tax, addition, interest, and costs; or, if the county has assigned its certificate of sale to a citizen, the redemptioner must assume and discharge a like burden.' *Sanderson v. Bateman,* 78 Mont. 235. In so far as the law operates upon taxpayers of the same class, requiring, as it does, full payment from some delinquents and the remission of taxes as to others, it does not afford to all in the same class the equal protection of the laws and is contrary to the Fourteenth Amendment."

While it is true that the above quotation did not concern the precise point before us, its reasoning is applicable in support of the proposition that the statute before us violates the provisions of section 18, art. III of the Nebraska Constitution. The situation before us is well expressed in *State v. Fischl, supra,* where the Montana court used the following language: "The wellspring of the act was to alleviate the condition of our unfortunate fellow citizens who, unable to pay their taxes, were forced to see their lands sold at tax sales. In the view of the legislature, as expressed in section 4 of chapter 41, an extraordinary emergency existed by reason of the present world-wide economic condition. Whether the policy of favoring some taxpayers of the same class over others is wise or unwise, the emergent conditions considered, is not for us to decide, nor was it a subject upon which the legislature had a right to legislate, for the expression of the supreme will of the people—the Constitution—decides the policy for us all. It must be remembered that the provisions of the Constitution are mandatory and prohibitory unless otherwise expressed, and these provisions read the same whether in fair weather or in foul. The proposition that an emergency justifies a removal of constitutional safeguards is an egregious fallacy. A safeguard once let down inevitably must lead to mischief. If one be let down, why not another? 'And many

an error, by the same example, will rush into the state.' Our duty is clear. Each of us upon assuming office took an oath 'to support, protect, and defend the Constitution of the state of Montana,' and from this obligation we shall not shrink."

We are aware that some authorities hold that constitutional requirements as to uniformity of operation do not apply to statutes providing for a waiver or remission of a penalty. Penalties, including interest and costs, are generally considered punitive in their nature and a statute remitting them is one of grace to which the question of uniformity has no application. But, as to the extensions of time for payment of the principal amount due as taxes, the question of uniformity of operation upon a class becomes important. To say that one delinquent taxpayer can have an extension of time for the payment of his taxes, while another delinquent taxpayer, because of the arbitrary classification made by the legislature, must pay in full, including all interest, penalties and costs, is such discrimination as to warrant the holding that the classification is unreasonable and arbitrary and therefore void.

In *Ewert v. Taylor,* 38 S. Dak. 124, 160 N. W. 797, the court said: "Defendant contends that chapter 64 is unconstitutional because it provides that certain taxes assessed thereunder must all be paid on or before March 30th, while all other taxes, even certain taxes assessed under this same law, can be paid one-half on April 1st, and the other half on or before October 31st. This provision requiring payment on an earlier date is one which, from its nature, can only result in inequality—the use of money being a thing of value. There is a fundamental difference between laws under which lack of uniformity and equality may arise owing to defects in human judgment, and laws which absolutely contravene the provisions of the Constitution by themselves creating a lack of uniformity and equality. The mere fact that such lack of uniformity or equality may be slight cannot be considered in support of a law so inherently bad."

We have come to the conclusion that, for the reasons herein stated, the act under consideration is violative of the Constitution in the respects noted and is therefore void. The trial court erred in sustaining defendant's demurrer. The judgment of the trial court is therefore reversed and the cause is remanded for further proceedings in accordance with this opinion.

REVERSED.

PAINE, J., dissenting.

I most respectfully dissent from the opinion adopted by the court in this case, and submit herewith my reasons for not supporting it.

While it is impossible to present even an abridged summary of the 33 pages of this new law under discussion, yet it is necessary to state briefly what H. R. No. 4 (Laws 1935, Special Session, ch. 15) purports to do. First, it provides that, if a taxpayer on or before September 1, 1936, pays his 1935 real or personal taxes in full, with interest and penalties, he may then discharge all of his real or personal taxes which became delinquent before September 1, 1935, by paying only the face amount thereof, without interest or penalties added. If he is not able to pay such delinquent taxes in full in cash, a method is provided by which he may pay his delinquent personal taxes in five annual instalments, or his delinquent real estate taxes in ten annual instalments, all without interest or penalties. These provisions remain in force even if a tax sale certificate has been made out to the county, but do not apply in case the delinquent real estate taxes have been purchased by a *bona fide* purchaser and a tax sale certificate duly issued to such purchaser. It is further provided that, if the tax was levied for any kind of special assessments, the law does not apply. The act expires for all purposes in the year 1944. It sets out every section of statute amended by this law.

This H. R. No. 4 should be examined with care because of the fact that this court held that a similar act was unconstitutional because the title was defective in that it

failed to set out either the sections amended or the sections repealed. *Tukey v. Douglas County,* 129 Neb. 353, 261 N. W. 833. It appears that particular care was taken by the legislature in reenacting this similar law to meet all the objections made in the opinion in that case.

"It has been said that the eyes of the courts are never limited to the mere letter of a law, but that they may look behind the letter to determine its true purpose and effect." 6 R. C. L. 81, sec. 80.

With that in mind, it is proper to ascertain the facts causing the passage of similar laws in so many states, and for this second attempt by our Nebraska legislature to pass this form of law.

One of the most exhaustive articles on the increasing tax delinquency is that found in 28 Ill. Law Review, 147, written by Herbert D. Simpson, professor of economics at Northwestern University, in which is found the following facts: In Michigan taxes were delinquent in 1932 upon 15,660,000 acres of land. In the five states of Michigan, Wisconsin, Minnesota, South Dakota, and Oregon, the taxes on 40 million acres of land are delinquent. To show that this is not solely a rural problem, there was a delinquency in 162 cities of New Jersey of $65,449,441, and in the city of Cleveland in a recent year 192,000 parcels of land, or one-half of the total tracts of real estate of the city, were delinquent, and in Cook county, Illinois, 41 per cent. of the tracts of land was delinquent in the payment of taxes. This tax delinquency has crippled finances, impaired the credit of municipal governments in most of the larger cities, and created virtual insolvency in many school districts. It is said that this tax delinquency on real estate is an indictment of the system, for there is no such delinquency on excise taxes, gasoline taxes, income or inheritance taxes. The fundamental remedy is to modify our system, which imposes real estate taxes without any reference to the income or tax-paying ability of the property itself. In the past it was sought to avoid delinquent real estate taxes by stiffening up the collection procedure, by

giving speedier action, heavier penalties, and a less expensive process to get a valid deed into the hands of purchasers of tax liens. In the present financial depression these time-tried plans have absolutely failed, and the present trend of legislation is to give longer periods of redemption, less severe penalties, and cut off excessive interest and costs.

With this general review of the whole situation in mind, and with the desire of examining the problem which the legislature faced in Nebraska, the first question that arises is, what is the amount of delinquent taxes now outstanding in Nebraska? The Nebraska State Historical Society has compiled an estimate of the delinquent taxes for 1935. This report is set out in the appendix, beginning on page 341, of a new book entitled, "Land Systems and Land Policies in Nebraska," by Addison E. Sheldon. A careful study was made by several assistants of all the delinquent tax lists as published in each of the 93 counties in 1935. The number of tracts on which the delinquent taxes were advertised for sale ran from 238 in Grant county to 24,948 in Douglas county, with about half this number in Lancaster county. The total tracts advertised for sale for delinquent taxes in the state were, by their careful estimates, placed at 225,273, with an estimated total delinquent tax in Nebraska of over $46,000,000 in the fall of 1935. As it is known that the 1934 real estate taxes levied in Nebraska amounted to $30,835,831, it therefore shows the enormous amount of delinquent taxes now outstanding.

This is the real problem which faced the Nebraska legislature when it passed this law. High interest and sharp penalties had proved an absolute bar to the payment of delinquent taxes. The plan of waiving the interest would lighten the burden of delinquent taxpayers, but it would serve more important purposes, for it would get in needed money from delinquent taxes, and get these thousands of tracts of land back on the tax rolls to pay current taxes and probably all taxes due hereafter.

Our legislature was not proceeding into untried fields,

for many states have passed laws waiving the payment of interest, penalties, and costs on delinquent taxes. In the year 1933 six states placed such laws on their statute books. *State v. Baldwin,* 62 Minn. 518, 65 N. W. 80; *City of Rochester v. Bloss,* 185 N. Y. 42, 77 N. E. 794, 6 L. R. A. n. s. 694; 18 Minn. Law Review, 849.

It will give a better grasp of the trend of the recent decisions on this new form of tax relief if we examine briefly the recent delinquent tax laws passed in many states, and also note the reasons given by the supreme court in each state for declaring such a law valid and constitutional. An examination will disclose that in all these states some method was devised of waiving interest and penalties, especially those charged as part of tax sale certificates. It will be noted that in these opinions nearly every objection made to H. R. No. 4 is discussed and ruled upon.

While many states have been compelled to adopt this method of relief for delinquent taxpayers since the world-wide financial depression began in 1929, yet at least two states, Oregon and North Dakota, had pioneered in such laws in their legislative sessions of 1925, due to local adverse financial conditions, which early laws are each discussed herein.

In the opinion in *State v. Lawler,* 53 N. Dak. 278, 205 N. W. 880, the chief justice of that state wrote a long opinion, concurred in by all of the other members of the court, covering this subject, and finding that a law cutting down interest on tax sales was a valid exercise of legislative power. He says delinquent taxes upon desirable land are bought in by private bidders, but if the land is of little value no buyer is interested, and a tax certificate is issued to the county, which does not become the owner in the sense that it has parted with anything of value, for the certificate simply represents the uncollected taxes in another form to assist in the collection. The state itself has a direct interest in such county tax certificate. The opinion holds that such law does not violate the Constitution as being a special law (25 R. C. L. 813, sec. 65), nor is it a

local law which applies to some specific locality, for it operates alike on all persons and property similarly situated in the entire state. 6 R. C. L. 405, sec. 400. The opinion then adds: "'Legislative discretion in this matter is not subject to review by the courts, except to the extent of determining whether the classification adopted is arbitrary, unreasonable, and unjust. As in all other cases, * * * all reasonable doubts are to be resolved in favor of upholding the validity of legislation establishing a classification; and the legislative judgment as to classification can be overthrown by the courts only when it is clearly erroneous.' 12 C. J. pp. 1128, 1129." See Cooley, Taxation (4th ed.) sec. 1254; 26 R. C. L. 385, sec. 342. This decision makes clear that county tax sales are entirely different from those sold to *bona fide* purchasers.

