A. SPEIDEL, APPELLEE, V. SCOTTS BLUFF COUNTY, APPELLANT.

FILED OCTOBER 20, 1933. No. 28590.

1. **Appeal.** It is not proper for this court to consider on appeal evidence in another case, even though it involves the same land in controversy in this case, when the first reference thereto appears in the briefs filed in this case.
2. **Taxation: TAX SALES: REFUND.** The liability of a county to refund money paid by purchaser of a tax sale certificate, where title has failed, is entirely statutory, and does not rest upon legal principles recognized by the common law.
3. ———: ———: ———. In order to hold a county liable for a refund to a tax certificate purchaser, it must appear that the land has been sold for taxes when no tax was due at the time, or sold in consequence of an error in describing the land (section 77-2030, Comp. St. 1929), or it must have been determined by a court of competent jurisdiction that said sale was void (section 77-2054, Comp. St. 1929).
4. ———: ———: ———. When a tax sale certificate has been held valid, and a decree of foreclosure entered thereon, tax purchaser is not entitled to a refund from the county in any amount.

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

Rush C. Clarke and *Robert W. Patterson*, for appellant.

Olsen & Olsen, contra.

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

PAINE, J.

A claim was filed with the board of county commissioners, asking a refund of money paid by the purchaser of a tax sale certificate, which he claimed was invalid. His claim being rejected by the county commissioners, an appeal was taken, and the district court reversed the order of the county commissioners, and allowed the claim in the full amount claimed. The county brings the case here on appeal.

On November 23, 1925, appellee bought a tax sale cer-

tificate, No. 4451, at public tax sale, of the county treasurer of Scotts Bluff county, upon the northwest quarter of section 2, township 22 north, range 55 west, for taxes for the years 1923 and 1924. The county treasurer, in issuing such tax sale certificate, inserted in the blank, under the column headed "Acres," the figures 119.21. The purchaser paid the sum of $1,031.59 therefor, and thereafter paid, as subsequent taxes thereto, the delinquent taxes for 1925, in the sum of $432.27.

On November 19, 1930, the purchaser filed his petition in the district court to foreclose said tax certificate, the defendants named therein being the administratrix and the heirs of John Fink, deceased. In their answer, filed February 11, 1931, they admitted the ownership of 92.59 acres of the northwest quarter, but alleged that the remainder, to wit, the south 27.26 acres, belonged to other parties not defendants in the suit, and that the answering defendants were ready, willing and able to redeem the 92.59 acres belonging to them. On March 24, 1931, the district judge entered a decree in said tax foreclosure case, finding for the defendants in so far as the 92.59 acres of said quarter were concerned, and that their proportionate share of said taxes upon that portion of the northwest quarter was $1,867.65, and finding that the remaining 27.26 acres, set out in said tax certificate as belonging to the northwest quarter of said section, was not owned by the defendants, but belongs to persons not made parties defendant in the foreclosure action. The defendants immediately redeemed their 92.59 acres by the payment of $1,867.65 to the county treasurer, being $1,149.62, principal, and $718.03, interest. On June 3, 1932, the district judge entered a decree that A. Speidel, the purchaser of the tax sale certificate, should recover from the county the sum of $314.24, principal, with interest thereon at 12 per cent. from November 23, 1925, and costs of suit.

It will be noted that on the tax sale certificate the county treasurer entered the amount of land in the north-

west quarter to be 119.21 acres, and that all through the records of this case it is stated that the defendants owned 92.59 acres, and that there is a balance left, owned by parties not made defendants, in the amount of 27.26 acres, which add to 119.85 acres, showing that throughout the foreclosure proceedings on the tax sale certificate, by an error of some one, the two amounts made a surplus of .64 of an acre, which will not be discussed further.

The difficulty in this case arises from the fact that, upon the date of the redemption by the Fink heirs, there were only 92.59 acres of land in the northwest quarter, and that the tax sale certificate sold the purchaser, by mistake of various county officials in the levy and assessment of the land, indicated that there were 119.21 acres, which was not true, and, therefore, it is contended by the purchaser that the county should refund to him the amount he has lost, as authorized under section 77-2030, Comp. St. 1929. On the other hand, the county maintains that the tax sale certificate holder is not entitled to a refund until said sale is adjudged to be void by a court of competent jurisdiction (section 77-2054, Comp. St. 1929) and that said tax certificate, in the action to foreclose, was not adjudged invalid, and that after five years from the date of the sale of such tax certificate it ceases to be of any force or effect. Comp. St. 1929, sec. 77-2049; *Battelle v. Douglas County*, 65 Neb. 329.

1. The appellee says that the mistake of the county officers as to the number of acres in the northwest quarter of section 2, involved herein, can best be explained by reference to the case of *Littlejohn v. Fink*, 109 Neb. 282, in which a plat of this particular section of land will be found on page 284. In the reply brief of the appellant, it is insisted that this reference to proceedings in another lawsuit, bearing upon the exact size of the northwest quarter of section 2, is improper for the reason that it is the first appearance of such facts in the case at bar, for the bill of exceptions discloses no refer-

ence thereto. None of these facts were either pleaded or proved in the lower court, and it has been held that proceedings in collateral actions can only be proved by a certified copy of the record of proceedings had in the case in the appellate court. *Morrison v. Boggs,* 44 Neb. 248; *Burge v. Gandy,* 41 Neb. 149; 15 R. C. L. 1113, sec. 44.

When a case is brought before the court for trial, the respective parties must establish the facts involved in the case, the court being presumed to be uninformed in reference thereto. In the trial of one case, the court can no more take judicial notice of the record in another case in the same court without its formal introduction in evidence than if it were a record in another court; and much less can the supreme court on appeal take notice of the existence of a record not introduced in evidence in the court below. *People v. De la Guerra,* 24 Cal. 73. See notes to *Lanfear v. Mestier,* 89 Am. Dec. 658 (18 La. Ann. 497).

It is not proper for this court to take judicial notice of the pleadings, evidence, and judgment in another case, even though it involves the same land in controversy in this case, when the first reference thereto appears in the briefs filed in this court.

"The reviewing court should not by judicial notice introduce into the record facts of which the lower court had no knowledge. Any other rule would be manifestly unfair to the trial court and to the parties, who are entitled to a full and impartial hearing in the court of original jurisdiction." *Fassler v. Streit,* 92 Neb. 786.

2. It has been held that the rule of *caveat emptor* applies with full force to a purchaser at a tax sale. *Pennock v. Douglas County,* 39 Neb. 293; *Norris v. Burt County,* 56 Neb. 295.

The liability of a county to refund money paid by the purchaser of a tax sale certificate, where his title has failed, is entirely statutory, and does not rest upon legal principles recognized by the common law. *Martin v.*

Kearney County, 62 Neb. 538. It is claimed that this certificate failed, and the tax sale purchaser is entitled to a refund under sections 77-2030 and 77-2054, Comp. St. 1929.

The purchaser of real estate at delinquent tax sale is a volunteer, and subject ordinarily to the rules applicable to voluntary payments of taxes. When such purchaser relies upon a statute for the recovery of taxes paid, alleged by him to be illegal, he must be careful to bring himself within the provisions of the statute. *McCague v. City of Omaha,* 58 Neb. 37; *Dixon County v. Beardshear,* 38 Neb. 389.

3. To bring any action within these requirements of our statute, it must appear that the sale in question failed through mistake or wrongful act of a county officer, and the one seeking to recover must point out the particular act done or omitted, and the officer responsible for the same. *Kaeiser v. Nuckolls County,* 14 Neb. 277.

It is clear that, if the lands sold for taxes by a county treasurer were not subject to taxation, the county would be liable. *Fuller v. County of Colfax,* 33 Neb. 716.

It has been held that if the mistakes or wrongful acts of the treasurer or other officer are not matters of record, nor are participated in by the tax purchaser, the county is to save the purchaser harmless, but a tax purchaser is bound to take notice of county records, not only as to what they show, but also, if such be the case, of their failure to show matters material to the business in hand, for tax purchasers are under a peculiar obligation to act with fairness and in good faith, and must recognize that a county can act only through its records and other instrumentalities given it by law. *Merriam v. Otoe County,* 15 Neb. 408; *Roberts v. Adams County,* 18 Neb. 471; 3 Cooley, Taxation (4th ed.) 2583.

It has been held that when a taxpayer voluntarily pays a questionable tax without objection, there can be no recovery, because the party waives the objection by deliberately paying the amount claimed. *Wilson v. Butler County,* 26 Neb. 676.

In our opinion, the statute does not include, as one of the grounds for a refund, that the land has been assessed too high, or on the theory that it contained more acres than it may actually contain. Such an error of the county officers does not constitute a violation of official duty, or actionable wrong-doing on the part of the public officer, for the county is in no sense a warrantor or guarantor of the title, but the doctrine of *caveat emptor* prevails at all times in the purchase of tax sale certificates.

If a tax has been levied that is absolutely void, and has been paid, though voluntarily, the amount thereof may be recovered in an action for that purpose, but taxes not entirely void, though the assessment on which they are based was irregularly made, may not be recovered when voluntarily paid. *Haarmann Vinegar & Pickle Co v. Douglas County,* 122 Neb. 643.

If, as a matter of fact, the taxing authorities have assessed the plaintiff's property, which is liable to taxation, at too high a valuation, it would seem that the remedy by suit to recover a tax paid under protest would not be applicable, for, so long as the property assessed is liable to taxation, plaintiff's remedy is to go before the board of equalization, where that portion constituting the overvaluation, however it may occur, may be abated. *Janike v. Butler County,* 103 Neb. 865.

In order to hold a county liable for a refund to a tax certificate purchaser, it must appear that the land has been sold for taxes when no tax was due at the time, or sold in consequence of an error in describing the land (section 77-2030, Comp. St. 1929), or it must have been determined by a court of competent jurisdiction that said sale was void (section 77-2054, Comp. St. 1929).

4. This court has held that the title acquired by a purchaser at a tax sale might be said to fail when it should be pronounced invalid by the judgment or decree of a court of competent jurisdiction. *Peet v. O'Brien,* 5 Neb. 360. But, in the case at bar, it is shown by the

pleadings and evidence that, upon the foreclosure of the tax certificate in question, the burden of proof of the regularity of all proceedings leading up to the issuance of the tax certificate was upon the purchaser thereof. *Moffitt v. Reed,* 124 Neb. 410. After the trial the district court found that the certificate in the case at bar was valid, and that the northwest quarter of said section 2 contained 119.85 acres, as sold by the county treasurer. Such judgment is unreversed and unmodified, and has become final and conclusive. The only other action taken by the holder of the tax certificate was the filing of a claim for a refund from the county, which was rejected. From this an appeal was taken to the district court, where the claim was held good, and the case at bar is an appeal therefrom. In our opinion, the tax certificate having been held valid by a court of competent jurisdiction, the tax purchaser is not entitled to a refund from the county thereon.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FARMERS & MERCHANTS STATE BANK, E. H. LUIKART, RECEIVER, APPELLANT: L. H. CHENEY, INTERVENER, APPELLEE.

FILED OCTOBER 20, 1933. No. 28609.

Banks and Banking: TRUST FUND. **When money is deposited in a bank by a court officer, under the agreement with the cashier as set out herein, which funds are to be paid out upon order of the court, such deposit is a trust fund.**

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

F. C. Radke, Barlow Nye, G. E. Price, C. D. Ritchie and *Magdelene C. Radke,* for appellant.

L. H. Cheney and *Butler & James, contra.*

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

PAINE, J.

This is an action to establish a preferred claim with the receiver of the Farmers & Merchants State Bank of McCook, in the sum of $2,700, by reason of a deposit to the credit of the intervener, L. H. Cheney, referee in partition.

In June, 1931, L. H. Cheney, a practicing attorney at McCook, was appointed referee in partition by the district court in the case of Harsch v. Harsch. He filed his report, showing that the real estate could not be partitioned, which report was approved by the court, and he was directed to sell the property. The district court fixed the amount of his bond for the sale of the property at $25,000. The referee then interviewed Dale S. Boyles, cashier of the Farmers & Merchants State Bank of McCook, and offered that, if Boyles would sign the $25,000 bond with him as referee, the money received from the sale should be deposited in his bank until it was ordered paid out by the district court. Thereupon, Mr. Boyles signed the bond, together with L. Suess. The land was advertised for sale, and sold August 17, 1931, on which day the referee received two checks, one from Leonard Harsch for $1,380, and one from Rudolph F. Harsch for $1,320, each being a part payment on land purchased by each of them. Upon the same day, these checks, which had been drawn upon the Bartley State Bank, were deposited in Mr. Boyles' bank, the deposit slip showing the deposit as being made by "L. H. Cheney, Referee Harsch Estate." No checks were ever drawn on this account after it was made. Objections were filed in the district court to the sale, and after the hearing thereon the trial judge refused to confirm the sale, and on November 28, 1931, made an order setting aside the sales, and directing: "The referee is ordered to return to the bidders the deposits made on their bids." The Farmers & Merchants State Bank of McCook had been closed on October 24, 1931, and, therefore, the referee could not comply with the order of the district court.

Upon March 31, 1932, the referee filed a petition of intervention, setting out all of the facts in said matter, and alleging, among other things, "that said funds were deposited by this referee and received by said bank as a trust fund, then knowing that the same were deposited by said referee to be paid out upon the order of the district court."

On April 22, 1932, the receiver of said bank filed his answer, alleging that the deposit in question was a general, unsecured deposit, and that the trust relationship of the referee was not transferred to the bank.

Hearing on said matter was had upon May 14, 1932, and the case taken under advisement, and on June 27, 1932, the court found generally that the claim of the referee for $2,700 was not a regular or general bank deposit; that at the time of the deposit the referee was acting under the order of the district court in a partition proceeding, and that when the land was sold the down payments were placed in the said bank under the agreement with Dale S. Boyles, as set forth in the petition of intervention, and the court directed that the classification of the claim of the referee as a general, unsecured claim be set aside, and said claim be allowed as a trust fund, and ordered paid out of any funds available. Motion for new trial, setting out that the judgment was contrary to law and not sustained by the evidence, was duly filed, argued, and overruled.

In the able argument on behalf of the receiver, it is contended that the bank was not required to do anything but to honor the referee's checks, and the holding of the trial court is criticized, by saying that the proposition is simply this: That the referee, in substance, said to the banker, "If you will do me a great favor and sign my bond for $25,000, then I will permit you to do me another great favor, and hold the proceeds of the sale as trust funds;" and it is contended that this does not sound like a proposition that either a lawyer or a banker would enter into, and that the fact that the bank had knowledge

of the general purpose for which the funds were to be used does not change the deposit from a general deposit into a trust fund, citing, in support thereof, *Bank of Crab Orchard v. Myers,* 120 Neb. 84, and *Diehl v. Johnson,* 123 Neb. 699.

It may be contended that the original checks were not held by the bank, but the referee and the bank would have run a risk if the checks had not been put into circulation immediately. The total amount of deposits in the bank at the close of business on the date of the deposit of the two checks was $81,810.09, and on October 24, 1932, when the bank failed, the cash on hand and in correspondent banks was $26,243.77.

Trust funds placed in a bank for a particular purpose are sufficiently traced into the hands of the bank's receiver to entitle their owner to claim them if the fund delivered to the receiver exceeded the amount of the trust, although the money deposited may not have been kept intact. *Hudspeth v. Union Trust & Savings Bank,* 196 Ia. 706, 31 A. L. R. 466.

In the notes in A. L. R. following the case of *Hudspeth v. Union Trust & Savings Bank, supra,* it is stated as a general rule: "Where a deposit is made in a bank with the distinct understanding that it is to be held by the bank for the purpose of furthering a transaction between the depositor and a third person, or where it is made under such circumstances as give rise to a necessary implication that it is made for such a purpose, the deposit becomes impressed with a trust which entitles the depositor to a preference over the general creditors of the bank where it becomes insolvent while holding the deposit." See *Corporation Commission v. Trust Co.,* 194 N. Car. 125, 57 A. L. R. 382; *Blythe v. Kujawa,* 175 Minn. 88, 60 A. L. R. 330.