In Louisiana the 1934 legislature, by act No. 161, granted a right to redeem delinquent taxes by paying the face of the taxes alone in instalments. This act came to the supreme court in the case of *State v. Grace,* 182 La. 405, 162 So. 26, and involved the following state of facts: The state had secured title to a tract of land through the nonpayment of taxes, and leased this land, inserting in the lease the provision that the land was subject to legal redemption by the owner upon payment of the delinquent taxes. The supreme court held that the new law allowing delinquent taxes to be paid off in instalments by the former owner without interest was not unconstitutional, even as applied to this particular case, as impairing the obligation of the lease, although at the time when the state gave the lease such taxes could only have been redeemed by paying the delinquent tax in full with all interest and penalties.

The case of *Livesay v. DeArmond,* 131 Or. 563, 284 Pac. 166, 68 A. L. R. 422, was heard by the Oregon supreme court sitting *en banc,* and with no dissenting opinion, it was held that waiving or reducing the penalty or interest, or both, on delinquent taxes, if such action appears likely to facilitate the collection of taxes, does not violate the constitutional provision that all taxes shall be levied under general laws operating uniformly.

An earlier case in Oregon, *State v. Coos County*, 115 Or. 300, 237 Pac. 678, held that the Oregon law of 1925, p. 612, did not conflict with the constitutional provision as to equality and uniformity: "We do not regard this, however, as an act regulating taxation, but merely as an act remitting certain penalties, which would otherwise have accrued but for its passing. The act of taxation had already been performed when the tax was properly levied by the authorities in Coos county, and this did not authorize the levying of any taxes, or regulate the manner in which they should be paid, but was an act of grace remitting certain penalties, but for which, the parties named in the act would have been liable." This act also recited the severe handicaps, as much of the grain of eastern Oregon had been frozen, and farmers suffered under severe handicap due to the general depression in agriculture.

In deciding that a similar law was constitutional in Kentucky, and that an act reducing the rate of interest and penalties applied to lands sold for taxes to the county prior to its enactment, the court of appeals of Kentucky said it is a matter of general knowledge that, during the prevalence of the existing oppressive economic conditions, there were, prior to the enactment of the act of 1932, many sales of land of taxpayers for the payment of their delinquent taxes for the years 1928 to 1932. "It must be presumed that the legislature was cognizant of the general effect of these sales, when it enacted the act here involved. The court in construing every act, and declaring its effect, should effectuate the obvious intention of the legislature; and this doctrine applies with special force when it is apparent its intention conserves a wholesome purpose." *Grieb v. National Bank of Kentucky's Receiver*, 252 Ky. 753, 68 S. W. (2d) 21.

In *State v. Butts*, 111 Fla. 630, 149 So. 746, 89 A. L. R. 946, we find a main opinion, with several concurring opinions, all holding that the recent Florida law providing reasonable extensions, reductions, and privileges to facilitate redemption of lands under tax certificates held by the

state, was valid. It was said that the law was not misleading, nor did it cover more than one general subject, and that the law would, in the judgment of the legislature, best conserve the interests of taxing units having rights in the unpaid delinquent taxes included in such tax certificates. In *State v. O'Quinn,* 114 Fla. 222, 154 So. 166, in discussing the above case it was said that the legislature had the right to protect the state and the other subdivisions having justiciable rights in these delinquent tax sale certificates.

In *State v. Bair,* 333 Mo. 1, 63 S. W. (2d) 64, a law permitting the payment of delinquent taxes without interest or penalties was held by the supreme court of Missouri, sitting *en banc,* not to violate the Constitution as an *ex post facto* law, the court saying it simply provides a different remedy for the collection of back taxes, and of the right of the legislature to change the method or remedy in such a case as this there can be no doubt. To the same effect is *Backus v. Fort Street Union Depot Co.,* 169 U. S. 557, which held that a state may adopt new remedies for the collection of its taxes and apply such new remedies to taxes already delinquent, without any violation of the federal Constitution.

The Texas legislature passed a similar law remitting penalties on tax delinquencies provided they were paid before a certain date, and the supreme court in the exhaustive opinion entitled *Jones v. Williams,* 121 Tex. 94, 45 S. W. (2d) 130, 79 A. L. R. 983, held that a state legislature could enact all laws not prohibited by the Constitution, either in express terms or by necessary implication. It then declared that a constitutional provision prohibiting the legislature from remitting fines, penalties, and forfeitures by special laws implies the power on the part of the legislature to remit such fines and penalties by a general law, and that, therefore, the waiving of interest and penalties on delinquent taxes by a general law was constitutional. It admitted that exemptions from penalties in taxation laws must be very strictly construed, and not extended beyond the express requirements of the language used. Annotations upon this subject appear in 68 A. L. R.

431 and 79 A. L. R. 999. In *Pate v. Ross,* 84 S. W. (2d) (Mo.) 961, it says: "Statutes should be construed so as to effectuate purpose of their enactment, and words may be restricted or extended to accomplish that purpose."

A later Texas case is that of *McGruder's Unknown Heirs v. State,* 68 S. W. (2d) (Tex. Civ. App.) 519, in which is said, in passing on the same kind of a law, that the ever-increasing millions of dollars of delinquent taxes due the state, counties, cities, and school districts in many instances exceeded the total tax assessed for an entire year. The purpose and intent of the law is not to make any citizen immune to paying taxes, but it is to offer inducements for the prompt payment of delinquent taxes, for the act extends a mere privilege to a delinquent taxpayer of paying without interest added, but it is only a privilege, and not a right of immunity to avoid the tax itself as levied.

The supreme court of Missouri, sitting *en banc* and with all judges concurring, recently rendered an opinion upon this question in the case of *State v. Koeln,* 332 Mo. 1229, 61 S. W. (2d) 750. The court stated that it took judicial notice of matters of common knowledge and current history as related to affairs of public interest, such as the depleted condition of public and private financial resources and the inability for lack of tax collections for the schools to function adequately, and that it realized the great volume of unpaid taxes delinquent throughout the state. The Missouri court held that this law did not violate a constitutional provision prohibiting releasing an indebtedness due to the state on the ground that this provision of the Constitution applied only to an obligation which had become fixed, and that a penalty attached to the payment of delinquent taxes is not a fixed obligation.

In *Henry v. McKay,* 164 Wash. 526, 3 Pac. (2d) 145, it was held that the state could, through the legislature, release the delinquent property owner from liabilities due to the state and make the statute retrospective in its operation. There would be no impairing of the obligation of a

contract. Taxes are not imposed by contract. The state may pass such retroactive laws as only waive the state's right without violating the Constitution. Black's Constitutional Prohibition, sec. 221. Surely, if the state may waive the penalty for encouraging payment of delinquent taxes in its entirety, it logically follows that the state may reduce the interest rate on delinquent taxes.

In *Biles v. Robey*, 30 Pac. (2d) (Ariz.) 841, the court had before it a very similar law permitting the payment of real estate taxes delinquent on June 1, 1933, to be made in 20 semiannual instalments, with only 6 per cent. interest from June 1, 1933, instead of 10 per cent. interest provided for delinquent taxes theretofore. It was held that it did not violate constitutional provisions forbidding special privileges and guaranteeing equal rights, since the classification of taxpayers resulting from the law is based on reasonable and natural differences. The court said, in effect: We hold, therefore, that it was the intention of the legislature to remit all accrued interest, costs, and penalties, provided the taxpayer would comply with the conditions set forth in the chapter. We are led to believe this, said the Arizona court, when we consider the general conditions existing in the state and nation, which conditions are so notorious that this court takes judicial notice thereof, which undoubtedly caused the enactment of the chapter; that a great economic depression has covered all parts of the land; that many property owners through no fault of their own have had their incomes entirely destroyed or else depleted so they could only furnish the bare subsistence for themselves and their families; that this destroyed their ability to pay their taxes, no matter how great their desire to do so. If the taxpayer's income has failed, and his property is unsalable, the tax cannot be paid, and legislative bodies in many states have passed measures of a similar kind, intended to relieve taxpayers who have fallen into *bona fide* misfortune; that these measures, while differing in language, have generally followed the same course of relieving taxpayers from accrued penalties and giving him more time to pay his taxes.

The experience of Montana with this form of law is very interesting, and worthy of most careful study. Four acts of the legislature, all relating to reduction of interest and penalties, have been carefully considered by the supreme court of Montana. The first two acts of the legislature to relieve delinquent taxpayers of interest and penalties were very promptly held unconstitutional. The first act was held void in *Sanderson v. Bateman,* 78 Mont. 235, 253 Pac. 1100. This law was quite similar to H. R. No. 4 in the case at bar. It came to the supreme court of Montana as an original action to obtain a mandate commanding the county treasurer to permit the redemption of lands from tax sale under the new law. The supreme court held that the legislature had no authority to relieve a delinquent taxpayer in this way, and the demurrer was sustained and the action dismissed.