The law relating to partition sales provides, in section 20-2199, Comp. St. 1929: "If the sales are disapproved, the money paid and the securities given must be returned to the persons respectively entitled thereto." This clearly

implies that the money belongs to the bidder until the sale is confirmed, and that the bidder, or the referee in his behalf, had a right to follow that money wherever he could trace it, and when he found it in the possession of one who had knowledge of the facts, he could recover it.

When there is an agreement with bank officers that certain money is placed in a bank for the specific purpose of being held intact until the completion of a contemplated land sale by a referee in partition, and then to be turned over to the parties entitled thereto, the money so placed in the bank may be reclaimed as a trust fund, where the bank becomes insolvent while holding such money. *State v. Citizens Bank,* 124 Neb. 717; *Capital Nat. Bank v. Coldwater Nat. Bank,* 49 Neb. 786, 59 Am. St. Rep. 572, 172 U. S. 434; *State v. State Bank of Touhy,* 122 Neb. 582.

The judgment of the district court, holding that the deposit of money by the referee in partition was for a specific purpose known to the bank, thereby constituting the deposit a trust deposit, is hereby

AFFIRMED.

STATE, EX REL. G. B. IRA ET AL., APPELLEES, V. J. A. ADAMSON, COUNTY JUDGE, APPELLANT.

FILED OCTOBER 20, 1933. No. 28755.

1. **Eminent Domain:** SELECTION OF APPRAISERS. By an act of the legislature of 1927 changing the procedure in condemnation of lands for county use, the county judge was divested of his function of selection of appraisers and that function was committed solely and exclusively to the sheriff.
2. ———: ———: AWARD. Where a county judge assumes to and does select the appraisers in a case where the department of public works is proceeding to condemn lands for highway purposes, the award made by such appraisers is absolutely void and of no effect.
3. ———: ———: ———. In the instant case the county judge selected the appraisers in condemnation proceedings and the award money was placed in his hands. *Held,* that he could not be compelled by writ of mandamus to turn the money over

to the landowners, for the reason that said appraisers were never vested with power to make an award and their acts in this behalf were without jurisdiction.

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

Paul F. Good, Attorney General, Paul P. Chaney and *W. L. Brennan,* for appellant.

Wills & Wills, contra.

Morsman & Maxwell, amicus curiæ.

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

SHEPHERD, District Judge.

This is an appeal from Boyd county. The action was in mandamus. Proceedings had been begun by the department of public works of Nebraska to condemn real estate for road purposes. The owners of the land, G. B. Ira and R. E. Kriz, contested the award as too little, and subsequently appealed to the district court. The condemnation money was paid to the county judge, the appellant herein, and the department took possession of the land and proceeded with its highway construction. Later Ira and Kriz, the appellees, dismissed their appeal and almost immediately the department of public works began further condemnation proceedings in the case on the theory that the first proceedings were defective, and the award therein made absolutely void because the appraisers had been selected by the judge instead of by the sheriff.

The appellees demanded the condemnation money in the hands of county judge Adamson and commenced this action for a peremptory writ of mandamus commanding the county judge to turn it over to them. Issues were joined, trial was had, and the trial court entered the order prayed for. Thereupon the respondent came here upon appeal. The assignments of error are: (1) The judgment is contrary to the evidence, (2) contrary to

law, (3) not sustained by sufficient evidence, and (4) erroneous because not for the appellant and against the appellees.

The record, which is entirely documentary, indeed shows that the appraisers were selected and appointed by the judge. The following is a part of his order: "Appointment of Appraisers. To N. E. Baker, Wm. D. Spicknall, and James B. Roush, you and each of you are hereby notified that you have been selected by me upon application of the department of public works of the state of Nebraska, to inspect the following described real estate, to wit," etc.

This order imports verity and is not to be robbed of its plain meaning by the fact that possibly the sheriff may have reported the names of these appraisers to the court in the first instance and that thereupon the court appointed them. Nor can we agree that since there was no oral evidence as to what was actually done it is to be presumed that what was done was done according to law. We conclude and hold that the selection of the appraisers was by the county judge and not by the sheriff.

It is an unusual situation where both the judge and the department of public works assail the work of their own hands. They retain the benefits and impugn the means by which they were obtained. Certainly the appellant must be declared to be estopped unless jurisdiction was not acquired. Certainly, too, if the judgment of award was merely voidable the order of the trial court is quite unimpeachable. But if the award was void, a nullity, that ends the matter. Nothing can be done in mandamus to require the appellant to pay and no power can be based upon any of the proceedings.

The deciding of the controversy clearly hangs on sections 26-710 and 26-711, Comp. St. 1929, and upon their construction, interpretation, and application. These statutes read as follows:

Section 26-710. "The damages which shall be paid to the owner by a county for any real estate taken as afore-

said, when not agreed upon, shall be ascertained and determined by commissioners who shall be appointed by the county judge of said county as hereinafter provided."

Section 26-711. "If the owner of any real estate shall refuse to agree with the county board as to the amount of the damages sustained by him on account of the appropriation of his land for public use by the county, the county judge of the county in which such real estate may be situated, shall upon the written application of either party, direct the sheriff of said county to summon three disinterested freeholders of the county, and not interested in a like question, whose duty it shall be to carefully inspect and view the real estate sought to be appropriated, and who shall hear either party interested therein in reference to the amount of damages when they are so inspecting and viewing said real estate and who thereafter shall assess the damages which the owner shall sustain by the appropriation of his or her land to the use of such county and shall make report in writing to the county judge of said county."

These sections do not employ the term "selection" but use the words "appoint" and "summon." The old statute, however, provided expressly that the appraisers were "to be selected by said judge." There was an amendment of the statute in 1927 (Laws 1927, ch. 56) omitting the phrase quoted and providing that three instead of six appraisers should be appointed.

It has been definitely concluded by the decisions of this court that by this amendment the great and important function of selecting disinterested and unprejudiced men to appraise the land sought to be condemned is lodged solely and entirely in the sheriff, and that the judge acts only in a ministerial capacity in appointing. In the late case of *Goergen v. Department of Public Works*, 123 Neb. 648, the question was fully discussed, and the doctrine fully established. In that case it was expressly determined and adjudged that where the appraisers are selected and appointed by the judge the award is void.

Such being the law of the state of Nebraska, it rules the case at bar. The decision of the trial court in the instant case is only to be sustained upon the theory that the award was valid or at least voidable. Such was not the case. The award was void. The peremptory writ issued by the trial judge should have been denied and the same is held to be without authority of law and of no effect. The judgment of the lower court is reversed and the cause is remanded, with instructions that an order be entered in accordance with the holdings of this opinion.

REVERSED.

ENOS T. CLARKE V. STATE OF NEBRASKA.

FILED OCTOBER 20, 1933. No. 28782.

1. **Intoxicating Liquors: WITNESSES: COMPETENCY.** If a witness has sufficient knowledge and experience to form a correct opinion as to whether a certain liquor is or is not intoxicating he may testify on that point.
2. **Criminal Law: VENUE: PROOF.** The venue of an offense may be proved like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient. *Weinecke v. State*, 34 Neb. 14.

ERROR to the district court for Kearney county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Walter M. Crow, for plaintiff in error.

Paul F. Good, Attorney General, and *Edwin Vail, contra.*

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

SHEPHERD, District Judge.

This is a liquor case in which the plaintiff in error Enos T. Clarke was convicted in Kearney county. He was found guilty upon the first, second, third, and fifth counts of the information, and not guilty on the fourth.

The plaintiff in error will be called the defendant and the state the plaintiff in this opinion.

The errors assigned and discussed in the briefs are in substance as follows: There is not sufficient evidence in the record to sustain the verdict of guilty. There is no competent evidence in the record to prove that the liquors introduced in evidence by the state are intoxicating liquors and contain more than one-half of one per cent. of alcohol. The verdict of the jury on count five of the information is inconsistent with the verdict of the jury on count four of said information. The court erred in overruling the motion of the defendant to quash the indictment for variance between the complaint filed in the county court and the information filed in the district court. The court erred in overruling the motion of the defendant Oldsmobile Coupé, Motor No. L5800. The complaint filed in the county court of Kearney county was entitled "The State of Nebraska v. Enos T. Clarke." The information was entitled "The State of Nebraska v. Enos T. Clarke and one Oldsmobile Coupé, Motor No. L5800," and the motion to quash made by the defendant should have been sustained. The motion to quash on behalf of the Oldsmobile coupé should have been sustained for the reason that the complaint filed in the county court did not make said automobile a party defendant, and no proper warrant describing said automobile was ever issued and placed in the hands of an officer for service, and the automobile was never called upon to plead in the county court.

Most of the facts relating to the persons involved, the places involved, the selling of the liquor, the possession of said liquor, the dates involved, etc., were so clearly established by competent evidence that they are hardly mentioned in defendant's brief. Practically only two points are in dispute, the intoxicating quality of the liquor, and the place of the transportation, whether in Kearney county or in Phelps county.

As to the former, the evidence was such as to satisfy

the requirements of proof beyond reasonable doubt. The liquor in question was shown in every instance by practical experts such as federal agents, sheriffs and bootleggers to be whiskey or alcohol. Courts take judicial notice that whiskey is intoxicating. *Peterson v. State,* 63 Neb. 251; *Steinkuhler v. State,* 77 Neb. 331. And alcohol is the compelling ingredient in whiskey. *State v. La Due,* 164 Minn. 499. These witnesses were fully qualified by examination on foundation before testifying. Even though a witness is not an expert he is competent to testify as to whether a certain liquor is or is not intoxicating if he has sufficient knowledge and experience to enable him to form a correct opinion upon the point. 33 C. J. 775.

As to the latter, there is serious contention on the part of the defendant that the transportation was not in Kearney county. The plaintiff is equally certain that it was. The buying and selling transaction was in Wilcox in Kearney county and the delivery was on the road between Phelps and Kearney counties about a mile west and a quarter of a mile north. The west side of this road was in Phelps and the east side in Kearney county. The bootleggers, two young women, were the purchasers. The defendant directed them to drive to a place where there was a clump of trees on the east side of the road. They did so, and parked at the point designated. He followed in his own car, the automobile in question, driving up beside them on their left. He took the liquor out of his car and handed it over to them; they saw him in his every movement in so doing. The liquor delivered was that introduced in evidence. As his car was on the west side of the bootleggers' car the defendant argues that his car may have been on the west side of the road, or in Phelps county, the center of the highway being the county line. This may not be splitting hairs but the point is exceedingly attenuated, to say the least.

However, since the bootleggers' car was facing north on the east side of the road, we may fairly conclude that

it was well to the east so as not to interfere with the traffic; and that the defendant's car, being to the west, would almost necessarily be, in part at least, on that side of the highway. If any part of it was on the highway the car was certainly being used for transportation of liquor in Kearney county. All of the facts were submitted to the jury upon proper instructions and the jury determined that Oldsmobile Coupé, Motor No. L5800, was doing transportation duty in Kearney county. The identification of the car was ample. Facts inferable from other facts well proved may be established in evidence and the jury may find accordingly. The venue of an offense may be proved like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient. *Weinecke v. State*, 34 Neb. 14.

The prosecution was upon five counts, and if the jury convicted the plaintiff on count five and not upon count four, this does not show that they did not conclude aright in finding the defendant guilty on the fifth count. The more natural conclusion is that they did not find aright on count four. Again the counts are separate and the evidence may be different and it is possible that the findings are not in any way inconsistent.

This brings us to the question of whether or not there was a fatal variance between the information charging the car as a defendant and the complaint which was filed in the county court. We think not. The complaint made mention of the car and described it practically as described in the information, though it did not particularize. The variance is not, therefore, sufficient to make a good defense. If there was an error it was not such a prejudicial error as to endanger the rights of a citizen and it will not be permitted to nullify the decision of the Kearney county jury.

The well known section of our Code of Civil Procedure,

section 29-2308, Comp. St. 1929, was made to fit the case. It reads as follows: "No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case * * * for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

No separate action is required to be brought against the automobile in question where there is a personal defendant. It is only necessary to establish that the automobile in question was used by the personal defendant in the transportation of liquor. Comp. St. 1929, sec. 53-137.

We conclude that the district judge was right in his judgment and that the conviction of the defendant by the jury should be affirmed.

AFFIRMED.

CHARLES PENWELL, APPELLEE, V. RAY ANDERSON ET AL., APPELLANTS.

FILED OCTOBER 27, 1933. No. 28919.

Master and Servant: WORKMEN'S COMPENSATION LAW: INJURY TO EMPLOYEE: VENUE. Workmen's compensation law of this state is applicable where employer is engaged in a business in this state, and the employee, while performing work in another state incident to such business, suffers disability, caused by an accidental injury arising out of and in the course of his employment.

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

Deutsch & Stevens, for appellants.

Hugh J. Boyle and *Moyer & Moyer, contra.*

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

GOOD, J.

This action was brought under the workmen's compensation law. Plaintiff, the workman, recovered a judgment, and defendants have appealed.

Defendants contend that plaintiff's injury is not compensable under the Nebraska law because plaintiff was employed to work in the state of Texas where his injury occurred.

From the record the following facts appear: Plaintiff and defendant Anderson, the employer, are residents of Tilden, Nebraska. Anderson is engaged in operating a number of trucks in hauling gravel, paving material and dirt. He owned 20 or more trucks and took contracts for hauling principally in Nebraska, but also in other states, particularly Iowa, South Dakota and Texas. Plaintiff had been in Anderson's employ for about nine years, acting as foreman and mechanic and keeping the trucks in operating condition. Ordinarily, plaintiff's wages were $100 a month, but, when he was working as foreman and mechanic on contracts out of the state, he received a larger amount. Anderson entered into a contract for hauling paving material in the state of Texas. He directed plaintiff to take 10 of the trucks to Texas and superintend the work of this particular contract, and informed him that his wages would be $125 a month while there. After the particular contract was completed, two other contracts were obtained in the state of Texas, and plaintiff remained as foreman and mechanic upon those jobs. While at work as a mechanic on one of the trucks on the last of the three jobs in Texas, he received an injury to his left eye, which entirely destroyed its sight and necessitated the removal of the eyeball.

The record shows that Anderson's principal place of business is in Tilden, Nebraska, where he had lived for many years; that it was the intention, when the jobs were completed in Texas, that plaintiff should bring the trucks to Nebraska, where plaintiff continued in Anderson's employ. While the work was being performed in Texas,

Anderson had other contracts in Nebraska where the remaining, or at least some of the remaining, trucks were engaged. It also appears that a part of plaintiff's wages while he was working in Texas was paid to him or to his wife in Nebraska. It is conceded that plaintiff suffered an accidental injury arising out of and in the course of his employment. The question is: Is plaintiff entitled to compensation under the law of Nebraska?

The workmen's compensation law was enacted for the purpose of requiring industry to bear a part of the burden occasioned by accidental injuries to the workmen engaged therein when such injuries arise out of and in the course of the employment. In determining whether the compensation act is applicable to a particular case, it is of prime importance to determine the location of the industry. If the industry in which the workman is employed is located in this state, he is, ordinarily, entitled to the protection of the Nebraska compensation law, and this applies even though his injury may occur in another state, if the work that he was doing was a part of the industry being carried on in this state or was incident thereto. Domicile of the employer or employee and the place where the contract was entered into are not, in themselves, controlling, although those facts may be circumstances to aid in ascertaining whether the industry is located within the state.

Counsel for defendants seems to think that our former decisions are not harmonious and some of them not based upon sound principles. We fear counsel has not read the decisions understandingly. He criticizes the holding of this court in *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609. In that case the industry was located in Nebraska. The workman was required to perform some service, incident thereto, in the state of Iowa, where he was injured, and it was held that he was entitled to compensation under the law of this state.

Counsel also criticizes the opinion in *Stone v. Thomson Co.*, 124 Neb. 181. In that case the industry was carried

on in this state, but the employer sent its employees to various adjoining states in the performance of certain contracts, and employed the plaintiff to work at a point in Kansas, where he was injured. It was held that the work in Kansas was incidental to the industry which was carried on in Nebraska, and that an action for compensation was maintainable in this state.

In *Skelly Oil Co. v. Gaugenbaugh*, 119 Neb. 698, the employer was engaged in an industry carried on in this state, and it required one of its employees to work in southwestern Iowa, but reporting weekly to the main office in Omaha, Nebraska. The employee was injured in Iowa. It was held that his work there was incidental to and a part of the industry carried on in Nebraska, and that he was entitled to compensation.

In *Esau v. Smith Bros.*, 124 Neb. 217, the employer was domiciled in Texas and was engaged in laying a gas pipe line through the states of Kansas, Nebraska and Iowa. At the start of the work, the industry being served was located in Kansas. The employee had work there. After the work was practically finished in Kansas, the seat of the industry was moved to the state of Nebraska where the workman was injured while here employed. It is apparent in that case that the only location of the industry being served at that time was in Nebraska, and it was held that the workman was entitled to recover under the Nebraska law.

On the other hand, in *Watts v. Long*, 116 Neb. 656, the contract of employment was entered into in Nebraska, the work to be performed in Kansas. The employer at that time had no place of business and was carrying on no industry in the state of Nebraska. The industry was located in Kansas where the employee was injured. It was held that he was not entitled to recover. In that case, referring to the workmen's compensation law, it was further held: "Such law is applicable where the employer is engaged in any trade, business, profession, or avocation in this state and the employee, while per-

forming work incident to such business in another state, is there injured."

Freeman v. Higgins, 123 Neb. 73, is a case where the employer resided in this state, and the employee was also a resident of this state, but the industry in which the workman was engaged was located in Wyoming, where the contract of employment was made and where the injury occurred. The employer was not operating any industry in this state, and the employment was not incidental to any industry being carried on in this state. It was there held that the workman could not recover under the workmen's compensation law of Nebraska.

Through all these cases, it is apparent that the prime question is whether the workman is employed in an industry which is being carried on in this state. If so, and the workman is injured in another state while employed in work incident to the industry in this state, he is under the protection of the Nebraska workmen's compensation law.

Counsel has cited and referred to many cases from other jurisdictions. An examination of the workmen's compensation laws of other states leads us to the conclusion that the decisions from those states can afford us little aid. The workmen's compensation laws of most of the states provide, in terms, for their application extraterritorially under certain prescribed conditions, and in other states limit their application to injuries occurring in the state. In some, the statute applies only where the contract was entered into in the state. A few of the other states, like Nebraska, do not have any specific provision in their compensation laws as to extraterritorial operation. Wisconsin appears to be one of such states.

In *Anderson v. Miller Scrap Iron Co.,* 169 Wis. 106, it was held: "Where a contract of employment was made in Wisconsin and both parties thereto were residents of this state and were subject to our workmen's compensation act, their rights and liabilities in case of injury to the employee must be determined in the courts of this

state in accordance with the provisions of said act, whether the injury occurred within or without the state." On rehearing the opinion was adhered to in *Anderson v. Miller Scrap Iron Co.*, 169 Wis. 119. In that case the employer had its principal place of business in Wisconsin where it transacted the major part of its business. The workman had been a regular employee and most of his work had been within that state, but the employer had purchased scrap iron in Michigan. The employee was engaged in gathering this scrap when he was injured in Michigan. The court held that plaintiff was entitled to recover, and while the opinion laid stress on the point where the contract was made, the facts are quite similar to the situation in the present case, and to that in a number of other decisions of this court, to which reference has been hereinbefore made.

In our view, the industry in which the plaintiff was engaged was a Nebraska industry. The performance of the work in Texas was incidental to the industry being carried on in this state. The employer in this case had no permanent industry in Texas or in any other state, so far as the record discloses. The work being carried on in Texas was of a temporary nature, and the workman, with all the employer's trucks, returned to Nebraska upon the conclusion of the specific work in Texas, and resumed his employment here. We hold that that work was merely incidental to the industry carried on in Nebraska, and that the plaintiff was within the protection of the Nebraska workmen's compensation law.

Plaintiff is allowed an attorney's fee of $200 for services in this court, to be taxed as a part of the costs.

The judgment of the district court is right and is

AFFIRMED.

NELLIE WELTON, ADMINISTRATRIX OF THE ESTATE OF ELIHU L. WELTON, APPELLANT, V. SWIFT & COMPANY, APPELLEE.

FILED OCTOBER 27, 1933. No. 28818.

1. **Master and Servant:** ACTION FOR COMPENSATION: LIMITATIONS. No proceedings for compensation can be successfully maintained if no claim was made therefor within six months, or petition filed therefor within one year, of the death of the employee.
2. ———: INJURY TO EMPLOYEE: SETTLEMENT. Where an employee, in the absence of fraud, signs a release for an injury, such act is binding upon his dependents after his death.
3. ———: ———: ———. If deceased could not have recovered additional compensation for an injury occurring four years before his death, his dependents cannot recover therefor.

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

Howard Saxton, Henry S. Weisberg and *John E. Eidam,* for appellant.

George H. Winn and *Brown, Fitch & West, contra.*

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

PAINE, J.

This is an action for workmen's compensation for the widow and dependent child of Elihu L. Welton, in which the claim was rejected by the compensation commissioner, and also rejected upon hearing in the district court.

The record discloses that the deceased husband was employed as night watchman for Swift & Company at its ice house near the city of Ashland, and on October 11, 1925, fell while so employed, fracturing several ribs, and was laid up for about two months. That on November 9, 1925, he was paid compensation by Swift & Company in the sum of $15, together with a doctor bill in the sum of $20, at which time he signed a final settlement receipt. He then continued in the employ of Swift & Company, working almost continuously, to October, 1926, and his

death occurred three years later, to wit, November 27, 1929. The petition was filed June 15, 1931. To this an answer was filed, alleging that deceased was fully compensated, and signed a release in full settlement and satisfaction of all claims for compensation, and further alleging that he had fully recovered from the injuries, and that his death was due to natural causes, and in no way connected with the injuries. Defendant also charges that no claim or demand for compensation was made by the plaintiff upon the defendant for more than six months after the death of said Elihu L. Welton, as required by section 48-133, Comp. St. 1929, and alleges that plaintiff filed a petition for a hearing before the compensation commissioner, which hearing was held on April 16, 1931, and thereafter the commissioner dismissed the plaintiff's action on the ground that no demand for compensation had been made within six months of the date of the death of the employee, and that, therefore, the compensation commissioner was without jurisdiction.

Hearing was had before the district judge on January 12 and 13, 1933, and on February 22, 1933, after briefs had been filed, the trial judge entered a decree, finding that no notice had been given to the defendant company that plaintiff claimed a compensation, either for herself or other dependent, prior to the filing of the petition before the compensation commissioner. The court further found that the accident suffered by Elihu L. Welton did not produce the heart condition from which he suffered thereafter, but that such heart condition existed prior to the time of the accident, nor did such accident aggravate the heart condition, but that such heart condition, from which he was suffering prior to the time of the accident, gradually grew worse, and continued up to the time of his death. The court finds that the death of said Elihu L. Welton did not result from the injuries received by him on or about October 11, 1925, and the district court thereupon dismissed the plaintiff's petition and cause of action, and affirmed the findings and judgment

of the compensation commissioner. Thereupon, a motion for a new trial was overruled on March 14, 1933.

1. The testimony shows that no notice or claim of any kind had been given to the company of continuing injuries from his first accident, for which he had signed a release on November 9, 1925. No notice of injury or claim for compensation was filed within six months with the compensation commissioner, or served upon the employer, as required by section 48-133, Comp. St. 1929, nor was a petition filed within one year after the death of the employee, as required by section 48-138, Comp. St. 1929.

2. The deceased, while in full possession of his mental faculties, and in the absence of fraud, made a settlement with the company, and signed a release, and this was binding upon his dependents. Comp. St. 1929, sec. 48-124; *Bliss v. Woods,* 120 Neb. 790.

3. Under the evidence and the law in this case, the deceased could not have recovered additional compensation for the injury occurring October 11, 1925, if he had lived; therefore, his dependents cannot recover therefor after his death. *Good v. City of Omaha,* 102 Neb. 654; *Bartlett v. Eaton,* 123 Neb. 599; *Samland v. Ford Motor Co.,* 123 Neb. 819; *Kurtz v. Sunderland Bros. Co.,* 124 Neb. 776.

In the opinion of this court, this action is barred by the sections of the statute hereinbefore cited, and the judgment of the trial court is correct, and is hereby

AFFIRMED.

FARMERS & MERCHANTS STATE BANK OF PENDER, APPELLEE, V. CELESTINE KUHN, APPELLANT.

FILED OCTOBER 27, 1933. No. 28599.

1. Trial: WITHDRAWAL OF CASE FROM JURY. If from the undisputed facts different minds may not honestly reach different conclusions or draw different inferences without reasoning irrationally, it is not error on the part of the trial court to withdraw the case from the consideration of the jury and enter a judgment consistent with the facts. *Knapp v. Jones,* 50 Neb. 490.

2. Bills and Notes: CONSIDERATION. Good consideration for a promissory note may consist of money received by the maker or of money or property lent, advanced or returned by said payee to a third person at the instance of said maker and with her knowledge and consent.

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

A. P. Coleman, for appellant.

Robert G. Fuhrman, contra.

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

SHEPHERD, District Judge.

This is an appeal from an order of the district court dismissing the jury at the close of the evidence and entering a judgment for plaintiff.

The petition was the ordinary declaration on a promissory note of $3,600 made by the defendant Celestine Kuhn to John Wollmer, liquidating agent of the plaintiff bank. The answer admitted the execution of the note but alleged lack of consideration and also alleged that the note was made for the accommodation of the bank. The reply was a general denial of new matter. The plaintiff will hereinafter be called the appellee, and the defendant the appellant.

It appears that appellant was a woman of property, 74 years of age, living with a married daughter, Mrs. Rutledge, and under no disability when she signed the paper. She had been transacting her own considerable business up to the time of executing the note in question, and had theretofore had banking experience in connection therewith. She signed and delivered the note at the bank and in the presence of her said daughter after being present at a long conference at her attorney's office in Walthill. Said conference was devoted to a settlement of the affairs of her son George and incidentally of one of her own affairs with the latter. All parties were pres-

ent at that conference, her son George and his wife, her attorney Mr. Coleman, the attorney for the bank Robert G. Fuhrman, Mr. Wollmer liquidating agent of the Pender bank, her daughter Mrs. Rutledge, and herself. It was an amicable gathering in which much time was taken and much business transacted.

Briefly, this was about what was done at that meeting: George Kuhn was a farmer and stockman heavily indebted to the bank of Pender and somewhat indebted to other concerns. The indebtedness to the Pender bank amounted with interest to about $9,600, including a note of $6,000 and several others of smaller amounts. He was also indebted to his mother, the appellant, for land rent in the sum of $600. And his mother was desirous of collecting the same in order that she might apply the proceeds to an indebtedness of her own at the bank. George had been seeking a settlement whereby he might clear the slate by the payment of the $6,000 note, and had proposed a sale of his personal property, variously estimated as of the value of $6,000 or $7,000, in order that he might pay in cash. It appears that the bank had considered settlement on that basis. But up to the time of the meeting no agreement had been reached in regard to this.

The details of the conversation do not fully appear, but this is what they did. The bank extended George's $6,000 note for a year, agreed to lend him such money as he needed to conduct his farm and stock business during that year, agreed to and did then and there furnish him with about $600 to pay his rent to his mother, furnished him with means to pay off certain indebtedness at the bank of Rosalie, furnished him enough cash to pay some other small obligations, and returned the balance of his notes. The notes returned, together with advancements made by the bank, total almost precisely the sum of $3,600.

George paid his mother out of the cash received from the bank, and at the conclusion of the meeting she went with her daughter and Mr. Wollmer back to the bank at

Pender and signed the $3,600 note now in suit, as hereinbefore noted. There had been a great deal of conference and negotiation at Walthill in which the subject and object of this note had doubtless been discussed, but the details of the same are not in the record. No objection was ever made to the bank or to any one connected with it during the two years that it ran before due, though George says in his testimony that he only learned of its existence a short time before trial. In the forenoon of the day of the conference at Walthill the appellant in the presence of her daughter had a conversation on business with Mr. Wollmer at the bank, but appellant insists that she remembered not a word of it.

Upon trial appellant called neither her daughter nor her attorney to testify. The burden of proof being upon her, this is a circumstance of some significance.

The main question is whether the jury could have properly found from the evidence differently than the trial court found. The assignment of errors is in substance as follows: The decision is not sustained by sufficient evidence; the decision is contrary to law; the finding that the note in suit was given for and is supported by valuable consideration is not supported by evidence and is contrary thereto; the court erred in not sustaining the motion for new trial; the court erred in sustaining the motion of the plaintiff to take the case from the jury and erred in rendering judgment in favor of plaintiff and against defendant; there were errors of law occurring at the trial and excepted to; there was irregularity on the part of the court by which the defendant was prevented from having a fair trial in that the court excluded testimony offered by defendant pertaining to the issues. The last assignment was not argued to the court nor is the same discussed in the brief. This is also true in regard to errors of law occurring upon trial.

Necessary to the determination of the main question is the question of consideration. Good consideration for a promissory note may consist of money received by the

maker or of money or property lent, advanced or returned by said payee to a third person at the instance of said maker and with her knowledge and consent.

The appellee says in its excellent brief that to constitute a consideration for the giving of a promissory note it is ordinarily unnecessary that any benefit result to the promisor, it being sufficient if the transaction results in trouble, injury, inconvenience, prejudice or detriment to the promisee; that also forbearance to proceed with the collection of a promissory note is a sufficient consideration for the giving of a promissory note by a third person; that furthermore an extension of time of payment upon the debt of another is a sufficient consideration for the giving of a note by a third party; and that again a promissory note given to a bank given to procure the bank's surrender of the note or notes of a third party held by such bank is a binding obligation. To all of these propositions this court gives assent. All of them are sustained by respectable authority from the various states as well as by our own decisions. Among such authorities may be cited 3 R. C. L. 935, 940, secs. 131, 136; 8 C. J. 220, 222; *United States Fidelity & Guaranty Co. v. Walker,* 248 Fed. 42; *Cawthorpe v. Clark,* 173 Mich. 267; *Harris-Emery Co. v. Howerton,* 154 Ia. 472; *Osborne & Co. v. Doherty,* 38 Minn. 430; *Becker v. Noegel,* 165 Wis. 73; *Nelson v. Diffenderffer,* 178 Mo. App. 48; *Bridges v. Vann,* 88 Kan. 98; *Atherton & Ricker v. Marcy,* 59 Ia. 650; *Steep v. Harpham,* 241 Mich. 652; *Wright v. McKitrick,* 2 Kan. App. 508; *Zimbelman & Otis v. Finnegan,* 141 Ia. 358; *Fulton v. Loughlin,* 118 Ind. 286; *Galena Nat. Bank v. Ripley,* 55 Wash. 615; *Seager v. Drayton,* 217 Mass. 571; *Citizens Bank v. Oaks,* 184 Mo. App. 598; *Nichols & Shepard Co. v. Dedrick,* 61 Minn. 513; *Union Banking Co. v. Martin's Estate,* 113 Mich. 521.

The presumption is that a promissory note is a valid obligation based upon a good and legal consideration, and the burden of showing that there was a want of consid-

eration rests upon the defendant. *Brokaw v. McElroy,* 162 Ia. 288; *South Dakota Central R. Co. v. Smith,* 22 S. Dak. 210; *Hawley Furnace Co. v. Hooper,* 90 Md. 390; *Carter v. Butler,* 264 Mo. 306.

The facts established by the record clearly indicate that this note was not an accommodation note, though if it were she would not under all the circumstances be relieved of liability.

As heretofore intimated, the record contains no evidence on the part of the appellee, save the identification of the note by Mr. Wollmer, and it does not show all of the conversation had upon the lengthy settlement conference at Walthill. The bill of exceptions is entirely silent as to what the appellant said during the meeting, though it is in evidence that she received her rent money from her son George through the bank. We take it, however, from what she did then and immediately thereafter, a strong and indeed necessary inference arises that she knew what she was doing in giving her note for $3,600 to the bank and that she thereby intended to help her son while incidentally helping herself. It is a legitimate inference that the appellee made and gave said note in order to induce the bank to forbear from compelling payment on some of George's indebtedness, also to secure the surrender of certain of George's notes, and finally to get her rent.

Consideration for the making of the note was established beyond question.