Then the second law was passed for the same purpose in 1933, and this came before the supreme court in *State v. Fischl,* 94 Mont. 92, 20 Pac. (2d) 1057. A taxpayer sought a writ of injunction prohibiting the county treasurer from putting the new law into effect on the ground that it was unconstitutional and void, and as the question affected the entire state and was of general interest, the court assumed original jurisdiction. This second act provided that real estate sold to a county for taxes could be redeemed within a certain period without paying interest or penalties. The court stated very sharply that, by its decision in *Sanderson v. Bateman, supra,* the legislature was charged with knowledge that the supreme court had held that the Constitution prohibited the remission of such penalty and interest, and that a question once deliberately examined and decided should be considered settled. However, in spite of the two decisions, two years later the legislature passed two acts along the same line to relieve the distress of the taxpayers. Chapter 88, Laws 1935, again permitted real estate to be redeemed from county tax sales by paying the original tax, without penalty or interest. As this was the third act which had been passed of this nature, it is of interest to

note the preamble to this act, in which the legislature set out that its two former acts had been held unconstitutional, but that, in response to a demand of an intelligent public, this third act was passed, not for the purpose of destroying or seriously impairing constitutional government in the state of Montana, but only to assist and aid taxpayers within reasonable grounds. This 1935 act was promptly brought before the supreme court in the case of *State v. Hitsman*, 99 Mont. 521, 44 Pac. (2d) 747, and the court cited its first two opinions in which it had held that such acts were beyond the power of the legislature to pass, and then added: "While we do not feel justified in overruling previous holdings of this court merely because of the asserted and established emergency, we shall attempt to demonstrate the proper rule as applicable to the statute under consideration, regardless of the previous decisions of this court." "Construction placed upon constitutional provision in former decision will not prevail under the rule of *stare decisis*, where manifestly wrong. * * * Every possible presumption is indulged in favor of constitutionality of statute, and statute will not be pronounced invalid unless its unconstitutionality is made manifest beyond reasonable doubt. * * * Statute providing for redemption within specified period of real estate sold to county for taxes without payment of penalty or interest *held* not violative of Fourteenth Amendment to federal Constitution or of provision of state Constitution for uniformity of taxation." The opinion then frankly admitted that the court had erred in basing its two prior decisions upon the wrong premise, to the effect that penalty and interest were a part of the tax proper, and concluded that, after a careful consideration, the court had finally reached the conclusion that the new law did not violate any of the constitutional provisions to which its attention had been called.

However, to show that the Montana supreme court was still vigilant in protecting all the provisions of the Constitution relating to taxation, we find that the same 1935 legislature enacted another law relating to taxation, being

chapter 149, which provided that application could be made by delinquent taxpayers to the county commissioners of any county, whereupon such commissioners could enter into a special written contract with each particular taxpayer, which contract would provide that he could under certain conditions pay delinquent taxes without interest, and that no tax deed could issue except to the county clerk. This very complicated and ambiguous act was brought to the supreme court, and in *State v. Leslie,* 100 Mont. 449, 50 Pac. (2d) 959, the Montana court promptly declared it invalid, and quite naturally referred to its former opinion in *State v. Hitsman, supra,* and still adhered to its ruling therein, and added that its opinion in that case was supported by common sense and sound reasoning.

We have now presented briefly opinions from North Dakota, Louisiana, Oregon, Kentucky, Florida, Missouri, Texas, Washington, Arizona, and Montana, which have held similar laws waiving interest and penalties on delinquent taxes to be valid, yet the courts of these states are just as careful as that of Montana in holding that new tax laws which violate their respective Constitutions are invalid. Let me very briefly give examples to illustrate this fact. For instance, in Texas the greater part of Hidalgo county was greatly damaged by repeated floods in the years 1904, 1909, 1919, and again in 1922, and the legislature of 1923 passed an act releasing the inhabitants and property of that county from the payment of state taxes for a period of 25 years. In an exhaustive opinion it was recently held that giving the inhabitants of an entire county the right not to pay taxes was an exemption from taxes, and contravenes the constitutional provision requiring equal and uniform taxes. *Sheppard v. Hidalgo County,* 83 S. W. (2d) (Tex.) 649.

Again, to show that the courts of these states have not let down the bars too far, we find that in *Odell v. Commerce Farm Credit Co.,* 67 S. W. (2d) (Tex. Civ. App.) 626, it was held that, when a mortgagor had failed to pay his 1930 taxes, the right to sell under a deed of trust was not af-

fected by a new statute releasing interest and penalties on delinquent taxes, as the mortgagee had paid the delinquent taxes in full prior to the date the law went into effect. In *Islais Co. v. Matheson,* 3 Cal. (2d) 657, 45 Pac. (2d) 326, the California supreme court held void a law which attempted to cut down the interest on tax assessments to pay bonds. See, also, opinion by Justice Cardozo in *Worthen Co. v. Kavanaugh,* 295 U. S. 56.

The legislature of Minnesota went further than any other state in adopting chapter 414, Laws 1933, which provided that county treasurers of the state were authorized to accept a net amount equal to three-fifths of the face amount of certain delinquent taxes, without interest or penalties. In *State v. Luecke,* 194 Minn. 246, 260 N. W. 206, it was held that such statute, permitting complete satisfaction of delinquent taxes by payment of but a fraction of the face amount originally assessed, violates the constitutional provision requiring uniform taxation.

And, lastly, in 1935 the Florida legislature enacted a law creating a delinquent tax adjustment board in each county to examine into the financial situation of each individual taxpayer, and then to compromise and adjust and fix the amount that should be paid by each landowner for the redemption of tax sale certificates outstanding against his particular piece of land. In *Richey v. Wells,* 166 So. (Fla.) 817, the Florida supreme court held this law to be absolutely unconstitutional which allowed a tax adjustment board in each county at its discretion to remit taxes, or a part thereof, which had been duly levied and assessed.

In the main opinion in the case at bar, this act is held void on the ground that it violates that part of section 4, art. VIII of our Constitution, which reads: "Nor shall commutation for such taxes be authorized in any form whatever." The opinion defines the word "commutation" in the terms given in 12 C. J. 215, and includes therein the clause, "a substitution of one sort of payment for another," which clause appears to be taken from *Woodrough v. Douglas County,* 71 Neb. 354, 98 N. W. 1092, in which this sec-

tion of our Constitution was discussed. In 1903 the legislature enacted chapter 75, which is now entitled "Delinquent Real Estate Taxes," and is found in sections 77-2101 to 77-2147, Comp. St. 1929, and has been styled Scavenger Tax Act to clean up hopelessly delinquent taxes.

Joseph W. Woodrough, now judge of the United States circuit court of appeals, brought this action to test the validity of the sale of property for just what it will bring in the foreclosure of a tax lien. It was claimed that this method of getting rid of these delinquent taxes was a commutation of taxes and violated section 4, art. VIII of the Constitution, but this court said: "The sale of land to satisfy a tax lien thereon is an extinguishment of the lien, which becomes merged in the title thus conveyed. Therefore it is not a release or commutation."

It was held that wiping out all the delinquent taxes for a mere pittance was not commutation of the tax, yet this case is now quoted as an authority that letting taxpayers pay their full tax over a period of years is invalid as a commutation.

The county of Fillmore urges an objection that if the law is not found to be invalid they will lose the money shown by their tax certificates. "The lien of taxes regularly levied on real estate is, ordinarily, perpetual and can be divested only by payment or in some manner authorized by statute. * * * When the county or governmental subdivision acquires a tax sale certificate no money is paid. It is simply a means to enforce the payment of the lien of taxes. If the statutory period passes without the county or irrigation district taking any steps to enforce the lien, the lien itself is not lost, because no payment of the lien has been made. In order to enforce the lien a repurchase of the taxes must be made for the years covered by the prior purchase. *Valley County v. Milford,* 70 Neb. 313; *Logan County v. Carnahan,* 66 Neb. 685, 693; Comp. St. 1922, sec. 2877." *Flansburg v. Shumway,* 117 Neb. 125, 219 N. W. 956.

To declare a needed law void on a peculiar definition of

the word "commutation" is rather a close decision, for in the best dictionary in the state library, the Oxford Dictionary, we find the first four definitions of commutation, stated briefly, are as follows: (1) The action or process of changing or altering; (2) the exchanging of one thing for another, exchange, barter; (3) the putting of one thing instead of another, substitution or interchange; (4) the substitution of one kind of payment for another; of a money payment instead of the performance of some obligation; of a single payment instead of a number of successive payments. In Black's Law Dictionary it is defined as the payment of a designated lump sum, permanent or annual, for the privilege of exemption from taxes, or the settlement in advance of a specific sum in lieu of an ad valorem tax.

To the writer of this dissent the question arises: Is this court justified in picking out one particular line or clause from many conflicting definitions of the word "commutation" and on that line alone declare an act of the legislature void? If one definition is to be chosen over another, why not take the one from Black's Law Dictionary? "Of two constructions, either of which is warranted by the words of the amendment of a public act, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended." 2 Lewis' Sutherland, Statutory Construction (2d ed.) 913, sec. 489.

In the main opinion in the case at bar, it is stated that this law violates section 18, art. III of the Constitution, because it grants to an individual special immunity and is class legislation. With this statement I beg to disagree. Taxpayers divide themselves into several classes by their own acts. One class paid up its taxes before they were delinquent. Of the others who let their taxes become delinquent, a few find that private bidders have bought a tax certificate on their property, and the county, state, school district, and other subdivisions have each received their money in full, and are no longer interested in the tax. Some delinquent taxes are on paving, sewer, or other special

assessments, but to no one of the above taxpayers does this new law apply. But the legislature found millions of dollars of delinquent taxes outstanding in Nebraska, some of which in a few counties had been written in tax certificates to the county, although no money had been paid. To all of this last class of taxpayers, amounting to thousands, in every county in the state, the legislature followed the plan approved in other states, of throwing off interest, penalty, and costs if they would pay up their delinquent taxes, and in the main opinion no fault appears to be found with this part of the law, but the law goes further, and provides that, if the delinquent taxpayer cannot pay up all of it in cash, he may pay it in certain payments.

It is argued that such a law discriminates between citizens, but Justice Roberts said: "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, or if any state of facts reasonably can be conceived to sustain it." This he said in deciding the chain store tax law case of *State Board of Tax Commissioners of Indiana v. Jackson,* 283 U. S. 527.