We are not unmindful of the case of *Central Nat. Bank v. Ericson,* 92 Neb. 396, and have no quarrel with the statements of law therein appearing. The writer of the opinion in that case stated the law in regard to the credibility of witnesses in a most admirable manner. In that case there was a dispute of facts and a matter of resolving that dispute to determine what the true fact was. In this case, construing all of the facts which the evidence tends to establish most favorably for the appellant and most unfavorably for the appellee, the jury

must have found for the appellee had the case been submitted to it.

"If from the undisputed facts different minds might not honestly reach different conclusions or draw different inferences without reasoning irrationally, it is not error on the part of the trial court to withdraw the case from the consideration of the jury and order a verdict consistent with the facts." *Knapp v. Jones*, 50 Neb. 490. The Nebraska cases are all in consonance with this holding. It does not conflict in the least with the settled rule that, where there is such a conflict of the evidence that a verdict might reasonably be found in favor of the plaintiff, it is error for the trial court to instruct the jury to find for the defendant.

We are convinced that the district court was right in its order and judgment and that its judgment should be affirmed.

AFFIRMED.

MINNIE STRUVE, APPELLEE, V. CITY OF FREMONT, APPELLANT.

FILED OCTOBER 27, 1933. No. 28856.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY. In compensation cases an injury is received in the course of the servant's employment when the latter is engaged at the work which the master employs him to perform or in some duty incidental thereto. *Speas v. Boone County*, 119 Neb. 58.
2. ———: ———: CONSTRUCTION. Though the provisions of the compensation law should be carefully followed where the meaning and limitations of its language are plain, technical refinements of interpretation will not be permitted to defeat the law's effectual operation or its kindly and beneficial purpose.
3. **Evidence.** An ultimate fact, fairly and reasonably inferable from facts and circumstances proved, may be taken as established. *Perry v. Johnson Fruit Co.*, 123 Neb. 558.
4. **Master and Servant:** WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY. By legitimate inference from the facts proved we find that the deceased came to his death while work-

ing for his employer within the scope of his employment and in the course of his duty.

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

Ziegler & Dunn and *G. W. Becker,* for appellant.

Waldo Wintersteen and *J. C. Cook, contra.*

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

SHEPHERD, District Judge.

Whether the judgment of the district court, awarding compensation for the benefit of the widow of Harry D. Struve in the case of Minnie Struve v. City of Fremont now on appeal, shall be upheld in this court is the question for determination here.

The assignments of error are only two, namely, the court erred in finding that the deceased was engaged in the line of his duty at the time of his death; the court erred in not finding that Struve's death was due to his own wilful negligence.

Harry D. Struve had long been the head of the Fremont fire department, a working chief who went to the fires night and day in his own car whenever the call for service came. He was a 24-hour-a-day fire chief, and on regular shift beside.

According to his routine, he was early at the station in the morning—sometimes before breakfast, sometimes immediately after—to inspect equipment, give orders and attend to anything immediately pressing. Through the day he was commonly at the engine fire house or about town to look after fire plugs, buildings and other matters in connection with the work of the department. At night, if nothing detained him, he was at home to eat and sleep, though always ready to answer calls or to labor or direct in any matter of emergency.

For his services he received $150 a month, and the city paid for the gas and oil and repairs necessary for

his automobile. He used this automobile, not only on the alarm of fire, but to take him about town according to his employment, also to convey him to and from his home in the performance of his duties. Occasionally he used the car for family purposes or for his own convenience. Its primary use, however, was for the city and the fire department.

The city, by its council or governing body, passed an ordinance in due form authorizing and delegating him to attend a firemen's convention in Omaha in order that he might have opportunity to study methods of fire-fighting and department management and to counsel with other chiefs and firemen of experience. He had been attending this convention on the day before the day of his demise, and was expecting to attend again on that unfortunate day. He was also to take another Fremont fireman with him in his car.

He arose early in the morning that day and went out, saying to his wife, "I can't sleep any longer, I am going up to the station for a minute." After dressing and preparing breakfast his wife found him dead or at the point of death in his car, the victim of monoxide gas poisoning. One of the doors to the garage in which the car was standing was open, the hood on the carburetor side was up, the engine was running, and the man was lying on his side on the cushions, his feet upon the running-board and his hand hanging forward as if he had been reaching for the choke when unconsciousness came upon him.

The open door, the posture of the body, together with evidence that it had been the practice of the deceased to tune up the car in the morning, and that the car had been hard to start recently, put suicide out of question. No defense on that ground was made in the trial court, nor is the same presented in this court.

Numerous cases have been cited in which employees have been injured or killed while going or coming on their own responsibility, or while they were abroad on their own business or for their own pleasure, or while

they were using means of conveyance not permitted by their orders and not designated by their employers. In these cases recovery was denied.

But these cases have no application to the facts in the case at bar. The deceased was preparing his car to carry him to his fireman's duty, it matters not whether to his morning inspection or to Omaha to his firemen's school. He was a 24-hour-a-day man and his car was the means of conveyance designated by the council and actually operated at the expense of the city. Great dependence is placed by the appellant upon the case of *Siedlik v. Swift & Co.*, 122 Neb. 99. In that case the injury was held noncompensable as not arising in the course of employment. The fact was that Siedlik was going to work at about 6:30 in the morning and stepped into a hole near the depot. He had not yet reported for duty. Generally speaking, he was going and coming on his own responsibility and on his own time. His going and coming had no connection with the duties of his employment, nor was what he did or failed to do in any way connected with his employer's business. The distinction is plain; we repeat that Struve was about his master's business in the way designated by his master and in the use of a car devoted to his master's business.

The following Nebraska cases give warrant to this conclusion: *Perry v. Johnson Fruit Co.*, 123 Neb. 558, *Tragas v. Cudahy Packing Co.*, 110 Neb. 329, and *Speas v. Boone County*, 119 Neb. 58. In the case last cited the court said that an injury is received in the course of employment when the workman at the time of the injury is engaged in work for which he is employed or work incidental thereto.

By legitimate inference from the facts proved we find that Mr. Struve came to his death while working for his employer within the scope of his employment and in the course of his duty.

An ultimate fact, fairly and reasonably inferable from facts and circumstances proved, is to be taken as established. *Perry v. Johnson Fruit Co.*, 123 Neb. 558.

It remains to consider the second contention of the appellant, namely, that the court erred in not finding that Struve's death was due to his own wilful negligence. Our statute provides that "wilful negligence shall consist of (1) deliberate act, or (2) such conduct as evidences reckless indifference to safety, or (3) intoxication at the time of injury, such intoxication being without the consent or knowledge or acquiescence of the employer or the employer's agent." Rev. St. 1913, sec. 3693, as amended by Laws 1917, ch. 85, sec. 23. The condition of the appellant therefore must be decided upon the definition of such conduct as evidences reckless indifference to safety. Certainly, "deliberate act" is not inferable from the evidence. A deliberate act would be a suicidal act; and Struve was no suicide but a fireman dead in the line of duty. He was in his prime, happily married, possessed of honorable and lucrative employment. He owed no money; he had no troubles save those of his busy and dangerous avocation. He was of cheerful disposition and full of the joy of life.

The term "reckless indifference to safety" has had approved definition in the holdings of this court. " 'Reckless indifference to safety' as used in the statute means more than want of ordinary care. It implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in degree, a willingness to take a chance." *Farmers Grain & Supply Co. v. Blanchard,* 104 Neb. 637. Considering all of the circumstances and giving all of the evidence in the record its full weight and effect we have no difficulty in deciding that Struve's act was not wilful negligence. He may have taken a chance wittingly or unwittingly, but if he was negligent such negligence did not amount to wantonness or that which approximates it in degree. In the opinion of the court his negligence, if any, did not approach that of the injured man in the *Blanchard* case above cited. The man looked west and presumably saw the train approaching and then proceeded between the main and passing tracks

in the direction of the station at a dog trot. As he angled off he was struck by the engine. The district court reversed the award of the commissioner who found for the claimant. This court, however, reversed the district court and remanded the case with directions, the opinion being written by Letton, J.

Though the provisions of the compensation law should be carefully followed where the meaning and limitations of its language are plain, technical refinements of interpretation will not be permitted to defeat the law's effectual operation or its kindly and beneficial purpose. *Baade v. Omaha Flour Mills Co.*, 118 Neb. 445.

Finding, as we do, that Struve's death occurred while working for his employer and within the scope of his employment, and finding also that he was in no wise guilty of wilful negligence, we are of opinion that the award of compensation must be sustained. The court below was right in its disposition of the case and its decree should be and is

AFFIRMED.

BESSIE E. SAXTON, GUARDIAN, APPELLANT, V. SINCLAIR REFINING COMPANY, APPELLEE.

FILED OCTOBER 27, 1933. No. 28866.

1. Master and Servant: WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY: PROOF. Awards for compensation in proceedings under the workmen's compensation law are not to be based upon possibilities or probabilities, but only upon sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment.
2. ———: ———: ———: BURDEN OF PROOF. In order to recover in a compensation case, the burden is upon the plaintiff to show with reasonable certainty that his or her ailment was caused by the injury sustained; and this proof must be made by substantial evidence leading either to the direct conclusion or to a legitimate inference that such is the fact.
3. ———: ———: ———: PROOF. In compensation cases it is incumbent upon the plaintiff to make his case by a preponderance of the evidence.

4. ———: ———: APPEAL. "Where a motion for a new trial, alleging errors of law occurring at the trial, is interposed in a proceeding under the workmen's compensation act, the thirty days within which an appeal shall be perfected from the district to the supreme court commences to run on the overruling of the motion." *Lincoln Packing Co. v. Coe*, 120 Neb. 299.
5. ———: ———: ———: AFFIRMANCE. The evidence has been examined and compared and the court finds that the disorder suffered by the appellant's ward was in no way caused, precipitated or aggravated by the injury which he received in his automobile accident. The judgment of the district court is therefore approved and affirmed.

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

Gray & Brumbaugh, for appellant.

Kennedy, Holland & DeLacy, Edward J. Svoboda, Ralph E. Svoboda, Walter E. Brown and *C. L. Canfield, contra.*

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

SHEPHERD, District Judge.

Upon appeal taken from the decision of the compensation commissioner awarding compensation for total permanent disability, this case was tried in the court below and dismissed on the ground that the ailment complained of did not in any wise result from the accident alleged as the cause thereof. The case is one in which Delmar Saxton is suffering from schizophrenia or dementia præcox, and in which Bessie E. Saxton, his guardian, charges that his affliction is due to an injury sustained by him in an automobile collision. The case is now here on appeal duly taken from the decision of the district court.

The assignments of error may be stated in a single sentence. The decision rendered by the trial court is not sustained by sufficient evidence and is contrary to the evidence and to the law. It may also be said that the

appellant complains of errors of law occurring at the trial and duly excepted to. But this assignment is not discussed in the brief and was not argued orally.

Errors of law occurring at the trial were presented to the trial court by motion for a new trial, as shown in the transcript, and one of the contentions of the appellee is that appellant did not perfect her appeal to this court within the time prescribed by law. It urges that since the said errors of law were not argued before the court or discussed in appellant's brief the appeal should have been perfected within thirty days from the entry of the decree. But it appears that said motion for a new trial was overruled by the trial court on the 20th of April, 1933, and that the case was docketed in this court on the 18th of May, 1933. The appeal was therefore within thirty days and in due time. This is in accordance with the rule of the supreme court announced in *Lincoln Packing Co. v. Coe,* 120 Neb. 299, the language of the opinion being: "Where a motion for a new trial, alleging errors of law occurring at the trial, is interposed in a proceeding under the workmen's compensation act, the thirty days within which an appeal shall be perfected from the district to the supreme court commences to run on the overruling of the motion."

This being disposed of, it remains only to consider *de novo* whether the condition of Delmar Saxton is due wholly or in part to the accident alleged, it being without dispute that said accident occurred while Delmar was in the employ of the appellee and upon an errand in the course of his employment.

Delmar Saxton was a youth of about the age of nineteen or twenty at the time the accident occurred. He was driving a car and delivering a piece of pipe or something of the kind; his car collided with a truck; his car was overturned and he was thrown to the ground. But he was only slightly injured, receiving a sprained thumb and a scratch upon that member or upon his hand. From that injury the appellant insists that he became

afflicted with the disorder of schizophrenia or dementia præcox, or at least that such disorder was so aggravated or accelerated as to become active and render him a confirmed sufferer from schizophrenia, completely and permanently disabled.

The defense is that the accident bore no relation to his condition; that at the time of its occurrence he was subject to schizophrenia, had long suffered from it and had long been treated for it; and that such injury as he received from the accident in no degree excited it or accelerated it.

A great deal of time was consumed upon trial by testimony to the effect that the boy Delmar was a brilliant student in the high school and that his accomplishments there were many. However this may be, if he is to recover in this case it must be upon the ground that the accident was the cause of his disablement, or aggravated it. Otherwise his injury cannot be held compensable. Deplorable as it is that a boy of so much early promise has become the victim of schizophrenia, the rule must go further. The burden of proof is upon him, and in order to compel compensation from his employer he must prove by a preponderance of the evidence that there was a direct causal connection between his disorder and his automobile injury. Nor can such proof be made upon possibilities or even probabilities.

The evidence is exceptionally voluminous and the briefs exceedingly lengthy; and since under the comparatively new law the court is trying the case anew and making an independent finding upon the evidence an exhaustive study has been made of the whole record. Much time has been expended by the writer in reading the bill of exceptions and in comparing all of the evidence. The case is important, involving as it does the future of the boy, and should receive and has received full consideration at the hands of the court,—none the less because of the extraordinary zeal of appellant in her discussion of the evidence.

It is plain, we think, that schizophrenia or dementia præcox or the glandular deficiency described by some of the witnesses are very much alike. The terms were much used as interchangeable by the specialists on the stand. The court has no difficulty in arriving at the conclusion that for the purposes of this case all refer to the same thing, i.e., the condition from which young Saxton is now complaining.

Delmar Saxton, Mrs. Bessie E. Saxton, Dorothy May Saxton, Robert Saxton and Howard Saxton, all of the immediate family, testified in substance that Delmar was almost beside himself after the accident, wildly excitable, nervous, critical of his sister and rough of manner toward her, distraught in his appearance, slovenly in his dress, and abnormal in most of his actions. Some of them testified that he appeared fearful to an extreme degree and had delusions and hallucinations of a pronounced character. Some of these statements were sharply checked upon cross-examination as to dates and circumstances. It was shown unmistakably that for more than ten days immediately following the accident he worked with diligence and effectiveness for his employer. Nevertheless, the evidence of these witnesses plainly indicates that he was in a period of great stress for several days before January 18, 1931, when he was taken to the Bailey Sanatorium at Lincoln.

Neither Delmar, his father, his family nor anybody else included any reference to the accident in the history which they gave to Dr. Bailey at that time, nor was he informed of it till after the trial before the commissioner, long afterward.

Where a person has an accidental bodily injury, followed briefly by a severe and permanent mental disorder such as schizophrenia, and where he has at all times been mentally sound and healthy before, men might naturally conclude that such injury was the cause of such disorder; but if it were made known to them that he had had such disorder for several years before, with sharp attacks

down to the date of the accident, they would not be apt to so decide. And if in addition it were shown that the said bodily injury was not to the head, trunk or spinal column, but consisted of no more than a sprained thumb and a scratched hand, they could be expected to agree that the injury was not the cause of the condition and had no causal connection therewith. We think they would so find even without reference to the preponderance evidence rule which the law would impose upon the plaintiff.

The case of the defense is stronger than that presented by way of illustration above. The subject had displayed the symptoms of schizophrenia in 1926, 1927, 1928 and 1929. Dr. Young, his own witness, discloses in his testimony that he treated him in November of each of the last three years and that his history clearly indicated the presence of the disease in all of them. He had had his periods of diffidence and timidity, his periods of moroseness, his periods of extreme excitation and irritability, his periods of delusions, his periods of wild and unnatural laughter, his periods of fear, his periods of abnormal use of tobacco, his periods of unnatural and unhealthy practices, his periods of desire to commit suicide, his periods of belief that he was being imposed upon and was the object of attempt to do him ill, and, along with these, his periods of remission in which his conduct was practically as it should be. All indicated, in the opinion of all of the experts, that he was afflicted with schizophrenia. This is established beyond question by the evidence; no reasonable person could conclude to the contrary upon reading the record.

The father of the young man, himself a lawyer of standing at the bar, realized the capacity of his son in the high school and hoped that the boy would follow in his footsteps and become a member of his great profession. He accordingly made every effort to persuade him to go to law school. Delmar did indeed matriculate at Creighton College, but attended only two classes and then refused to continue. No doubt there was much sorrow

and possibly some words on that account. Soon afterward Delmar secretly withdrew his savings from the bank and disappeared, leaving a note declaring that none of his family would ever see him again. According to his own story, he felt that if he did not break away from his relatives and surroundings in Omaha he would not be able to refrain from suicide. He went to California, riding partly on the train and hitch-hiking the remainder of the way. For a time he was employed there by a drug firm and went along very well in that employment. But this did not last. The record discloses that he fell in with bad associates, indulged to a greater or less degree in homosexual relations with one of them, dropped into the notion of suicide again and was only prevented therefrom by arrest upon the beach. Subsequently one of his associates wired his parents, who were already advised that he was in California, stating that Delmar was in danger of committing suicide and asking for $150 that he might bring him home. His father sent him transportation through the Y. M. C. A. and Delmar returned by himself, arriving in good spirits. This was in the fall of 1927. After that for some months he seemed fairly content and worked comparatively steadily in a store which was conducted by his mother pending the settlement of an estate but even during that time he had trouble with an employee and was accustomed to remain unusually long in an outside toilet. This was also his habit during his later employment at the Sinclair plant, as remarked and testified to by a number of his fellow employees. And he was once admonished by the superintendent for so doing.

After the disposal of the store he returned to Omaha and sought employment. He was first given a position in the offices of the Union Pacific, where he either lacked experience or was unable to apply himself successfully to the duties demanded by his employment. Consequently he remained there but a week, and was again looking for a job. He obtained a job with the Sinclair Oil Company,

the appellee, going to work for that concern at its plant in December of 1928. It was there that he was said to have had one or more or several relapses or periods of unusual mental disturbance characteristic of schizophrenia and dementia præcox. Dr. Young, his own specialist and expert witness, diagnosed his trouble as this disease in 1927.

There seems to be no dispute among the experts that those afflicted with schizophrenia have recurring periods of stress and remission, ordinarily termed relapses and remissions. During relapses the afflicted commonly exhibits greatly increased excitement or depression, indulges in bizarre conduct and entertains delusions. Remissions occur between the relapses and are usually of much greater length in point of time. Dr. Royal, one of appellant's witnesses, says that no one can tell the particular cause of this and that relapse, though he recognizes sexual difficulty and traumatic injury as responsible for some. It would probably suit the expert to say in any particular case, "I wish I knew." One of the experts for the appellant so testified in this case in speaking of the general rule. Dr. Bailey, a specialist of long experience in cases of the mind and also a witness for the appellant, said in answer to a hypothetical question, in substance, that he considered it possible that the injury was responsible for Delmar's condition, but never in a single instance did he say that he was convinced that such was the case. Several of his answers, and indeed the burden of his answers, were as follows: "Assuming those premises, which the history does not quite show, I would naturally be suspicious that it (referring to the accident) might have caused it." He had testified before, it having been made plain that neither Delmar nor his father nor the plaintiff nor any one else had made any mention of the accident at the time he was received at the sanatorium, in these words: "Well, the history does not seem to show, as I have it, that he was free from nervous conditions of marked type before that." Another of his answers

was: "I should be suspicious that he had had a shock which had disturbed an unstable nervous system." And again he said: "I would think it might be very possible that any shock would accentuate a condition which seems to be present to a greater or less extent under the history." And, finally, he said, under the questioning of deputy commissioner Dutton: "I think my answer would be the same as before; that I would feel the shock of the accident very probably had something to do with awakening the previous trouble and aggravated it." Furthermore, upon cross-examination, in answer to a hypothetical question describing Delmar's activities immediately following the accident and for a period of nearly twenty-four days after, he declared that he would not be willing to have an opinion definitely that the accident had nothing whatever to do with his ailment. As to the lighting up of schizophrenia by the shock of the accident, his answer was: "It is quite possible." He further said: "I would fear the result of any shock in such a condition." Dr. Royal testified in much the same manner, saying that it would be possible. Dr. Young testified that he was of the opinion that the accident as described might have had an aggravating or precipitating effect. The testimony of the experts for the appellant is full of "mights," "mays," "possible," and "fear." "Quite probable," "might be possible," and "very probable" recur again and again. Nowhere in the record is there stronger evidence on the part of the experts for the appellant, when the whole of it is compared and analyzed, than might be summarized in this expression: Very probably the injury caused the condition or aggravated, excited or accelerated it. On the other hand, all of the experts for the appellee were strongly of opinion to the contrary, and so testified, justifying their opinion by reasoning that was proof against cross-examination and convincing to the court. The court concludes that the preponderance of medical opinion was to the effect that the injury received in the accident had nothing to do with the disorder.

No recognition of the doctrine that because an injury may probably be the cause of an ailment the court should so find appears in our decisions. It may be so in other states, but not in this jurisdiction. The Nebraska rule, often pronounced and adhered to, is that in proceedings under the workmen's compensation law awards for compensation are not to be based upon possibilities or probabilities, but only upon sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment. *Bartlett v. Eaton,* 123 Neb. 599; *Townsend v. Loeffelbein,* 123 Neb. 791; *Kuhtnick v. Carey,* 124 Neb. 762. Going further, the rule is that the burden is upon the plaintiff to show with reasonable certainty that his or her ailment was caused by the injury sustained; and this proof must be made by substantial evidence leading either to the direct conclusion or to a legitimate inference that such is the fact. *Omaha & C. B. Street R. Co. v. Johnson,* 109 Neb. 526; *Bartlett v. Eaton,* 123 Neb. 599; *Townsend v. Loeffelbein,* 123 Neb. 791; *Mullen v. City of Hastings, ante,* p. 172.

Furthermore, the law by which this court must be guided in its independent finding and in its decision of this case is to the effect that in compensation cases the burden is upon the claimant to establish by a preponderance of the evidence that the alleged resulting disability is due to the injury complained of. *Pensick v. Boehm,* 124 Neb. 28; *Bartlett v. Eaton,* 123 Neb. 599, and cases hereinbefore cited.

Although our court has heretofore decided that mental disorder may result from trauma and may be lighted up, aggravated and set in motion by trauma, it has at no time declared or recognized in its opinions that such a disorder often occurs from such a cause. The fact, if it be a fact, has comparatively few instances to justify the view; so few that in any given case the probability may be properly indulged that trauma is not the cause of an ailment of the kind mentioned. By far the greater number of cases in which recovery has been permitted

in cases of dementia præcox or the like, alleged to have resulted from trauma, are cases in which the injury was to the head and had a direct physical connection with the brain. The reason seems to be that direct injury to the head may be severe enough to cause structural lesions of the brain thereby becoming the immediate cause of some form of insanity or mental weakness.

In the case at bar the evidence of the appellant is entirely insufficient to connect his dementia with the accident suffered; and though his disability may have happened from trauma or from sexual disturbance or from narcotics or from accident of birth, the court cannot say, as it must say if recovery is to be had, that it happened from any particular one or other of them. The evidence does not justify it.

In an Illinois case, *Standard Oil Co. v. Industrial Commission,* 322 Ill. 524, the court said: "The liability of an employer under the compensation act cannot be based on a choice between two views equally compatible with the evidence but must be based on facts established by evidence, and where the cause of injury or death is equally consistent with an accident and with no accident, compensation will be denied." Under this rule, which is far more favorable to a claimant than the Nebraska rule, no finding for the appellant can properly be made. Stripping the case of a great deal of unnecessary and immaterial matter and from the rancor of the battle extending almost to unwarranted disparagement of witnesses and parties and from sympathetic appeals which cannot be properly considered, and giving every material detail of the evidence its due weight and effect and impartially applying the law, it is impossible for the court to conclude that the accident in question was in any way responsible for Delmar Saxton's condition. We conclude that the appellant had long suffered from schizophrenia or dementia præcox before the accident which he sustained, and that the accident contributed nothing to its relapses, and that the trial court was correct in his findings and decree.

Finding as we do, the decision of the trial court must be upheld and its decree affirmed. It is so ordered.

AFFIRMED.

PAINE, J., dissenting.

I find it impossible to agree with the opinion rendered in this case by a majority of the court, and therefore file this dissent.

It is stated in the opinion that the disorder from which Delmar Saxton was suffering was in no way caused, precipitated, or aggravated by the injury which he received in his automobile accident; that the bodily injury he suffered from his accident was not to his head, trunk, or spinal column, but consisted of no more than a sprained thumb and a scratched hand. But let us remember that, in the trial of this same case before the compensation commissioner, he found that the plaintiff, while in the employ of the defendant, sustained personal injuries in an accident arising out of and in the course of his employment, by the wrecking of the automobile which he was driving, thereby causing great mental and nervous shock to the plaintiff, of such a nature and extent that his previous nervous and mental condition was accelerated, excited, and aggravated, thereby causing a complete nervous and mental breakdown to the plaintiff on January 15, 1931, and that, as a result of said accident, plaintiff has been totally disabled from and after the 15th day of January, 1931. It is a matter of common knowledge that many soldiers in the battles in the Argonne Forest suffered shell shocks which did not even scratch a thumb, and yet, from the shocks thus received, they will be disabled and live in sanatoriums all the remainder of their days. In one case an employee's back was broken, and the insurance carrier attempted to avoid an award for permanent incapacity of both legs on the ground that there was no actual injury to the feet or legs, but only to the spinal cord, although the lower limbs were paralyzed. *Burns' Case,* 218 Mass. 8.

In the main opinion, the answers of the experts, Dr.

Bailey, Dr. Royal and Dr. Young, are said to be filled with indefinite statements, as "mights," "mays," etc., and from this fact a conclusion is drawn that the shock received in Delmar Saxton's accident had nothing to do with his present insanity. Has the study of mental diseases reached that state of development in which a skilled expert of great experience can be expected to state absolutely and positively, when under oath, the exact degree of resulting insanity which was due to the shock of a serious accident? I do not so understand it.

And yet, let us examine just one answer of Dr. G. A. Young, who had been superintendent of both the Lincoln and Norfolk state hospitals for the insane. He is asked a hypothetical question, being No. 530, which recites all the facts proved by plaintiff, and is then asked to give his opinion. His answer is: "I *have* the opinion that the emotional shock of trauma which Delmar Saxton suffered December 6, 1930, had an aggravating or precipitating effect in bringing about this acute mental disturbance of the latter part of December and the middle of January." Is not that a positive, but conservative, answer of a careful expert who *knows,* but refrains from overstatement?

Mrs. Bessie E. Saxton, the mother of Delmar, testified that Delmar went to work for the Sinclair Refining Company in December, 1928, working continuously, without any vacation, until January 15, 1931, excepting once when he quit work because he did not receive a raise in salary, and was off work two or three days. During those three days he was at home, there was no change in his appearance, or no threats of suicide, or no evidence of nervousness or mental disturbance because of the refusal to increase his pay. She says he was never absent from his work for the Sinclair Refining Company on account of illness, physical, mental, or nervous. The accident occurred December 6, 1930, and he had to be taken to Green Gables Sanatorium, Lincoln, on January 18, 1931.

A study of the photographs taken shows how terrible the shock of the collision must have been. Delmar's light car was crushed against the curb, both wheels on that side were snapped off, and the automobile finally came to rest against a tree, upside down in a slanting position, resting on its top and hood, in which position the storage battery acid ran over Delmar, ruining his clothes. It seems incredible that he escaped being killed.

A workman received an injury in the course of and arising out of his employment, through a splash of molten lead into his eye September 17, 1913. He was treated at a hospital until October 13, 1913, when he threw himself from a window and was fatally injured. There was evidence tending to show that, although for a time after the injury the deceased was in his normal temperament, which was hopeful and joyous, he then became silent and moody, and was depressed, and suffered from certain kinds of hallucinations. The medical testimony was to the effect that probably there was developed from the accident a mental disturbance, accompanied by delusions and hallucinations, and that as a result he committed suicide. It was held that the evidence was sufficient to justify a finding that the insanity was incurred as a result of the accident received in the course of his employment, the court saying that, although the finding in this respect was supported by a rather slender thread of evidence, it was not unsupported, and therefore must stand.

To show how far some courts have gone, we find in this case that, in discussing the burden of proof, Chief Justice Rugg, of Massachusetts, said: "Of course this does not mean, as was said by Lord Loreburn in *Marshall v. Owners of Steamship Wild Rose* (1910) A. C. 486, 'that he must demonstrate his case. It only means that if there is no evidence in his favor upon which a reasonable man can act he will fail.' If the evidence, though slight, is yet sufficient to make a reasonable man conclude in his favor on the vital points, then his case is proved."

Sponatski's Case, 220 Mass. 526, L. R. A. 1916A, 333, 20 A. L. R. 59, note.

English courts have held that mental, nervous, or hysterical effects of an accident are included within the term "personal injury by accident arising out of and in the course of the employment" under the compensation act. *Yates v. South Kirkby, etc., Collieries, Ltd.,* (1910) 2 K. B. 538.

It has frequently been held that hysterical neurosis as a result of an injury entitles one to compensation, as in *Linser v. Consumers Ice & Coal Co.,* Mich. W. C. C. (1916) 61, and that insanity caused by accidental injury is a proper ground for compensation. *Hayes v. Standard Oil Co.,* 1 Cal. Ind. Acc. Com. 218; *Walsh's Case,* 227 Mass. 341. Nervousness following a fall from a scaffold was held compensable. *Coslett v. Shoemaker,* 38 N. J. Law Journal, 116; 1 Schneider, Workmen's Compensation Law (2d ed.) 610, 630, 639. When an employee suffered an accident to his arm which caused hysterical paralysis, it was ordered that compensation continue as long as it should last. *Ream v. Sutter Butte Canal Co.,* 2 Cal. Ind. Acc. Com. 187; *Guay v. Brown Co.,* 83 N. H. 392, 60 A. L. R. 1284.

Even though an accident may not produce an anatomical pathology, nevertheless if the workman does, in fact, become disabled as a result of that accident, the injury is compensable, although such disability may be the result of hysteria, and may be traceable to a mental condition and not a physical disorder. *Wilkinson v. Dubach Mill Co.,* 2 La. App. 249; *United States Fuel Co. v. Industrial Commission,* 313 Ill. 590; *Harris v. Castile Mining Co.,* 222 Mich. 709.

A woman, in an effort to avoid injury from a broken pulley flying from a machine, strained her left leg and fell against a machine, causing her to suffer from traumatic neurasthenia. It was held that, even though this disease exists only in the mind of the sufferer as a hysterical condition, she had no power to prevent this mental

condition, and is entitled to compensation for the results of the accidental injury. *Brewster v. Hemingway & Sons Soap Co.*, 2 Conn. Comp. Dec. 128; 1 Schneider, Workmen's Compensation Law (2d ed.) 610, sec. 205.

In *Skelly Oil Co. v. Gaugenbaugh*, 119 Neb. 698, it was held that "it is sufficient to show that the injury and preexisting disease combined to produce disability, and not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement of the statute that the accident arose out of the employment." Other Nebraska cases of interest are *Gilcrest Lumber Co. v. Rengler*, 109 Neb. 246, 28 A. L. R. 200; *Marler v. Grainger Bros.*, 123 Neb. 517; *Van Vleet v. Public Service Co.*, 111 Neb. 51; *Miller v. Central Coal & Coke Co.*, 123 Neb. 793; *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1; *Watkins v. Brunswick Restaurant Co.*, 123 Neb. 212.