In 6 R. C. L. 97, sec. 98, it is stated that all the presumptions are in favor of the constitutionality of a statute, and if there is doubt it must be decided in favor of its validity, for each intendment is in favor of its constitutionality unless the contrary is made to appear beyond a reasonable doubt, and such invalidity must be made to appear clearly and plainly. Again, in section 100, the court should not conjure up theories to overturn and overthrow the solemn declarations of the legislature; and, again, in section 107: "The propriety, wisdom and expediency of legislation is exclusively a legislative question, and courts will not declare a statute invalid because in their judgment it may be unwise or detrimental to the best interests of a state." The only question for courts to decide is one of power, and not of expediency, and statutes will not be declared void simply because in the opinion of the court they are unwise.

Cooley's Constitutional Limitations (6th ed.) ch. 7, dis-

cusses the circumstances under which a legislative enactment may be declared unconstitutional.

Courts will never "declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt."

"Before proceeding to annul, by judicial sentence, what has been enacted by the law-making power, it should clearly appear that the act cannot be supported by any reasonable intendment or allowable presumption."

In examining the law as to rules of classifications, it is stated in 1 Lewis' Sutherland, Statutory Construction (2d ed.) 398, sec. 215, that, if the law relates to a subject of a general nature, and is general and uniform in its operation upon every person who is brought within the relation and circumstances provided for by it, such law is valid.

"A law, framed in general terms, restricted to no locality, and operating equally upon all of a group of objects, which * * * are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law," even though there happens to be but one individual of that class in the state. *State v. Parsons,* 40 N. J. Law, 123. See, also, *Atchison, T. & S. F. R. Co. v. Matthews,* 174 U. S. 96.

Justice Holmes said, in a dissent in a tax case, that we should avoid with great caution attempts to substitute our judgment for that of the body whose business it is in the first place to deal with questions of domestic policy that are fairly open to debate. *Schlesinger v. Wisconsin,* 270 U. S. 230.

As stated by Justice Cardozo in the case of *Fox v. Standard Oil Co.,* 294 U. S. 87, 79 L. Ed. 780: "The tax now assailed may have its roots in an erroneous conception of the ills of the body politic or of the efficacy of such a measure to bring about a cure. We have no thought in anything we have written to declare it expedient or even just, or for that matter to declare the contrary. We deal with power only."

That a statute discriminates in favor of a certain class does not make it arbitrary if the discrimination is founded upon a reasonable distinction.

And, furthermore, it is settled, as Justice Brandeis said in *Royster Guano Co. v. Virginia*, 253 U. S. 412: "That mere inequalities or exemptions in state taxation are not forbidden by the equal protection clause of the Fourteenth Amendment; that the power of the state to make any reasonable classification of property, occupations, persons, or corporations for purposes of taxation is not abridged thereby."

In the case of *Rosenbloom v. State*, 64 Neb. 342, 89 N. W. 1053, Chief Justice Sullivan quoted with approval the following language from the case of *Seabolt v. Commissioners of Northumberland County*, 187 Pa. St. 318: "Classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones, used for the purpose of evading the constitutional prohibition."

To show that taxes may be unjust, it is known by all that income taxes do not strike all persons alike. In *Brushaber v. Union P. R. Co.*, 240 U. S. 1, 60 L. Ed. 493, Chief Justice White delivered an opinion relating to the enforcement of the Sixteenth Amendment, providing for income taxes, and held that, while the statute was enacted October 3, 1913, it was not illegal to apply the tax to income received as early as May 1 of that year, and that this retroactive feature of it did not make it unconstitutional. The court also held that the exception, that the income tax law should not apply to labor, agricultural, or horticultural organizations, nor to mutual savings banks, was valid. The terms of the Sixteenth Amendment authorized a tax on incomes from whatever source derived, and by implication excluded the power to make any exemptions, but it was held in the opinion that the power to exclude from taxation some income of designated persons and classes, and to exempt entirely certain enumerated organizations and corporations,

was not forbidden to congress by the provisions of the United States Constitution.

With a due regard and consideration for the opinions of the other members of this court, and after a somewhat careful study of the authorities, this law is in my opinion a valid act of the legislature.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. SOUTHERN NEBRASKA POWER COMPANY ET AL., APPELLANTS.

FILED JULY 8, 1936. No. 29587.

Constitutional Law. A party invoking the provisions of a statute is not in position to raise the question as to its constitutionality.

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

B. F. Napheys, Jr., Stiner & Boslaugh and *Stubbs & Stubbs,* for appellants.

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

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

FITZGERALD, District Judge.

This is an action brought by the state of Nebraska on the relation of C. A. Sorensen, attorney general, against Southern Nebraska Power Company, a corporation, and the village of Ayr, a municipal corporation, in Adams county, Nebraska.

The action is brought by the plaintiff pursuant to the provisions of article 6, ch. 70 (sections 70-601 to 70-609) of the 1931 Cumulative Supplement to the Compiled Statutes of Nebraska, being an initiative law passed by the voters of the state of Nebraska on November 4, 1930. This initiative law appears to have been passed for the pur-

pose of allowing municipal corporations owning and operating light and power plants to extend their transmission lines beyond the corporate limits of the municipality, and in addition to permitting the municipal corporation to extend its lines beyond its corporate limits, the law in sections 70-604 to 70-608, inclusive, places certain restrictions on private persons, firms, associations or corporations proposing to acquire by lease or purchase the distribution system of any municipality.

During the latter part of 1931, the defendant power company began negotiations with the defendant village of Ayr for the purchase of the power distributing plant of the defendant village, and on February 17, 1932, an election was held after a four months' publication of notice of such election in the village of Ayr. At this election the proposition of the power company was submitted to the voters, 49 of whom cast their ballots in favor of the sale to the defendant power company of the village's electrical distributing plant and equipment, and 27 of whom cast their ballots against such sale. The number of voters eligible to participate in said election in said village was approximately 79. The proposition for the sale of the electric equipment of the village of Ayr received more than 60 per cent. of the votes eligible to be cast at said election, and was declared to have carried, and the defendant power company and the defendant village proceeded to transfer the equipment according to the proposition submitted by the two contracting parties. Whereupon this action was brought by the plaintiff seeking to have the sale adjudged a nullity and of no binding effect, and to cancel the same, and seeking further to enjoin the confirmation of such sale by the village to the power company, alleging that said sale was not in accordance with the provisions of the initiative statute above referred to.

Both defendants allege and contend that the initiative measure is repugnant to the Constitution of the state of Nebraska, and the Constitution of the United States, and that it denies to the contracting parties equal protection

of the law and violates their right of freedom to contract. The trial court found in favor of the plaintiff and ordered the sale canceled and the parties restrained from carrying out the provisions thereof.

Plaintiff alleges that the defendant power company failed to comply with the terms of the statute in failing to file a correct report with the department of public works of the state of Nebraska, of the transaction with the village of Ayr, as required by section 70-605, Comp. St. Supp. 1931, and further alleges that the defendant power company violated section 70-607, Comp. St. Supp. 1931, in the expenditure of more than $1 per qualified voter in the village, in the promotion of the said sale.

The testimony reveals that some time in 1923 the villages of Ayr, Holstein and Roseland had pooled their interests and established a lighting system for the three villages, and connected the same with a power line from the city of Hastings, and that late in 1931 the equipment, at least in the village of Ayr, was out of repair and unsatisfactory and it was necessary to repair and improve the same, but the village had no funds with which to bring about these repairs and improvements. As a result thereof they discussed sale of their equipment.

The village of Ayr and the defendant power company came to an agreement on the terms for the sale of the equipment by the village to the power company, which agreement included the payment of the expense of an election of the voters of the village for the purpose of ratifying the action of the village board. This election was called and held according to the provisions of section 70-604, Comp. St. Supp. 1931. It is shown by the record of the trial that the expense of the election was $120, which is much more than the statute allowed for the number of eligible voters in the village. Defendants contend that this was part of the purchase price, but defendants stipulate that the defendant power company spent more than $80 in salary and expense of its manager in the promotion of the sale. This was certainly within the prohibition of the

statute and would be a violation of the same that would void the election.

Defendant power company then proceeded to report to the department of public works the proceedings in regard to the election and the transaction with the village of Ayr. The reports were not considered satisfactory and were not accepted.

The trial court held, after hearing all the evidence, that defendants had invoked the statute, had relied upon and taken advantage of it, and are now estopped to assail the statute as unconstitutional. It would seem that the facts revealed by the transcript and bill of exceptions justified the finding of the trial court on this point. The law has been fixed in this state on this subject. *La Borde v. Farmers State Bank*, 116 Neb. 33, 215 N. W. 559, and since the bill of exceptions shows an undisputed violation of the statute, we find that the holding of the trial court is correct and its decree should be and is

AFFIRMED.

FIRST TRUST COMPANY OF LINCOLN, APPELLEE, V. AIRDALE RANCH & CATTLE COMPANY ET AL., APPELLANTS.

FILED JULY 8, 1936. No. 29682.

1. **Mortgages: FORECLOSURE: MORATORIUM.** Where the evidence establishes that the amount of the mortgage lien exceeds the value of the land, good cause is shown for denial of moratory stay.
2. **Constitutional Law.** Unless necessary for the proper disposition of the pending case, constitutionality of a statute will not be passed upon.
3. **Mortgages: FORECLOSURE: SALE: CONFIRMATION.** Inadequacy of price alone is not ground for refusing confirmation, unless so great as to shock the conscience of the court or amount to evidence of fraud.

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

Neighbors & Coulter, for appellants.

Harry R. Ankeny, contra.

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

KROGER, District Judge.