In the opinion of the writer of this dissent, the evidence shows that Delmar Saxton was not only a popular scholar, being elected president of his class in the eighth grade, but also a brilliant scholar in the Central high school at Omaha, with rarely a B upon his report card, and being one of those out of a class of 400 to be elected to the National Honor Society. He was editor-in-chief for two years of the high school paper, and wrote first-page articles while working for the World-Herald. He was somewhat nervous and high-strung, and, failing to get a job to his liking upon graduating from high school, hitch-hiked to California, as other boys have done, and there practiced some bad habits and showed evidence of minor mental disturbance. He returned to Omaha and settled down. He followed advice given him by Dr. Young, a leading psychiatrist, and conquered some of his weaknesses, and became a faithful, hard-working member of society at $75 a month for the Sinclair Refining Company. He performed exacting duties of a warehouse clerk, made deposits of their funds in their bank account, and as a stenographer got out reports and letters for

some two years. On December 6, 1930, an extension pipe had to be taken immediately to a customer's residence, for a tank was on the way out to make a delivery. This was not Delmar's job, but he not only volunteered to do the job, but volunteered to use his own car, as the two company cars were out of commission at the moment. The collision was without fault on his part, but the terrific shock of this accident overcame his mental balance, and aggravated his mental condition so that in a few weeks he became insane, and has since been confined in Green Gables Sanatorium.

His former employer has contested this case at every step of the road, bringing a former general agent from Fort Worth to testify, as well as the surgeon-in-chief of the company from Tulsa. The thick brief of 166 pages attests to the battle royal which has been waged to avoid the payment of compensation awarded by the commissioner in this case. All of these things are entirely proper, and within its legal rights, and appear to have brought victory and established a precedent which will be of great value to this far-reaching company.

The writer of this dissent believes that we have a case squarely in point in *Faulhaber v. Griswold,* 124 Neb. 357. There a Lincoln young lady received a bump on the head in an automobile collision. She suffered from shock and headaches, and in a few days showed mental disturbance, which grew at an alarming rate, and in a few weeks it was necessary to commit her to a state hospital for the insane, where she now remains. In this opinion Judge Good said: "The evidence on behalf of defendants is to the effect that plaintiff is suffering from dementia præcox; that it is an inherited disease, and that the injury, shock and fright did not cause or contribute to her condition. Medical testimony on behalf of the plaintiff tends to show that she might have gone through life without ever developing dementia præcox but for the injury, resulting in the shock and fright, and that, in

the opinion of such witness, the injury, shock and fright caused the development of the disease."

It was my understanding that in this case our court had established a precedent that the shock of an accident may cause or precipitate dementia præcox, and in my opinion the case at bar is a parallel case, clearly established by the evidence of well known experts in mental diseases called by the plaintiff, and warrants this court in reversing the lower court and in reestablishing the judgment for compensation awarded by the compensation commissioner, at the rate of $12 a week, beginning January 15, 1931, with attorney fees and other costs.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. BANK OF CAMPBELL, E. H. LUIKART, RECEIVER, APPELLANT: JOE GAGNON ET AL., INTERVENERS, APPELLEES.

FILED NOVEMBER 10, 1933. No. 28586.

Banks and Banking: GUARANTY FUND: DEPOSITS: PREFERENCES. By the use of the term "otherwise secured" in the statute providing that depositors in state banks "not otherwise secured" shall have the first lien on the assets, the legislature intended to exclude from participation in the lien "only such depositors as take security for their deposits, and in some degree deplete the assets of the bank and to that extent secure an advantage over other depositors." *State v. State Bank of Omaha*, p. 492, *post*.

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

F. C. Radke and *Barlow Nye*, for appellant.

Leon Samuelson and *Howard S. Foe, contra.*

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

ROSE, J.

In a proceeding by the state in the district court for

Franklin county to wind up the affairs of the Bank of Campbell, an insolvent corporation, Joe Gagnon intervened and presented for allowance on an equality with preferred claims of depositors generally a claim for $2,600 based on a certificate of deposit issued by the bank to him February 4, 1931, and bearing interest at the rate of 4 per cent. per annum. Malvina Trambly also intervened and likewise presented a claim for $2,787.28 based on a certificate of deposit issued by the bank to her April 23, 1931, and bearing interest at the rate of 4 per cent. per annum.

The receiver resisted the allowance of the certificates of deposit as preferred claims on the ground that they were secured and therefore not in the class of deposits "not otherwise secured," within the meaning of the statute providing that depositors in that class shall be preferred and have the first lien on the assets of the bank. Comp. St. 1929, sec. 8-1,102.

The district court allowed the certificates of deposit as valid preferred claims on a par with the claims of other depositors having the first lien. The receiver appealed.

On appeal the receiver contends that the certificates of deposit were secured by a guaranty of payment indorsed on the back of each and that consequently they were "otherwise secured" and excluded from the class entitled to the first lien on the assets, within the meaning of the statute.

A guaranty was in fact indorsed on the back of each certificate of deposit. C. F. Gund, E. G. Peterson, P. H. Raun, and R. Haagensen, officers of the bank, individually indorsed the guaranty on the back of Gagnon's certificate. E. George Peterson, who was president of the bank, indorsed the guaranty of "E. J. Peterson Co." on the back of Trambly's certificate of deposit. Neither guaranty increased the obligations of the bank. If the indorsements could be considered corporate obligations they add nothing new to the liability created by the certificates of deposits. If the indorsements are individual liabilities they do not increase the obligations of the bank or take any asset or

other security from depositors generally. Nothing was taken from the bank's assets for the benefit of interveners or pledged as collateral for the certificates of deposit or indorsements. No part of the bank's assets was used in procuring the guaranties. In this situation the question presented by the appeal has already been determined by an opinion containing the following conclusion:

"Considering all the statutes upon the subject of banking and the general purpose of the legislature, as disclosed by the several legislative acts, we are impelled to the view that, by the term 'otherwise secured,' the legislature intended to exclude from participation in the lien on the bank's assets only such depositors as take security for their deposits, and in some degree deplete the assets of the bank and to that extent secure an advantage over other depositors." *State v. State Bank of Omaha*, p. 492, *post*.

For the reasons stated in the opinion from which the excerpt is taken, the judgment of the district court is

AFFIRMED.

ALICE J. MURPHY, APPELLANT, V. ROBBIN I. SHIBIYA, APPELLEE.

FILED NOVEMBER 10, 1933. No. 28600.

1. **Automobiles: INJURY TO GUEST: NEGLIGENCE OF DRIVER: DUTY OF GUEST.** The negligence of a husband while driving his automobile with his wife as his guest may not be imputable to her, but she may be responsible for the consequences of her own negligence in failing to warn him of known approaching danger and to protest for her own safety against his recklessness.

2. ———: ———: ———: GROSS NEGLIGENCE OF GUEST. Evidential facts outlined in opinion *held* sufficient to sustain a finding that the husband of plaintiff, his wife and guest, drove his car down grade on a known slippery pavement so fast at night, when snow was falling, that he could not stop, within the area lighted by his lamps, in time to avoid a collision with a car in front of him, and that his wife was also guilty of gross negligence concurring with his in failing to warn

him of the obvious danger and to protest for her own safety against his recklessness—the proximate cause of her resulting injuries.

3. Harmless errors in giving and refusing instructions or in rulings on evidence are not grounds for reversing a judgment.

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

Kennedy, Holland & De Lacy and *Ralph E. Svoboda,* for appellant.

Wear, Garrotto & Boland, contra.

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

ROSE, J.

This is an action against defendant to recover $10,000 in damages for alleged negligence resulting in personal injuries to plaintiff. Defendant with his wife and son in a Buick sedan and plaintiff and her husband in a Ford coupé were headed for Omaha on the paved highway from Lincoln after dark on the evening of November 26, 1931. Plaintiff was the guest of her husband who was driving the Ford behind defendant. Three or four miles beyond Gretna when the Ford was going directly north down grade from the crest of a long hill, it struck the Buick from the rear and as a result of the impact plaintiff, who was seated beside her husband in the Ford, was thrown forward and injured. It was alleged in the petition that the Ford "was proceeding down the grade on the pavement on the right-hand side thereof in a prudent and cautious manner;" that defendant, in violation of law, left his Buick on the pavement without a rear light and without leaving a passage-way 15 feet wide on the left-hand side of the main traveled highway, thus causing the collision and the resulting injuries.

The answer was a general denial and a plea that plaintiff's injuries, if any, were the proximate result of her own gross negligence concurring with the gross negligence

of her husband. The new matter in the answer was denied in a reply.

Upon a trial of the issues the jury rendered a verdict in favor of defendant. From a judgment of dismissal plaintiff appealed.

It is argued as a ground of reversal that negligence of the husband was not imputable to his wife; that there was no negligence on her part, and that the trial court erred to her prejudice in submitting the issue of contributory negligence to the jury. The evidence on behalf of plaintiff tends to prove that at the time of the collision defendant's Buick was standing on the slippery pavement in the dark without a rear light, while snow was falling and that there was not on the left-hand side the free passage-way of 15 feet required by statute. Comp. St. Supp. 1931, sec. 39-1154. On the contrary the evidence adduced by defendant tends to prove that he did not stop his Buick but was driving it carefully down the hill until it was struck in the rear by the Ford; that his rear light was shining; that he was on the right-hand side of the pavement; that the impact temporarily extinguished alike the headlights and rear light. Defendant's son testified he was in the back seat of the Buick looking out at the rear window and saw the red rays of the rear light on the snow. If defendant and his witnesses told the truth, a question for the jury, there was no negligence whatever on his part. There is also testimony tending to prove the following summarized facts: Between Lincoln and the place of the collision plaintiff and her husband had stopped two or three times to clear the windshield of wet snow. The automatic wiper kept a clear view in front of the driver. Vision through the windshield was partially obscured in front of plaintiff but she could see ahead at the lower edge of the windshield. The headlights were on. Visibility was good for 100 feet. The windshield was wiped at Gretna and was clear between there and the scene of the accident. The speed of the Ford during the trip from Lincoln was perhaps 25 miles

an hour. The snow was wet and the pavement was very slippery. There was no moon. The night was dark and snow was falling. The Ford approached the crest of the hill at a speed of 20 or 25 miles an hour and started down a grade a quarter of a mile long. Plaintiff and her husband saw the car ahead on the right-hand or east side of the pavement at a distance of 60 or 80 feet. The driver of the Ford applied the brakes within 30 feet of the Buick, but they did not hold on the slippery pavement and were instantly released. He could not stop in time to avoid a collision. He attempted to pass on the left but failed. The front right corner of the Ford struck the rear left corner of the Buick which slid 30 feet or more and came to rest while headed northeast with the front wheels on the soft shoulder east of the pavement. The Ford stopped after sliding 15 feet when headed northwest with the front end on the shoulder west of the pavement. The occupants of the Buick were jolted backward. Plaintiff was thrown forward with her face through the windshield. At the time of the accident there were no other cars near, but within a few minutes other drivers came down the hill with cars under control and safely stopped where the collision occurred. The right front wheel of the Ford was locked as a result of the impact and the pavement was so slippery that the car was driven back to Gretna with that wheel sliding instead of turning. Plaintiff herself had experience in driving an automobile. She had been out in the snow helping to clean the windshield. She knew the danger of speed on a slippery pavement. She had the same means as her husband of observing obstructions and the condition of the highway and the effect of falling snow on visibility. She testified she had been intently watching the road and had seen the object ahead as soon as her husband but never uttered a word of protest or warning about speed or management of the car. The negligence of a husband while driving his automobile with his wife as his guest may not be imputable to her, but she may be responsible

for the consequences of her own negligence, if she fails to warn him of known approaching danger and to protest against his recklessness. *Tomjack v. Chicago & N. W. R. Co.*, 116 Neb. 413; *Glick v. Poska*, 122 Neb. 102. The evidential facts and circumstances outlined were sufficient to sustain a finding that the husband of plaintiff drove his car down hill so fast at night on a slippery pavement, when snow was falling, that he could not stop, within the area lighted by his lamps, in time to avoid a collision with the car in front of him, and that his wife was guilty of gross negligence in failing to warn him of the obvious danger and in failing to protest against his recklessness —the proximate cause of her injuries. The issues of negligence and contributory negligence were questions for the jury and their verdict is supported by sufficient evidence. *Roth v. Blomquist*, 117 Neb. 444; *Glick v. Poska*, 122 Neb. 102.

It is further complained that the trial court, in giving an instruction on comparative negligence, erred by confusing the ratio of damages to negligence. In this respect the instruction related to the measure of recovery and the error did not prejudice plaintiff for the reason that the jury found she was not entitled to recover damages in any amount.

Other rulings in giving and refusing instructions are criticized, but the entire charge to the jury, when considered as a whole, does not affirmatively show error prejudicial to plaintiff. Challenged rulings on evidence are likewise free from harmful error.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. STATE BANK OF OMAHA, APPELLEE: NEW AMSTERDAM CASUALTY COMPANY, INTERVENER, APPELLANT.

FILED NOVEMBER 10, 1933. No. 28622.

1. **Banks and Banking**: DEPOSIT OF CITY FUNDS: GUARANTY FUND: PREFERENCES. Within the meaning of section 8-1,102, Comp. St. 1929, deposit of city funds in a state bank is "otherwise secured," where the city requires the bank to give depository bond and pay the premium therefor.
2. **Statutes**: CONSTRUCTION. Where a statute is fairly susceptible of two constructions, one of which would render it invalid and the other valid, the latter is to be preferred.
3. **Banks and Banking**: DEPOSIT OF COUNTY FUNDS: GUARANTY FUND: PREFERENCES. County deposit in a state bank is "not otherwise secured," within the meaning of section 8-1,102, Comp. St. 1929, where depository bond is given to the county, it paying the premium therefor, and none of the bank's assets being used in procuring the security for such deposit.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed in part and reversed in part, and remanded, with directions.*

Howell, Tunison & Joyner, for appellant.

A. M. Morrissey, F. C. Radke, Barlow Nye and *G. E. Price, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and PAINE, JJ., and BEGLEY and HORTH, District Judges.

GOOD, J.

This appeal involves the classification of claims against an insolvent state bank. Intervener sought allowance of two claims, with a classification of deposits "not otherwise secured." The trial court allowed them as general claims. Intervener has appealed.

The record discloses that the State Bank of Omaha had been duly designated as a depository for the funds of the city of Omaha and also for the funds of the county of Douglas. To secure the city funds, the bank gave a depository bond, with intervener, New Amsterdam Casualty Company, as surety, the bank paying the premium

for the bond. A bond was also given to the county for security of its funds, with intervener as surety. On this bond the county paid the premium. None of the bank's assets were used in securing the county deposit. When the bank was closed because of insolvency the city had on deposit $8,676.09 and the county $40,000. Intervener paid to the city and county, respectively, the amount of their deposits, took from each an assignment of its claim against the bank, and presented them for allowance.

It is conceded that, by the payment of the amount of the deposits to the city and county and by taking assignments from them, the intervener has become subrogated to all the rights of the city and county. The receiver contends that because depository bonds were given the claims are "otherwise secured" and were properly allowed as general claims only.

The questions presented by this appeal depend upon the proper interpretation of section 8-1,102, Comp. St. 1929, which, in so far as applicable to the present controversy, reads: "The claims of depositors, for deposits, not otherwise secured, * * * shall have priority over all other claims, except * * * taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation * * * and, upon proof thereof, they shall be paid immediately out of the available cash in the hands of the receiver. If the cash in the hands of the receiver available for such purposes, be insufficient to pay the claims of depositors whose deposits are not otherwise secured, * * * the court in which the receivership is pending, or a judge thereof, upon hearing shall determine the amount required to supply the deficiency and cause the same to be certified to the department of trade and commerce as a claim entitled to the benefits of the depositors' final settlement fund." Previous to the adoption of this section in its present form in 1929, the language was substantially the same except that depositors' guaranty fund was used instead of depositors' final settlement fund. The interpre-

tation of this section has been before this court on two occasions.

In *State v. First State Bank of Alliance,* 122 Neb. 109, it was held: "A city that exacts from a state bank collateral security for deposits, receives the proceeds of the security after insolvency of the bank and presents to the receiver a claim for excess of deposits over such proceeds, is in the class of depositors 'otherwise secured' and not entitled to share the assets of the bank on an equality with depositors in the class 'not otherwise secured,' within the meaning of the statute providing that depositors and holders of exchange in the latter class shall have the first lien, with the exception of taxes."