This action was brought to foreclose a real estate mortgage on a ranch consisting of 9,240 acres of deeded land and a section of school land located in Banner and Scotts Bluff counties. The mortgage was executed in 1924 to secure a loan of $75,000 and was due in 1929, at which time the time of payment was extended to January 1, 1935. Defendants failed to pay the semiannual interest due July 1, 1932, and subsequent interest payments. Taxes for 1930 and subsequent years are unpaid. On July 2, 1934, a decree of foreclosure was entered, at which time the court found the amount due plaintiff on notes and mortgage to be $87,375, with interest at 10 per cent. per annum from that date. Prior to the entry of the decree, a receiver had been appointed to collect the rents and profits. On May 13, 1935, the property was sold on judicial sale for the sum of $40,100, subject to unpaid taxes of over $4,000. Before a confirmation of the sale was had, the owner of the equity of redemption applied for a moratorium staying further proceedings until March 1, 1937, under the Nebraska moratory act as amended by ch. 41, Laws 1935, and also filed objections to confirmation of the sale. Plaintiff objected to the granting of a moratorium on the ground that the defendants had no equity in the property over and above the liens against it, and on the further ground that the moratory act of 1935 was unconstitutional. From an order of the district court denying a moratorium and confirming the sale, defendants prosecute this appeal.

During the oral argument, counsel for defendants conceded that there was no equity in the property over and above the liens against it, but took the position that the moratory law was intended for the relief of debtors on

notes secured by real estate mortgages as well as for the owners of real estate covered by mortgages; that the legislature intended to protect debtors against heavy deficiency judgments on such notes, and that the court erred in denying the moratorium on the ground that the defendants had no equity in the mortgaged real estate to protect, when the record discloses that a deficiency of about $50,000 will exist if the present sale is confirmed.

It was, no doubt, the intention of the legislature to postpone the sale of real estate to satisfy mortgage indebtedness until the emergency created by the depression had passed, provided such postponement would benefit the debtor. Such postponement was not intended to enable the debtor to realize some speculative value out of the real estate securing the debt or to delay indefinitely the day of reckoning where the mortgage indebtedness was excessive. A review of the record in this case discloses that the real estate has a rental value of not to exceed $2,000 a year. Accumulating taxes and interest on the decree is increasing the indebtedness at the rate of $9,500 a year.

Under the circumstances, this case comes within the doctrine announced in the case of *Clark v. Hass,* 129 Neb. 112, 260 N. W. 792: "Where * * * it appears that the amount of the mortgage lien exceeds the value of the lands secured by the mortgage, it is not an abuse of discretion on the part of the trial court to deny the application." See, also, *Srajhans v. Mares,* 130 Neb. 924, 267 N. W. 82; *Luikart v. Graf,* 130 Neb. 736, 266 N. W. 641. It follows that the trial court committed no error in denying defendants' request for a moratorium.

As it is not necessary for a proper disposition of the pending case, the constitutionality of the mortgage moratorium law is not passed upon. *First Trust Co. v. Stenger,* 130 Neb. 750, 266 N. W. 642.

Defendants further contend that the trial court erred in confirming the sale because the price bid for the property was so inadequate as to shock the conscience of the court or to amount to evidence of fraud. The evidence as to value

is conflicting, plaintiff's witnesses placing the value of the real estate from $36,800 to $47,100, and defendants' witnesses placing its value at from $62,000 to $125,000. Aside from the value placed on the land by the defendant Kelsey, the other witnesses for defendants placed the value of the land at approximately $62,000. In this state of the record, there is ample evidence to sustain the findings of the court that the fair value of the real estate under the terms and conditions of the sale was $44,636.33. The trial judge had the advantage of seeing and observing the witnesses. He, no doubt, was somewhat familiar with values of ranch lands in that community, and under these circumstances we do not feel justified in disturbing his conclusion as to the real value of this ranch, especially so since there was no showing by defendants that a resale would result in a greater sum being bid. The applicable rule to which this court is committed is: "Mere inadequacy of price will not preclude a confirmation of a foreclosure sale unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud." *Srajhans v. Mares*, 130 Neb. 924, 267 N. W. 82. We find therefore that the trial court did not commit error in confirming the sale.

No error being found in the record, the judgment of the district court is

AFFIRMED.

LOUIS H. SCHMIDT, APPELLANT, V. JULIUS O. SCHMIDT, EXECUTOR, APPELLEE.

FILED JULY 8, 1936. No. 29692.

1. Wills: CONSTRUCTION. In construing a will, the object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself, in the light of the circumstances under which it was made.
2. ———: REVOCATION. To revoke a will by implication, the acts of the testator must be such as will raise a presumption that such result was intended by him.

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

Mockett & Finkelstein and *Raymond B. Morrissey,* for appellant.

Charles A. Dafoe, contra.

Heard before GOSS, C. J., GOOD, EBERLY, DAY and CARTER, JJ., and KROGER and IRWIN, District Judges.

KROGER, District Judge.

Ida P. E. Schmidt, a resident of Johnson county, Nebraska, hereinafter referred to as the mother, departed this life testate, in December, 1933. She left surviving six sons, Edward A., Gustav J. R., Hugo J., Alfred W., Julius O., and Louis H. The son Louis, hereinafter referred to as the son, brought an action in the county court of Johnson county, Nebraska, to construe section four of the last will and testament of his mother, and to eliminate a part of said paragraph, on the ground that it had been revoked by implication, and for the further reason that there had been a settlement of the indebtedness mentioned in paragraph four, so that said paragraph was no longer operative as to him. From an adverse ruling by the county court, the son appealed to the district court, and from a judgment of the district court denying the relief prayed for brings the matter to this court for an interpretation of said section four.

The will was executed on November 20, 1931, and paragraphs three and four thereof read as follows:

"Third. I give, bequeath, and devise to my children, Edward A. Schmidt, Gustav J. R. Schmidt, Louis H. Schmidt, Hugo J. Schmidt, Alfred W. Schmidt, and Julius O. Schmidt, all of the residue and remainder of my property, both real and personal, of every nature.

"Fourth. I further provide that in consideration of above bequest and devise that there shall be deducted from each share of each of my said children any money that has been paid out by me for any such child or shall have been ad-

vanced to him by me, or that any child shall owe me at the time of my death, whether said money so owed to me or advanced by me shall be legally collectible, or shall be outlawed.

"At the present time Edward A. Schmidt owes me the sum of Six Hundred and no/100 Dollars; Gustav J. R. Schmidt owes me the sum of Thirteen Hundred Thirty-five and no/100 Dollars; and Louis H. Schmidt the sum of Twelve Thousand Seventy-three and 4/100 Dollars; and Hugo J. Schmidt owes me on rent on farm occupied by him owned by me, and I am on a security note for him for Eleven Hundred and no/100 Dollars.

"I further provide that in the event that my said son, Louis H. Schmidt, shall pay off the mortgage and all charges that may be against the southeast quarter of section two (2), in township five (5), range eleven (11), east of the Sixth Principal Meridian in Johnson county, State of Nebraska, and shall pay the above Twelve Thousand Seventy-three and 4/100 Dollars, together with interest at the rate of 5 per cent. per annum on said Twelve Thousand Seventy-three and 4/100 Dollars from this date, then I devise said land so described to the said Louis H. Schmidt."

It appears from the evidence that, in 1919, Louis H. Schmidt purchased the southeast quarter of section two, township five, range eleven, east of the sixth P. M., in Johnson county, Nebraska, and at the time of purchase obtained $13,500 from his mother to apply on the purchase price. To obtain this money, the mother gave a mortgage on lands owned by her. The son secured the $13,500 advanced by the mother by a second mortgage on the land purchased by him, subject to a first mortgage of $10,000 in favor of the Federal Land Bank. In 1924 the Federal Land Bank loan was increased to $15,000, and the mother's second mortgage for $13,500 was subordinated to that. In 1927 the son was adjudged a bankrupt, and in the bankruptcy proceedings the mother filed a secured claim based on the mortgage and notes held by her. In 1929 the mother obtained a deed from the trustee in bankruptcy to the real

estate on which she held the second mortgage, in consideration of the payment of $25 to said trustee, and a short time later the son and his wife executed and delivered to the mother a quitclaim deed to said premises. The son and Anna Schmidt, his wife, remained in possession of said premises as tenants of the mother until the spring of 1932, having agreed to pay a rental of $2,000 a year for said premises. Default having been made in some of the rental payments for the years 1930 and 1931, notice was served upon the tenants in the fall of 1931 to vacate on March 1, 1932. On March 1, 1932, the mother sold the land to John and James Sedlacek for the sum of $16,000, and agreed to deliver possession on March 15, 1932. When the time came to deliver possession, the son and his wife, Anna Schmidt, refused to vacate. At this time they were owing their mother on back rentals approximately $1,100 and a balance of $400 on a note for $500 given to the mother for money borrowed. During this time there were negotiations between the parties looking towards an amicable adjustment of their affairs and under date of March 11, 1932, the mother's attorney wrote a letter to the son's attorneys in which he recited the indebtedness of the son and his wife to the mother on account of past-due rent and the $400 balance due on the note given for money borrowed, and further stated that the mother would cancel "all the obligations to her from Anna Schmidt and Louis H. Schmidt" in return for a note for $250 due in nine months bearing 8 per cent. interest and a note of $400 due in two years bearing 2 per cent. interest. On the evening of March 16, 1932, the son and his wife went to the home of the mother, where there were present, in addition to the parties named, the mother's attorney and another son, and there a further discussion was had and a settlement arrived at, as a result of which the son and his wife executed two notes, one for $250 and one for $400 and received in return the rental notes held by the mother for the years 1930 and 1931 and the $500 note given for money borrowed. Immediately thereafter the son and his wife

vacated the premises theretofore occupied by them and surrendered possession thereof to the mother. In completing the sale of the property to the Sedlaceks, the mother released the mortgage of $13,500 which she held on the land, and the release recites that it was in consideration of the payment of the debt secured.

It is appellant's contention that, notwithstanding the deed from the trustee in bankruptcy and the quitclaim deed from the son and his wife to the mother, the son was the owner of the land at all times and that the mother's only interest therein was that of a mortgagee; that the mother, on March 15, 1932, elected to take the land and cancel the indebtedness and that in the settlement of March 16, 1932, there was a full and complete settlement of all indebtedness of the son and the son's wife to the mother; that the sale to the Sedlaceks and the release of the mother's mortgage by her was an election on her part to so treat the matter and that consequently the provision of the will establishing a charge of $12,073.04 against the son's share of estate was revoked.

As we view the record, the evidence does not sustain appellant's position. The mother acquired title to the land from the trustee in bankruptcy and so far as the record shows never parted with it thereafter until she made the sale to the Sedlaceks. She dealt with appellant and his wife on the basis of landlord and tenant. While it is true that the rent paid by appellant and his wife appears to be greatly in excess of the fair rental value of the premises, the probabilities are that the son felt that, having induced his mother to encumber her own land to the extent of $13,500 in order to assist him, he was in duty bound to pay the interest on that loan in addition to the necessary interest payments on the loan on the land occupied by him. This, no doubt, accounts for the figure agreed upon as rental. As we view the evidence, the settlement of March 16, 1932, had reference only to the delinquent rentals and the balance due on the $500 note representing moneys borrowed, and that neither the mother nor the son considered

the amount due the mother on the $13,500 mortgage as being included or involved in that transaction. Appellant stresses the letter of the mother's attorney written under date of March 11, 1932, in which the words "In short, Mrs. Ida P. E. Schmidt agrees to cancel all the obligations to her from Anna Schmidt and Louis H. Schmidt" were used, and insists that this discloses an intention to cancel the amount due the mother on the mortgage as well as the back rentals and other obligations. That this was not the intention of the mother is supported by the fact that in the same letter the mother's attorney specifically mentions the rent notes and the $500 note for money borrowed, but nowhere makes mention of the $13,500 mortgage, and the further fact that on the evening of March 16, 1932, the mother surrendered to the son the rent notes and note for money borrowed, but did not surrender the notes representing the $13,500 obligation. Nor is there any merit in appellant's contention that by the execution of the release of mortgage the mother acknowledged payment in full of the debt due her. This release was executed for the purpose of relieving the land from the lien of the mortgage and to give the purchaser a title free from the same and there is nothing in that transaction that is inconsistent with the provision in the will that the balance due the mother on that mortgage be deducted from the son's share.

To place the construction which appellant now contends for on the acts of the parties would be to impute to the mother an intention to give the appellant a preference over his other brothers and relieve him from repaying any of the advancements made to him by his mother, yet at the same time require the other brothers to repay the advancements which had been made to them, notwithstanding the fact that the advancements to appellant were greatly in excess of all other advancements combined. Such an intention on the part of the mother is inconsistent with her expressed desire that all of her children should be treated alike.

This court has repeatedly held that in construing a will

the object and purpose of the court is to carry out and enforce the true intentions of the testator as shown by the will itself, and in light of the circumstances under which it was made. *Luenenborg v. Luenenborg*, 128 Neb. 624, 259 N. W. 649; *Worley v. Wimberly*, 99 Neb. 20, 154 N. W. 849.

Applying that test to the will before us, we find that it was the mother's intention that all of her children be equal participants in her bounty and that any advancements made by her to any of her children should be deducted from their share, and that there was no such change in the plan adopted by testatrix as would defeat her purpose and imply an intention on her part to revoke a portion of her will.

It follows that the judgment of the district court was right and the same is

AFFIRMED.

VIOLA E. HEFLIN, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

FILED JULY 14, 1936. No. 29554.

1. **Eminent Domain.** Under the Nebraska Constitution, private property cannot be taken or damaged for public use without just compensation. Const. art. I, sec. 21.
2. ———: DAMAGES. In that part of the Nebraska Constitution providing that private property shall not be taken or damaged for public use without just compensation, the words "or damaged" include "all damages arising from the exercise of the right of eminent domain which cause a diminution in the value of private property." *City of Omaha v. Kramer*, 25 Neb. 489, 41 N. W. 295.
3. ———: HIGHWAYS. "Private property in Nebraska cannot be taken or damaged for public use without just compensation therefor, and this rule applies to public authorities exercising the right of eminent domain in establishing and opening public highways." *Johnson v. Peterson*, 85 Neb. 83, 122 N. W. 683.
4. **Municipal Corporations.** Immunity from negligence resulting in damage to private property is not included in municipal power to grade and pave streets.

5. **Eminent Domain:** DAMAGES. Verdict for $400 as damages to residence property by the grading and paving of a street *held* supported by the evidence.

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

Loren H. Laughlin and *Harold B. Porterfield,* for appellant.

John H. Comstock, contra.

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

ROSE, J.

This is an action to recover $5,000 for alleged negligence resulting in damages to plaintiff's lot and residence property at the southeast corner of Thirteenth and C streets in the city of Lincoln. East and west the lot has a frontage of 50 feet on C street and extends southward 142 feet on the east side of Thirteenth street. The principal improvement was a nine-room frame dwelling-house with two porches, all shaded on the west side and otherwise protected by large trees on both sides of a 5-foot brick sidewalk.

In the petition it is alleged in substance that defendant, in the pretended exercise of power to grade and pave streets, negligently lowered the street and sidewalk space adjacent to plaintiff's lot about three feet below the natural surface of the ground; removed the trees, one of which was on plaintiff's lot; weakened the foundation of the house; made ingress and egress inconvenient and unsafe; destroyed a drainage pipe from the house to the street; felled trees against the house; broke shingles on the roof; relocated the sidewalk six feet nearer the house and within two feet of it. The marring of aesthetic features of the premises and resulting loss in property values were emphasized in the petition.

The answer contained a general denial of unadmitted allegations of the petition and, among other defenses, the

plea that the municipal improvement of Thirteenth street, consisting of grading and paving, constituted a benefit to the property of plaintiff and that she suffered no damage whatsoever. The reply to the answer was a general denial.

Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $400. From a judgment therefor defendant appealed.

Referring to the assignments of error defendant reduced the questions for review to the following propositions:

"Can the city be held liable for damages to any abutting property owner when the city paves a street in strict accordance with an established grade ordinance of the city duly enacted many years prior to the acquisition of said property by said abutting owner? It is the city's contention there is no liability. In the argument all the assignments of error will therefore be treated together on the basis that the trial court did not properly follow the law on the subject and erroneously submitted the cause to the jury, and erroneously instructed the jury in substance that the defendant city was liable for any and all damages caused to the plaintiff by reason of the paving of Thirteenth street in 1923. The record is clear that plaintiff became the owner of the property some 27 years after the original grade had been established, and it is contended by the defendant city that the bringing of the property to this established grade, even though 39 years had elapsed, does not change the principle of law as to the city not being liable where it merely follows the established grade in effecting a new and beneficial improvement."

The Constitution provides that private property shall not be taken or damaged for public use without just compensation. Const. art. I, sec. 21. The words "or damaged," in that provision, "include all damages arising from the exercise of the right of eminent domain which cause a diminution in the value of private property." *City of Omaha v. Kramer*, 25 Neb. 489, 41 N. W. 295. In a later case the law was stated as follows:

"Private property in Nebraska cannot be taken or dam-

aged for public use without just compensation therefor, and this rule applies to public authorities exercising the right of eminent domain in establishing and opening public highways." *Johnson v. Peterson*, 85 Neb. 83, 122 N. W. 683.

See, also, *Weinel v. Box Butte County*, 108 Neb. 293, 187 N. W. 939; *Nine Mile Irrigation District v. State*, 118 Neb. 522, 225 N. W. 679; *Gledhill v. State*, 123 Neb. 726, 243 N. W. 909.

Immunity from negligence resulting in damage to private property is not included in municipal power to grade and pave streets. In view of the principles of law stated, did plaintiff make a case for the consideration of the jury? Is the verdict sustained by sufficient evidence?

It is a fair inference from the record that plaintiff's house was constructed where it now stands, with reference to the natural surface of the ground, before the original grade was established; that this grade applied to that part of Thirteenth street between the curb lines south of C street; that the trees were growing by plaintiff's lot before the first grade ordinance was passed. It is also fair to infer that, when the denuding axmen arrived, plaintiff was at the boundary of her possessions protesting. Her evidence tends to prove the following facts: Defendant took bricks from her sidewalk, which was in a fair condition, and threw them on her lot; felled trees against her house, tearing off a corner and breaking a window glass; entered her yard with plows; furrowed the lawn from street to house; plowed under the front steps and left them dangling; broke a down spout from the eaves; destroyed a tile conduit to the street and thereafter rain flooded the basement; so excavated as to leave a ditch beside her house where water collected and made a mudhole; left a narrow strip or bank of clay which plaintiff attempted to protect by a retaining wall of old boards to keep the earth from falling away from the foundation of the house, onto the new sidewalk; exposed the west side of the house to the sun and prevented plaintiff from renting rooms in summer on account of the heat.

Proof of the character outlined is evidence of negligence in the exercise of the power to grade and pave Thirteenth street. In addition there is evidence that it would cost at least $500 to replace a tree like the one destroyed on plaintiff's lot and that the value of her real estate was $1,500 less after the street improvement than previously. If destruction of the tree on plaintiff's lot was incidental to the grading and paving, it was property of plaintiff nevertheless and was taken by the city. Other property was damaged within the meaning of the Constitution. While testimony of a different import was adduced by defendant and while there was evidence to the effect that plaintiff was benefited by the street improvement to the extent of $1,000, the jury visited the premises after new horticulture and the invisible loom of nature had partially restored the former beauty of the place, and found plaintiff's damages to be $400. There is ample evidence to support the verdict.

In giving instructions and in refusing offered instructions, the trial court took the view of the law and the evidence herein expressed. Prejudicial error in the record has not been found.

AFFIRMED.