In *State v. First State Bank of Alliance,* 122 Neb. 502, it was held: "Where a county deposits its funds in a state bank and exacts as security therefor a pledge of some of the bank's assets, and also exacts a depository bond as further security, such deposit is one otherwise secured and is not entitled to share a lien on the assets of the bank on an equality with depositors in a class not otherwise secured."

In each of the above cases assets of the bank were pledged to the depositors, and the depositors thus secured a preference over other depositors to the extent that the assets of the bank were pledged. In those cases it was properly determined that the claims were "otherwise secured" and were not entitled to the lien afforded by the statute to depositors "not otherwise secured."

Intervener's first cause of action is based on the deposit made by the city of Omaha. Some portion of the bank's assets was used to pay the premium on the city's depository bond. Clearly, that cause of action is ruled by the decisions in the two cases above cited. The district court properly allowed intervener's claim, based upon the deposit, as a general claim and not entitled to the preferential lien given depositors whose claims are "not otherwise secured."

A different situation exists as to intervener's second

cause of action. Whether a deposit that is secured at the expense of the depositor, and where no part of the bank's assets is used in procuring such security, is to be classified as "otherwise secured," has not been heretofore determined by this court.

Counsel for the receiver cite and rely upon *State v. First State Bank of Alliance,* 122 Neb. 502, wherein it was held: "Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." It must be borne in mind that the language was used with reference to the character of the claim then before the court, and with reference to that claim the language was pertinent. The language there used was not intended as applicable to a situation presented in intervener's second cause of action. In the body of the opinion in that case it was said (p. 509): "In this connection, it may be observed that a brief *amici curiæ* has been filed in this case, which contends that where a depositor takes an indemnity bond to secure himself, and pays for the bond, and such bond is not paid for by the bank, nor any assets of the bank pledged, either to the depositor or to the surety on the bond, he is entitled to participate in the lien granted to depositors, not otherwise secured, and to participate in the depositors' final settlement fund. That question is not involved in this case and is not here decided." So it appears clearly that the ruling in that case was not intended as applicable to a situation now under consideration.

As long as there was a depositors' guaranty fund, or a depositors' final settlement fund, which, as has been heretofore held, was a trust fund created by the legislature, the latter could prescribe any conditions that it saw fit as to what class or classes of persons might share in such funds, but the depositors' guaranty fund and depositors' final settlement fund no longer have legal existence, as was held by this court in *Hubbell Bank v. Bryan,* 124 Neb. 51.

It follows that the lien provided by the section of the statute above quoted can only attach to the assets of the bank. The question then arises: Is the attempted classification of depositors who may share in the lien on the assets of the insolvent bank an arbitrary classification, or one without any reasonable basis therefor?

The rule is well established that the legislature may, for the purpose of legislation, classify persons, places, objects or subjects, but such classification must rest upon some difference in situation or circumstance which, in reason, calls for distinctive legislation for the class. The class must have a substantial quality or attribute which requires legislation appropriate or necessary for those in the class which would be inappropriate or unnecessary for those without the class. *State v. Bauman*, 120 Neb. 77, and cases therein cited.

We are of opinion that, if the literal wording of the statute is to be followed, the classification of depositors secured, if it was intended to include depositors whose only security is that procured by themselves, without any expense to the bank, or without any charge upon the bank's assets, would be arbitrary and unreasonable.

From all the banking legislation enacted in this state, it is apparent that one main purpose of the legislature was protection for the claims of depositors, and that depositors should have a lien upon all the assets of the bank when it became insolvent; that the bank's assets should not be used or pledged to secure any deposits other than deposits of public funds. A depositor who has taken the precaution to insure his deposit in the bank, without any expense to the bank and without impairing the claims of other depositors in any degree, is, in justice and reason, on the same footing as any other depositor with respect to the right to share in the assets of the bank.

The contention made by the receiver in this case, if upheld, would probably require us to hold that the classification of depositors in section 8-1,102, Comp. St. 1929,

is unconstitutional. However, we are not driven to that extremity. A familiar rule of statutory construction is that where a statute is fairly susceptible of two constructions, one of which would render it invalid and the other valid, the latter is to be preferred.

Considering all the statutes upon the subject of banking and the general purpose of the legislature, as disclosed by the several legislative acts, we are impelled to the view that, by the term "otherwise secured," the legislature intended to exclude from participation in the lien on the bank's assets only such depositors as take security for their deposits, and in some degree deplete the assets of the bank and to that extent secure an advantage over other depositors.

It necessarily follows that intervener's claim, as set forth in its second cause of action and based upon the deposit made by the county, was "not otherwise secured," within the proper meaning of section 8-1,102, Comp. St. 1929.

The judgment on first cause of action is affirmed; on second cause of action reversed, and the latter remanded, with instructions to enter judgment thereon in conformity with this opinion.

AFFIRMED AS TO FIRST CAUSE OF ACTION:
REVERSED AS TO SECOND CAUSE OF ACTION.

OMAHA LOAN & BUILDING ASSOCIATION, APPELLEE, V. R. H. CLARKE: MARGARET L. RACHMAN ET AL., APPELLANTS: AUGUST H. BODE, APPELLEE.

FILED NOVEMBER 10, 1933. No. 28637.

Mortgages: FORECLOSURE: SALE: CONFIRMATION. "Mere inadequacy of price in a sale under foreclosure will not justify a court in refusing a confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud." *Lemere v. White*, 122 Neb. 676.

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

Eugene N. Blazer, for appellants.

Penelope H. Anderson, contra.

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

GOOD, J.

This is an appeal from confirmation of a judicial sale in a mortgage foreclosure action.

The only assignment of error is that the mortgaged property did not sell for an adequate price. The property sold for $6,000. Other than the affidavit of one of the defendants, the evidence on their behalf is that the property was reasonably worth $7,500. The sale brought 80 per cent. of the value as fixed by defendants' witnesses. The evidence on behalf of plaintiff tended to show that the property sold for more than its actual market value. There is no evidence that if another sale should be had the property would sell for a greater amount.

In *Lemere v. White,* 122 Neb. 676, it was held: "Mere inadequacy of price in a sale under foreclosure will not justify a court in refusing a confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud."

In the instant case, inadequacy of price has not been shown.

JUDGMENT AFFIRMED.

MARIE TOFT, ADMINISTRATRIX OF THE ESTATE OF CLARA TOFT, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED NOVEMBER 10, 1933. No. 28612.

1. **Municipal Corporations: PUBLIC PARKS: LIABILITY FOR DEATH.** Upon the ground that municipal corporations are not liable for negligence in the performance of governmental functions,

a city is not ordinarily liable for injuries to persons using the instrumentalities provided for the public in a city park.

2. ———: NUISANCE. When a city maintains an artificial lake in a public park, upon which boat rides may be taken for hire, and such boat upsets and a passenger is drowned, such lake does not constitute a public nuisance, even though weeds and brush may be growing therein along the edges, and stumps be found several feet below the water line.

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

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

Max Kier and *Lloyd E. Chapman, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

PAINE, J.

Appellant as plaintiff brought action against the city of Lincoln, defendant and appellee, to recover $10,000 for the death by drowning of Clara Toft in a lake in Pioneers park, Lincoln. At the close of the plaintiff's evidence the court instructed a verdict for the defendant.

The appellant in her petition charged that the city of Lincoln, a municipal corporation, acquired by deeds, in 1928 and 1930, certain tracts of land, of approximately 600 acres, which were accepted and taken over by the city, and named Pioneers park, which park is located southwest of, and outside of, the city limits. That an artificial lake was created therein by damming up the waters of Haynes creek, thus causing the creek to overflow its banks, and creating a muddy, shoestring lake, with an irregular shore line, and scattered in this area, both above and below the surface of the water, were trees, snags, stumps, and underbrush. That its depth varied from 10 to 20 feet, with steep, slippery mud banks, which lake constituted an unsafe and dangerous condition, a menace to life, limb and health, and that the negligent, wilful, and wanton planning, construction, maintenance, and use of said lake by the city of Lincoln constituted a

nuisance. That while in this incomplete condition, the city entered into an agreement with George E. Schmidt to operate and maintain a boating concession, in which he let out boats and gave boat rides for hire, and retained all fees collected therefrom, and compensated the city by helping to complete the lake and drainage system. That said Schmidt built a boathouse and landing wharf near the east end of the lake, and had a 17½-foot outboard motor boat, with a carrying capacity of nine persons, the same being equipped in the bow with an automobile headlight, operated by storage battery. That there were no lights around said lake, no lifeguards or policemen on duty, and the lake was located approximately a mile from the nearest telephone, and further charged that said Schmidt was inexperienced and incompetent to operate such a boat in the narrow, tortious creek channel of the alleged lake. That at 10 p. m., July 26, 1930, four young men and four young ladies embarked on said motor boat, with the said Schmidt in charge and operating the same; that said boat was overloaded, and the load improperly distributed, and could not negotiate the sharp curves, and shipped considerable water. The said Schmidt suddenly turned the boat from its course, causing it to tip over and throw all of the passengers into the water, and the plaintiff's intestate was drowned. The plaintiff charges that the city of Lincoln caused the death of the plaintiff's intestate by "wantonly, carelessly, negligently, and knowingly creating and permitting an unsafe and essentially dangerous condition in Pioneers park, by planning and carrying out a public improvement within the limits thereof in the defective and unskillful manner as alleged herein, and before its completion setting up a commercial enterprise in connection therewith, with an inexperienced and incompetent person in charge thereof, and inviting and soliciting the patrons of said park to patronize and use the same, impliedly representing that the situation and condition were reasonably safe and that said lake could be properly used and enjoyed for such

purposes, which affirmative negligence and maladministration resulted in the injury complained of." That she was a self-supporting minor, of the age of 18 years, earning $1,000 a year, from which she contributed to the support of her mother, who was dependent thereon. That a claim for $10,000 was filed with the city and rejected.

The demurrer to said petition being overruled, an answer was filed, which admitted that Clara Toft was drowned on July 26, 1930, and the defendant alleged that the proximate cause of death was her own negligence and the negligence of her companions in moving about in a boat on the lake in Pioneers park in such a manner as to cause it to overturn.

In examining the evidence in regard to the accidental upset of the boat, to see if it supports the argument of the plaintiff that the boat either struck a large submerged stump, or else some of the branches growing up from stumps might have caught in the propeller blade of the outboard motor, we have been unable to find any witness so testifying. Two of those in the boat testified that there were weeds or brush above the surface of the water along near the bank; another testified that the boat made a sudden turn in the water, and Arthur V. Shaffer told that a stump was visible near the place of the accident when the lake had been drained, but stated on cross-examination that he estimated the top of the stump would be about four feet under water before the lake was drained. The conclusion from all of the evidence indicates that the boat was heavily loaded at the front end, and was shipping some water, and Mr. Schmidt, upon complaint of those in the front end, said that he would "park" the boat, and immediately turned the boat toward the shore, when the upset occurred. We are unable to find any evidence to indicate that the upset occurred by reason of the boat striking any obstruction.

1. Among the nine grounds for reversal set up by the plaintiff, the one insisted upon the strongest in the briefs and argument is that the court erred in holding that, the

accident having taken place within the limits of a public park, owned and operated by the defendant city as a governmental function, a municipal immunity arises.

There is a direct conflict between the decisions in various states upon the question whether a city park is conducted by a city in a governmental and public capacity, or in its private and proprietary capacity. 19 R. C. L. 1129, sec. 407.

From a careful examination of the authorities, it appears that the decisions of but a few states support the latter view, holding the city responsible to the same extent as a private proprietor, this minority view being supported by the case of *Norberg v. Hagna*, 46 S. Dak. 568, 29 A. L. R. 841, holding the city liable for injuries in permitting a swimming pool in a park to be in an unsafe condition, and *Byrnes v. City of Jackson*, 140 Miss. 656, 42 A. L. R. 254, where dangerous animals in a public park zoo caused injuries. Connecticut is another of the states holding that immunity does not attach to a city for nuisances created by it, and in a case where injury followed diving into shallow water in a public park, the city was held. *Hoffman v. Bristol*, 113 Conn. 386, 75 A. L. R. 1191. See, also, *Capp v. City of St. Louis*, 251 Mo. 345, 46 L. R. A. n. s. 731, Ann. Cas. 1915C, 245.

The majority view, holding that municipal corporations are not liable for negligence in the performance of governmental functions, including the establishment and operation of the city park, is supported by *Emmons v. City of Virginia*, 152 Minn. 295, 29 A. L. R. 860. Attention may be called to other cases supporting the same view, as follows:

In *St. John v. City of St. Paul*, 179 Minn. 12, a diver struck some sharp substance in Lake Phalen, maintained in a public park by the city of St. Paul. The court directed a verdict for the defendant on the ground that the city was performing a governmental function, and not liable for negligence, even if any had been proved, and that the small charge for the use of a bathing suit

would not subject the city to liability where otherwise no liability existed.

In *Warren v. City of Topeka,* 125 Kan. 524, 57 A. L. R. 555, a 12-year-old girl was drowned in a cement swimming pool in Gage park. In a suit brought for damages, the court sustained a demurrer, and this was affirmed on appeal to the supreme court. The girl was attending a Sunday School picnic in the park; no lifeguard was on duty, and, getting beyond her depth, she was drowned. "The swimming pool was doubtless attractive to children, but it was not a nuisance, producing public annoyance, inconvenience, discomfort, or hurt. It was a feature of the park tending to promote the public health, happiness and welfare. The accident to plaintiffs' child was a misfortune greatly to be deplored, but it did not change the essential nature of the place."

In *Gensch v. City of Milwaukee,* 179 Wis. 95, city employees were preparing a bath house for the opening of the bathing season, and were taking out lockers to clean them. A five-year-old boy climbed up on one of these lockers, which fell, causing his instant death. It was held that the negligence of the city employees in leaving this locker, which was attractive and dangerous to children, was a mere circumstance in performing part of the services to the city, and that fact cannot take this particular case out of the well-established rule that "a city is not liable for damages caused by the negligence of its servants engaged in the performance of a governmental function."

In our opinion this court has already taken its stand with the majority rule, for in *Faust v. Gore,* 119 Neb. 883, the plaintiff sought to hold the city of Lincoln and the Antelope Golf Club for damages suffered from being struck with a golf ball driven from the first tee in Antelope park. The city maintained that neither it nor the golf club was liable, because it was acting in a governmental capacity in maintaining and operating the park, and at the conclusion of the plaintiff's evidence a directed verdict in favor of the city of Lincoln was entered by the trial court.

In the case of *Caughlan v. City of Omaha,* 103 Neb. 726, the city maintained a public park and municipal beach on Carter lake, and a patron, in diving from a springboard, struck his head on the bottom of the lake, at a depth of 3½ feet, and broke his neck, resulting in his death, and suit was brought for $10,000 for negligence, and a demurrer was sustained to the petition. Such ruling was affirmed in this court. Judge Rose held that a city, in maintaining such a park and beach, performed a governmental function, as distinguished from a proprietary or business enterprise, and was not pecuniarily liable for personal injuries resulting from the negligence of city officers, and that such exemption was not changed because a small incidental revenue was derived therefrom. This case is in point, and determines that a city cannot be held for negligence under the facts stated.

2. Plaintiff also insists that, when a city creates, or knowingly permits to exist, a nuisance, by way of a dangerous condition in a park or playground, it is liable for any resulting injuries for the creation or allowance of a dangerous public nuisance.

Plaintiff urges upon our attention the famous belladonna case, being the case of *Glasgow Corporation v. Taylor* (1922) 1 A. C. (Eng.) 44, 29 A. L. R. 846, being an appeal from the court of sessions in Scotland to the House of Lords. It is set out that the city of Glasgow had a botanic garden adjoining a playground, in which various shrubs were planted for scientific purposes, among which was a shrub named atropa belladonna, which bore small black berries, similar in appearance to small grapes or large black currants, which were alluring and tempting to small children. This botanic garden was surrounded by a fence three feet high, with a rustic gate, held in position by a wire loop, which could easily be opened by children. There was no warning posted, and the respondent's boy of seven ate some of these berries, which were very poisonous, and died. The decision is interesting,

because five of the several members of the House of Lords individually give their ideas, among them Lord Sumner, who said the city authorities knew that these berries were a deadly poison, but took no precautions to warn children who frequented the playground adjoining, and this constituted a trap, and, in the case of a child too young to be capable of contributory negligence, it may impose full liability on the owner. This English case presents clearly a death trap, and there is no doubt in the mind of this court that the case at bar does not present the elements of a trap, nor an attractive nuisance.