DWIGHT F. FELTON, APPELLEE, V. ANNA FELTON, APPELLANT.

FILED JULY 14, 1936. No. 29612.

1. **Divorce.** In divorce action where defendant files a cross-petition and prays for a divorce, the court will consider all the evidence and determine therefrom which, if either, of the parties is entitled to a divorce.
2. ———. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.
3. ———: ALIMONY. In fixing the amount of alimony, the court should carefully make a detailed study of every item of property belonging to each, and find its fair value; then consider the ages of the parties, the duration of and their

conduct during marriage, station in life, necessities of each, as well as their health and physical condition, and then award such alimony as the evidence warrants.

APPEAL from the district court for Keith county: ISAAC J. NISLEY, JUDGE. *Reversed in part, modified in part, and approved in part.*

H. N. Mattley, for appellant.

Halligan, Beatty, Halligan & Maupin, Hall, Cline & Williams, Lowell C. Davis and *L. A. De Voe, contra.*

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

PAINE, J.

The defendant has appealed to this court from a decree of divorce granted to plaintiff. No supersedeas bond was fixed or given, hence the decree as entered by the trial court has been in effect, except for the purpose of appeal.

The plaintiff and appellee, Dwight F. Felton, on April 12, 1934, brought this action against Anna Felton in the district court for Keith county, Nebraska, for an absolute divorce. From a decree of said court, duly entered on April 23, 1935, granting to the plaintiff an absolute divorce, quieting title in the plaintiff to specific real estate then standing in the name of the defendant, awarding to the defendant $3,100 permanent alimony, $400 attorney fees, and the costs of the action, together with one piece of real estate, notes, securities, all household furniture, and other personal property, the defendant, Anna Felton, appeals.

The plaintiff alleges in his petition that the parties were married at Kearney, Nebraska, September 22, 1914, and that he had conducted himself as a proper husband, but that his wife had been guilty of extreme cruelty by threatening him with physical injury, and had destroyed his peace of mind to such an extent as to impair his physical health, and caused him to suffer a nervous breakdown; that by constant nagging and displaying an ungovernable

temper, it became impossible for them to live together as husband and wife. To this petition defendant filed a demurrer, which was overruled, and later her default was entered, and Judge Tewell granted plaintiff a decree of divorce on September 18, 1934, without alimony except to note that the parties had made a disposition of their property interests between themselves.

Defendant thereupon secured new attorneys and filed a motion to vacate this decree, supported by the affidavits of the defendant and her former attorney, Mr. Ledwith, with which affidavits she tendered an answer and cross-petition for a divorce. On October 23, 1934, the first decree was set aside. A month later the plaintiff filed his answer to her cross-petition, and the case was tried the same as if a general denial reply had been filed.

The answer and cross-petition alleged, in brief, that the plaintiff, Dwight F. Felton, temporarily resided in Lancaster county, Nebraska, where he was employed by the state of Nebraska under an appointment from the governor; that ever since her marriage to the plaintiff she has conducted herself as a faithful and obedient wife, but that the plaintiff, in total disregard of his marriage vows and of the marriage relations, had been guilty of extreme cruelty; that shortly after the plaintiff obtained his appointment to the state office in January, 1931, he moved to Lincoln, Nebraska, where the defendant joined him, and where they lived together for a time, but that the plaintiff, pretending an interest in the health of the defendant, requested the defendant to go to California, where she remained until September of the same year, and on her return to Lincoln the plaintiff failed and refused to make a home for her, or to live with her as her husband, and ever since has refused to live with the defendant.

The defendant further alleged that plaintiff was guilty of serious indiscretions with another woman, which he had repeatedly promised to discontinue, but had failed to keep his promises; that such conduct on his part continued for years, destroyed her peace of mind, and amounts to

extreme cruelty, and defendant prays for a divorce, and that her maiden name of Anna Kelley be restored to her.

She further alleged that plaintiff was the owner of a large amount of property and in receipt of a large salary, and that defendant was without means of support. The plaintiff, in his answer to her cross-petition, denied he was a man of means, and alleged that all his real estate was encumbered for its entire value; admitted he drew a good salary, but by reason of his sickness, medical and hospital bills, he was unable to save any part thereof; charged that defendant owned property, and that when the parties separated in 1931 there had been a full, complete, and final property settlement between them.

A spirited trial took place, with many reputable witnesses testifying for each party, all as shown in a bill of exceptions of over 400 pages. The decree of the trial court granted plaintiff an absolute divorce. The court further found that during the month of October, 1931, after the plaintiff and defendant had separated and ceased to live together, an attempt was made between the parties to settle their property rights outside of court, and that the plaintiff at said time conveyed to the defendant certain real estate; assigned and delivered to the defendant certain notes and securities, conveyed to the defendant an automobile, gave her all the household furniture, and the court ordered, in addition, paid to the defendant in cash $2,700 in payments, all of which has been accepted, used, and retained by the defendant.

The court further found that the real estate standing in the names of the parties was mortgaged at the time of the decree for approximately $52,000, with delinquent taxes and defaulted interest unpaid; that the best interests of the parties required that the title to all the real estate be placed in the name of the plaintiff, with the exception of an interest in real estate in Ogallala, which was in part inherited by the defendant and purchased by her from her mother and her brothers or sisters, which real estate is given to the defendant, and it is decreed that she shall re-

tain all notes and securities turned over to her by the plaintiff.

The defendant sets out, as errors relied upon for reversal, that the court erred under the evidence in granting a divorce to the plaintiff instead of to the defendant on her cross-petition, and in granting her alimony only in the sum of $3,100; further, the court erred in giving all the real estate to the plaintiff, including that which was standing in the defendant's name at the time of the decree.

The brief of the defendant is replete with charges of misconduct on the part of the plaintiff, and the evidence supports some of them. At the time of their marriage she was 21 years of age and he was 38, and there is no doubt that she did not find out until after the marriage that he had a divorced wife and three children to support. There is a great deal of evidence of an affair with a woman at Omaha, which had developed some time before their marriage, and after the marriage he received many letters from her, and the evidence shows that she used the name "Mrs. Dwight Felton" at times. She finally (probably some time in 1915) brought an action against plaintiff for a divorce, alleging a common-law marriage, which at that time would have been legal in Nebraska, if proved. In this connection, the plaintiff testified on cross-examination that he employed Omaha attorneys, who employed a detective, and that he paid the attorneys $150, and that the case never came to trial. However, this affair did not stop there, for the defendant produced a large amount of evidence of telephone calls and letters between the plaintiff and this Omaha woman, but further details of this matter will be omitted from this opinion.

The plaintiff charges in his petition that his wife continually made false accusations against him because of jealousy, which wounded his mental feelings and destroyed his peace of mind until he finally suffered a physical and nervous breakdown; further, that she nagged him, and had an ungovernable temper.

While it is absolutely impossible to reconcile all of the

evidence, yet, as this court is required to try the case *de novo*, we have reached the conclusion that the defendant is clearly entitled to a divorce on her cross-petition, the weight of the evidence preponderating greatly in her favor, and that the plaintiff is not entitled to a divorce under the evidence in this case.

All facts tending to show the treatment and conduct of the parties toward each other are properly considered by the trial court which must determine which party is entitled to the divorce. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.

We now come to the question of the amount of alimony to be allowed to the defendant. It has been said that, in fixing the amount of permanent alimony, all evidence must be considered relating to the respective ages of the parties, duration of and conduct during marriage, the station in life, circumstances and necessities of each, as well as their health and physical condition. The first question is, to arrive at the value of the real and personal property possessed by the parties, and we doubt if the testimony on that point has been more conflicting in any case that has reached this court. When they were married they were very poor, but as years went on the plaintiff finally became a very extensive real estate speculator in western Nebraska land, and for many years made money fast, and during those years he was very generous with the defendant, at one time buying her a $1,300 fur coat as a surprise present, and at another time he gave her a $1,500 ring, and they also took trips to California and to Florida, and enjoyed other luxuries. Then the depression hit, and instead of quick land sales and large profits, there came a time of no sales, and the only possible method by which interest and taxes could be paid was by gradually increasing the real estate mortgages until finally it was all encumbered.

The rule has been stated that a patient, detailed study of every item of property and its value should be made in each

case, but again we are faced with the wide discrepancy in the evidence of the witnesses. We will consider the evidence relating to just seven pieces of this real estate, located in Perkins and Keith counties, amounting to 1,286 acres, which were at the time of the trial encumbered with real estate mortgages to the amount of $35,100. The plaintiff's witnesses place an estimate of the actual value of these seven tracts of land, as set out in a summary form in his brief, as $6,000, while the estimate of the defendant's witnesses makes the seven tracts of land of a value of $38,000 at present land prices, but even at these prices there would only be an equity of $2,900 in these particular pieces of land.

The plaintiff is a man of executive ability, and has been able to hold fine positions with the state and federal governments, and draws a very good salary, as shown by the evidence. It is absolutely impossible to look into the future and tell whether this western Nebraska real estate will come back in value. If it does, the plaintiff, by selling a few of these tracts, would be able to pay off these mortgages, but it is our opinion that the trial judge arrived at the very best solution in giving the real estate to the plaintiff and in providing additional alimony in monthly payments for the defendant. The decree of divorce awarded her permanent alimony of $3,100, payable at the rate of $100 a month, including attorney fees of $400. Under date of September 18, 1935, the motion docket of this court shows that Mrs. Felton's attorney was allowed $200 suit money, and she was allowed temporary alimony of $200, to be paid forthwith to the clerk of the district court for Keith county, and, in addition, was allowed $100 to be paid October 1, 1935, and the sum of $100 a month to be paid each month during the pendency of the appeal in this court, the right being reserved to take such allowances into consideration, and reducing permanent alimony accordingly when cause is determined.

We have reached the conclusion that the permanent alimony awarded by the trial court is not sufficient, and in

addition to the $3,100 awarded by the trial court we add to that amount $1,900 additional, making a total of $5,000, and all of the payments heretofore made by the plaintiff upon the $3,100 in the decree of divorce, or paid to the clerk of the district court on the temporary order made in this court for her benefit, shall be credited upon the $5,000 herein awarded, and additional payments shall continue of $100 a month until the entire $5,000 permanent alimony is paid, and $200 additional attorney fees is hereby allowed to defendant's attorney, and the costs of the case are taxed to the plaintiff.

The decree of the trial court is reversed to this extent, that a divorce is hereby granted the defendant wife, and the alimony increased by further monthly payments as above set out, but the findings and decree of the trial court relating to all of the extensive real estate holdings, as well as to the personal property, are in all things approved.

REVERSED IN PART, MODIFIED IN PART, AND APPROVED IN PART.

DAY and CARTER, JJ., dissent.

MARIA BRETSCHNEIDER, APPELLANT, V. FARMERS NATIONAL BANK OF MADISON ET AL., APPELLEES.

FILED JULY 14, 1936. No. 29623.

1. **Wills: CONSTRUCTION.** Where the devise is to the wife so long as she remains a widow, with limitation over of the remainder after the remarriage, and also after the death, of the wife, she takes a life estate only.
2. ———: ———. We are not bound by the view that certain technical words in wills, which import a fee, will be held controlling so as to peremptorily discard whatever words of qualification may follow.
3. **Life Estates.** The holder of a life estate cannot forfeit that life estate simply by claiming to own the fee therein.
4. ———. The possession of the holder of the life estate will not be construed to be hostile and adverse to that of the remaindermen until such knowledge is clearly brought to them.

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

Willis E. Reed and *G. N. Anderson,* for appellant.

M. B. Foster and *Moyer & Moyer, contra.*

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

PAINE, J.

This is a suit to quiet title in the plaintiff in 480 acres of land in Madison county, Nebraska. The trial court decreed that the plaintiff had only a life estate therein. She appeals to reverse this decree.

The plaintiff and appellant sets out, in 58 pages of her brief, 184 separate propositions of law, with many authorities under each which are relied upon for reversal. While many of these would be interesting to discuss, it cannot be done without extending this opinion to undue length. We will simply content ourselves by saying that we have examined all of the propositions of law set forth in the exhaustive brief. The salient facts in the case, as found in the bill of exceptions, will be set forth, to be followed by a discussion of a very few propositions of law which we believe will determine all of the issues involved.

All of the parties herein admit that the title to this 480 acres in question was vested in the husband, Moritz Bretschneider, who died December 2, 1913, leaving a will which he had executed June 3, 1897. Omitting the introductory and concluding clauses of the will, the body thereof reads as follows:

"First: I direct that my funeral charges, the expenses of administering my estate and all my debts be paid out of my personal property. If that be insufficient I authorize my wife to sell so much of my real estate as may be necessary for that purpose.

"Second: I give and bequeath all of my estate, real and personal, to my beloved wife, Maria Bretschneider, upon the following condition, that as long as she remains my

widow she is to have all of my estate, both real and personal, but if she shall die or marry again during the infancy of my two children, Paul Bretschneider and Arno Bretschneider, then in that case all of the estate, personal and real, shall descend to my children above named in equal shares. It is my will and the intention of this will is, that all of my property both real and personal shall go to my two children, Paul and Arno. In no way shall any act of my wife deprive my children of all my property."

The will did not appoint an executor, and on January 10, 1914, said will was admitted to probate and letters of administration were issued to the son, Paul Bretschneider.

The plaintiff alleges in the second amended petition that she entered into the possession of said land on December 2, 1913, as the owner of said premises, and ever since said time has continued in open, notorious, actual, continuous, exclusive, hostile, and adverse possession, and claims to be the sole owner in fee simple of said land by reason of the terms of the will and adverse possession for more than 30 years last past, and further alleges that she "now is, occupying, living upon and using the W½ of section 3, township 22, range 1, Madison county, Nebraska, as a home and homestead." Said second amended petition further alleges that on November 8, 1933, Arno Bretschneider and his wife gave a mortgage of $2,500 to the Farmers National Bank upon said 480 acres of land, and that Adolph Behlen obtained a mortgage on the same date from the same parties upon the same land for $1,000, and that on April 24, 1933, Charles Hartner obtained a mortgage from the same parties upon the same land for $467.90, and on January 3, 1931, Emma Klug obtained a judgment against Arno Bretschneider for $163.15, which is a lien upon the same title, and that the Madison National Bank revived a judgment on August 13, 1926, against Arno Bretschneider upon the same land, which is a cloud upon the plaintiff's property, and the plaintiff prayed that each and all of said mortgages and judgments be declared null and void, and not to constitute a cloud upon the title of the plaintiff in the 480 acres of land,

and that a decree be entered forever quieting the fee title in said land in the plaintiff. The trial court entered a decree finding that the plaintiff was the owner of a life estate in and to said real estate, and that no one of the defendants has any right, title, interest, or lien in any way affecting the life interest of the plaintiff in and to said title.

The fact should be stated also that on March 5, 1934, Arno Bretschneider, one of the sons, filed a voluntary petition in bankruptcy, and was adjudicated bankrupt the next day. He lists in his petition taxes due, $11.11, and ten secured creditors, with claims amounting to $5,409.56, seven of them having mortgages upon his personal property, and three with mortgages on the real estate hereinbefore set out. He also lists 48 unsecured creditors, to whom he owes $2,695.83. He claims to have assets of $776.50 in personal property, but claims to own no interest in any land. His attorney who filed the bankruptcy petition is Willis E. Reed, one of the attorneys for the plaintiff herein, and George Moyer was appointed trustee.

Plaintiff insists that the will set out above is governed by the finding of this court in *Little v. Giles*, 25 Neb. 313, 41 N. W. 186; *Giles v. Little*, 104 U. S. 291. But that will provided that, if the widow should remarry, then all of his estate, *or whatever may remain*, should go to the surviving children. Again, in *Anderson v. Anderson*, 119 Neb. 381, 229 N. W. 124, relied upon by the plaintiff: In this opinion we find a quotation from Thompson, Construction of Wills, 515, sec. 382: "Where the devise is to the wife 'so long as she remains my widow,' with a limitation over of the remainder 'after the remarriage' and also 'after the death' of the wife, she takes a life estate only."

This is the exact situation in the case at bar, for it is stated clearly: "It is my will * * * that all of my property both real and personal shall go to my two children, Paul and Arno. In no way shall any act of my wife deprive my children of all my property." This is the last statement of the testator, this court is bound by it, and clearly the plaintiff, having never remarried, has a life estate. The plaintiff

claims that this last paragraph of the will is inoperative, because in the first paragraph he had given the fee to his widow to sell to pay debts, and states as her thirty-sixth proposition of law: "Where there is a clear devise of a fee simple, the attempted gift over is void and the clear fee simple will not be cut down by such void remainder or gift over;" and, as the fifty-second proposition of law states: "Where property is given in clear language sufficient to convey an absolute fee, the interest thus given shall not be taken away or diminished by any subsequent ambiguous, vague or general expressions in the will." In support thereof, plaintiff cites many cases from Connecticut, Iowa, Indiana, Kentucky, Maine, Maryland, New Jersey, New York, Massachusetts, Ohio, Pennsylvania, and a number of other states. Without going so far afield, we find that Judge Sedgwick, in *Grant v. Hover*, 103 Neb. 730, 174 N. W. 317, said: "The statement in *Loosing v. Loosing*, 85 Neb. 66, 'If a testator in his will devises an estate in fee simple, a subsequent clause attempting to devise over any part of that estate is void,' is not approved." In the later case of *Hiles v. Benton*, 111 Neb. 557, 196 N. W. 903, this language is used: "We are not bound by the view that certain technical words in wills * * * which import a fee will be held controlling so as to peremptorily discard whatever words of qualification may follow." The latest case in point is *Merrill v. Pardun*, 125 Neb. 701, 251 N. W. 834. Also, see 3 Neb. Law Bulletin, 291, which discusses this question, *In re Estate of Curtis*, 123 Neb. 97, 242 N. W. 257, and *Martley v. Martley*, 77 Neb. 163, 108 N. W. 979.

We will next consider plaintiff's propositions of law relating to plaintiff having acquired title by adverse possession, which is stated in many different forms, of which we select this as typical: "168. According to the weight of authority the possession of the widow, although not in hostility to the heirs, may be converted into an adverse holding which will ripen into title if continued for the statutory period."

Without discussing the dozens of cases cited from other

states, we will confine ourselves to a few pertinent Nebraska decisions. In *Maurer v. Reifschneider,* 89 Neb. 673, 132 N. W. 197, it is said: "Where a person is entitled to the possession of land by virtue of having a life estate therein, his possession will not be construed to be hostile and adverse to that of the remaindermen, unless the knowledge is clearly brought home to them that the person in possession claims the entire title in his own right, adverse and hostile to any claims of interest in the land by the remaindermen or others claiming through them." See, also, *Anderson v. Miller,* 103 Neb. 549, 172 N. W. 688; *Criswell v. Criswell,* 101 Neb. 349, 163 N. W. 302.

The plaintiff, under her life estate, had the full, complete, and absolute right of possession of this land. The two sons, who owned the fee under their father's will, had no right of entry on the place adverse to their mother, and their relations were very friendly. One son, Arno, has been living on the place under his mother for years, and recently gave three real estate mortgages on his interest therein, subject to his mother's life estate; and Paul, the other son, signs the leases to the mother's other tenant on the other place.

The plaintiff, in the very nature of things, could not forfeit her life estate simply by claiming a fee to this property. Nebraska has a statute, section 76-401, Comp. St. 1929, which allows any person to bring action to test their title to any real estate, and she had a perfect right to test out her interests, but the evidence in no way supports her allegations of holding the property adversely. We find no prejudicial errors, and, therefore, the decree of the lower court is hereby

AFFIRMED.