In the case of *McFarlane v. City of Niagara Falls*, 247 N. Y. 340, 57 A. L. R. 1, Chief Justice Cardozo said: "Nuisance as a concept of the law has more meanings than one. The primary meaning does not involve the element of negligence as one of its essential factors."

It has been held that nuisance is a violation of an absolute duty, while negligence is failure to use the degree of care required in the particular circumstances—a violation of relative duty; in other words, that a nuisance may be created or maintained with the highest degree of care, and the negligence of a defendant, unless in exceptional cases, is not material. *Herman v. City of Buffalo*, 214 N. Y. 316; *Harper v. City of Topeka*, 92 Kan. 11, 51 L. R. A. n. s. 1032.

In the case of *Stuver v. City of Auburn*, 171 Wash. 76, a ten-year-old boy, while playing about a merry-go-round in the public park of the city of Auburn, inserted a stick into exposed cogwheels while the platform was revolving, with the result that his hand was injured. A demurrer to the petition was sustained, and upon appeal several of the cases involving diving boards, wading pools, and various amusement devices were reviewed, and it was held that a city, in maintaining such a merry-go-round, with exposed cog-wheels, was carrying out its governmental functions, and that the rule of municipal liability for damages should not be extended to include an action of this kind on the theory that it was maintaining a nuisance.

In *Robbins v. City of Omaha*, 100 Neb. 439, a small boy played upon a raft in a pond in Elmwood park, which was as yet undeveloped for park purposes. The little boy fell off of the raft in the water and was drowned. It is held: "A lake in a park, whether artificially formed or not, is not of itself a nuisance. Parks are maintained for the benefit of the public, and a pond or lake adds to the beauty of the park and increases its attractiveness."

When a city maintains an artificial lake in a public park, upon which boat rides may be taken for hire, and such boat upsets and a passenger is drowned, such lake does not constitute a public nuisance, even though weeds and brush may be growing therein along the edges, and stumps be found several feet below the water line.

There being no error in the record, the judgment of the district court is

AFFIRMED.

GEORGE H. GUTRU V. STATE OF NEBRASKA.

FILED NOVEMBER 16, 1933. No. 28571.

1. **Banks and Banking**: INSOLVENCY: INSTRUCTION. An instruction, in effect that a bank shall be deemed insolvent when the actual cash market value of its assets is insufficient to pay its liabilities to its depositors, allowing a reasonable time to realize on such assets and referring what is such reasonable time to the jury, *held* not prejudicially erroneous in the prosecution of a banker under section 8-147, Comp. St. 1929, for receiving deposits knowing the bank to be insolvent.
2. ———: ———: RECEIVING DEPOSITS: PROOF. In the prosecution of an officer of the bank for receiving deposits when the bank was insolvent, an assistant receiver in charge of notes held by a bank in receivership is permitted to testify to the value of such notes, upon a foundation being laid showing his knowledge of the financial condition of the makers.
3. **Criminal Law**: INSTRUCTIONS. "Before error can be predicated upon the failure to charge the jury upon a given point, there must have been a request therefor, unless it is upon a question where a statute or positive rule of law requires the giving of such instruction." *Georgis v. State*, 110 Neb. 352.

4. Banks and Banking: INSOLVENCY: RECEIVING DEPOSITS. Where a managing officer, knowing a bank is insolvent, authorizes and permits it to remain open and to continue to receive deposits through its officers and employees, he is guilty of knowingly "being accessory to, or permitting or conniving at the receiving or accepting" of deposits, even though he may not have had actual knowledge of the receiving of such deposits.
5. ———: ———: PROOF. When a bank is insolvent, withdrawals of deposits by relatives and members of the families of defendant and other officers of the bank are competent to be considered, with other facts and circumstances, in determining their bearing upon defendant's knowledge of the insolvency of the bank.

ERROR to the district court for Madison county: CHARLES H. STEWART, JUDGE. *Affirmed.*

Gaines, McGilton, McLaughlin & Gaines and *William L. Dowling,* for plaintiff in error.

Paul F. Good, Attorney General, Carl H. Peterson and *George I. Craven, contra.*

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

GOSS, C. J.

George H. Gutru was the president and active managing officer of the Newman Grove State Bank. It was closed and taken over by the state banking department on July 16, 1929. On December 30, 1931, an information was filed, consisting of nine counts, each charging George H. Gutru with the offense of feloniously receiving and conniving at the receiving of a described deposit when the bank was insolvent and when he knew it was insolvent. Comp. St. 1929, sec. 8-147. The first deposit was charged to have been received on May 25, 1929. The others followed in chronological order, the last being on July 15, 1929. Defendant was found not guilty on the first count and guilty on the other eight counts. Upon each of these counts he was sentenced to be confined in

the penitentiary for a period of five years, but the judgment provided that the sentences should run concurrently, not consecutively. Defendant brought proceedings in error.

The trial lasted two weeks. The record is voluminous. Many errors are assigned. They have been carefully examined. Too lengthy discussion of their details is prohibitive. The chief questions are whether the bank was insolvent, whether defendant knew it was insolvent, and whether the court erroneously instructed the jury on the subject of insolvency.

The instruction defining insolvency follows:

"No. 9. You are instructed that under the laws of this state a bank 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 ordinary manner. Testimony has been offered and received in this case bearing upon the question of the actual cash market value of the bank's assets on the various dates set forth in the several counts of the information. This evidence was received and may be considered by you on the question of the solvency of the Newman Grove State Bank on the several dates mentioned in the various counts of the information. With respect to the actual cash market value of the assets, you are instructed that a reasonable time must be allowed to realize thereon in the usual and ordinary course of banking business, and what is a reasonable time in determining the value of the assets is for the jury to determine from all the evidence, facts and circumstances appearing in the evidence in this case. The phrase 'in the usual and ordinary manner' means not by forced and involuntary sale, but rather it means an ability to pay depositors as banks usually do and meet all liabilities as they become due in the ordinary course of business."

As heretofore stated, the last deposit charged in the information was received on July 15, 1929. The legislature of that year had amended the "words and phrases"

section (Comp. St. 1922, sec. 7985), which contained no definition of "insolvency," so as to define that word. The amending act was approved March 26, 1929. It contained no emergency clause. The legislative session adjourned April 24, 1929. So the act did not take effect until three calendar months thereafter (Const. art. III, sec. 27), or on July 25, 1929, which was nine days after the bank was closed. However, we quote the new words of the amendment to show the definition devised by the legislature:

"The terms 'insolvent,' 'insolvency' and 'insolvent bank,' as used in this article and amendments thereto, in reference to banking corporations governed by this article and such amendments, shall, for the purposes of this article, have the following meaning: 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." Laws 1929, ch. 37, sec. 1; Comp. St. 1929, sec. 8-116.

Generally, "The test of insolvency is the insufficiency of available property to pay debts." *O'Bryan v. State,* 111 Neb. 733. " 'Insolvency,' as that term is ordinarily used, is not the same thing as a mere failure to pay debts, but, as applied to an individual or a corporation, it means an insufficient amount of property to pay debts." *Frank v. Stearns,* 111 Neb. 101, 105.

Probably, when the trial judge phrased the instruction and gave it to the jury on June 17, 1932, he had considered the legislative definition of insolvency in the aforesaid act of March 26, 1929. While it had not been adopted as a statutory definition of insolvency, imperatively applicable to the cause on trial, the court evidently

undertook to apply its thought and content. In so doing it appears that the result ought not to be complained of by defendant. The instruction directed the jury not to appraise the bank assets on any particular deposit date as if there had to be an actual market for cash at that particular moment but that a reasonable time must be considered and allowed by the jury for the bank to realize upon its assets in the usual and ordinary course of the banking business, not by forced and involuntary sales. In taking the evidence on this subject the aim and general purpose of the trial seems to have been to discover evidentially the ultimate cash value of each asset as of the time fixed; this value to be determined, however, by such a market as can be found for such an asset in the ordinary manner of dealing. The instruction complained of contains certain sentences which, separated from the rest, would be subject to the criticism of defendant as imposing an unfair burden upon him and making the business of banking criminally hazardous in times like the present. But when these sentences are modified by other language of the instruction, explaining the meaning of words and phrases theretofore used, we think the points criticized lose their harshness and that the jury were not misled thereby but understood them in the sense derivable from the entire instruction. Considering the whole instruction, we think the court expressed in effect the liberal rule rather than the bankruptcy definition which requires obligations to be paid as they become due in order to avoid insolvency. We do not commend the phrasing of the instruction as a model for future use in like cases but are of the opinion it was not prejudicial to defendant. In a current cause, involving the same charge, we have just held: "An instruction that a bank may be deemed insolvent when it is unable to meet the demands of its creditors in the usual and customary manner and when the cash value of its assets is insufficient to pay its liabilities, allowing a reasonable time to realize on such assets, *held* not prejudicially erroneous in a prosecution

against a banker for receiving deposits knowing the bank to be insolvent." *Flannigan v. State,* p. 519, *post.*

Two assignments relate to the testimony of Harry Henatsch, a state witness who had become assistant to the receiver on August 8, 1929; the evidence shows that he was continuously in charge, for the receiver, of the books, records, notes and collections of the bank; while he had no previous knowledge of this bank or its customers or territory he was a Nebraska banker and receiver with years of experience; he began at once to familiarize himself with the notes and other assets; he had investigated the makers of the notes held by the receiver, knew their holdings and the value thereof, and knew their reputation for solvency or insolvency, as of the date of the deposits; he had continued this knowledge and familiarity from the time the receiver took charge until the trial and he had heard the witnesses testify at the trial respecting many of the items; he was permitted to testify giving the specific facts as to each of many notes held by the receiver, stating the knowledge of the witness in relation to the maker, his holdings and the security supporting each note, and to give the estimate of the value placed upon it by the witness as of the dates of the deposits in the information.

Upon a foundation being laid showing his knowledge of the financial condition of the makers, an assistant receiver in charge of notes held by a bank in receivership is permitted to testify to the value of such notes, in a prosecution of an officer of the bank for receiving deposits when the bank was insolvent. 3 R. C. L. 493, sec. 121; 7 C. J. 584; *State v. Gregory,* 198 Ia. 316; *State v. Easton,* 113 Ia. 516; *State v. Welty,* 65 Wash. 244; *State v. Miller,* 131 Kan. 36.

Complaint is made that Reuben A. Johnson, an attorney at law, was permitted, over an objection as to incompetency, to express an opinion as to the value of the bank building and fixtures. We have read his examination and cross-examination and conclude that a sufficient

foundation was laid to permit his testimony to go to the jury for what it was worth.

Error is assigned because the court did not submit "the proposed sale of the bank to Mr. Currie as a strong circumstance tending to prove the solvency of the bank and belief of defendant in its solvency." Mr. Gutru was put in touch with M. E. Currie, cashier of a bank in Schaller, Iowa. The first communication in person between them was a letter from Currie to Gutru, dated June 20, 1929, stating he had been advised that Gutru had "a proposition to offer a qualified banker" and that he was taking the liberty to go to Newman Grove the following Sunday. He made the trip and conferred with Gutru and they had a conference also with the president of another local bank concerning a consolidation. There was evidence that the banking department approved the policy of consolidation where communities were oversupplied with banks and would look with favor upon a consolidation here. A few days later Currie came again and the matter was gone over more in detail. Gutru testified that "the stockholders of each bank were to take out of that bank such objectionable paper as would equal their capital and surplus;" and that Currie requested that a new examination be made by the banking department to guide him in selecting the notes to be taken out in an amount equal to the capital and surplus. Gutru caused the new examination to begin and on July 16, 1929, the banks were closed. Currie appeared a day or two later but nothing was done by him to take over or reorganize the banks. The defendant did not request the trial court to give such an instruction as it now assigns as error on the part of the court to fail to submit to the jury. We know of no statute or positive rule of law requiring such an instruction. "Before error can be predicated upon the failure to charge the jury upon a given point, there must have been a request therefor, unless it is upon a question where a statute or positive rule of law requires the giving of such instruction." *Georgis v. State*, 110 Neb. 352, and cases cited, p. 355; *Welter v. State*, 112 Neb. 22.

Much was said in argument about the failure of the banking department to await the bank consolidation under the auspices of Mr. Currie. The arrangement with him was purely tentative. Even as tentatively comprehended it meant at least a restoration of the $40,000 capital and surplus. Defendant and his counsel had interviewed him in Iowa in May, 1932, to discover whether his testimony would be of value. The trial began June 6, 1932. On June 4, 1932, Mr. Currie mailed from Schaller, Iowa, to Mr. Gutru a letter containing the following:

"I think I told you when you were here a month or so ago on Sunday that we were planning a trip to Texas some time this summer. Our bookkeeper gets through making his canvass for county auditor today and we have suddenly decided to start on our trip tomorrow instead of in July.

"Now I am wondering whether this will make any difference concerning your trial. You mentioned that it came up for trial June 6th but would not be tried until later. If you decided after talking with your Omaha attorney that my evidence would be valuable perhaps the case could be continued until July or if you go ahead in June and a deposition from me would do any good you could make it out and send it here to the bank and they would forward it on to me for signature."

Near the close of all testimony the defendant introduced it in evidence without objection as a part of his defense. Though it would ordinarily be received on June 5th or 6th, no application was made for a continuance.

Error is assigned as to instruction No. 10, wherein the court told the jury the effect of the law requiring such a state bank to maintain a cash reserve in available funds of at least fifteen per cent. of deposits. The court carefully defined the forms other than actual cash in which such reserve may be held and instructed the jury that failure to maintain such reserve is not, of itself, proof of insolvency but is a circumstance to be considered by the jury along with other evidence. This was favorable to defendant.

The only other specific instruction, not already considered, upon which defendant assigns error, is No. 14, wherein defendant argues the court told the jury that the "defendant would be guilty although he had no personal knowledge that deposits had been received." We do not understand the instruction to be so limited. The latter half of the instruction said:

"And where the managing officer of a bank, with knowledge that it is insolvent, permits the bank to continue to receive deposits by its officers and employees, and permits the bank to remain open for the conduct of banking business in the usual and ordinary course, such managing officer would be guilty of permitting, conniving at and being accessory to the accepting and receiving of such deposits so received, within the meaning of the criminal statute, although such managing officer did not personally receive or accept the deposit in question, and even though he may not have known of the receiving of such deposit by other officers."

Under section 8-147, Comp. St. 1929, a managing officer of a bank, knowing it to be insolvent, who authorizes and permits the bank to remain open for business in the usual and ordinary course and to continue to receive deposits through its officers and employees, is guilty of permitting, conniving at, and being accessory to, the receiving of deposits, even though he may not have had actual knowledge of the receiving of such deposits. 3 R. C. L. 497, sec. 124, citing *State v. Mitchell*, 96 Miss. 259; *Appelget v. State*, 33 Okla. Cr. Rep. 125; *Commonwealth v. Croft*, 208 Ky. 220.

Complaint is made of the admission of evidence showing that on June 3, 1929, various deposits were paid to members of the Gutru family and to relatives of other officers of the bank. Gutru himself drew out two deposits of substantial amounts. His father-in-law was paid a $1,500 certificate of deposit not due. It was not paid in cash but was paid by exchanging for it good notes owned by the bank. Gutru's boys and relatives of other

officers likewise cashed certificates of deposit not yet due and withdrew deposits. These incidents, proved in detail, occurred on June 3, 1929. This evidence as to payment of these depositors was competent to go to the jury and to be considered in connection with other facts and circumstances bearing on defendant's knowledge of the insolvency of the bank.

Defendant challenges generally the question of the insolvency of the bank. Its paid-up capital was $30,000 and its surplus was $10,000. On the dates of the deposits its total deposits were around $280,000 varying less than $10,000 in the whole period. Its relative cash reserve on hand available to pay deposits was less than 10 per cent. of the deposits. The main controversy as to insolvency centered around 58 notes which were selected from the assets by the prosecution, concerning the values of a considerable number of which there was much testimony. We have held that the evidence was competent. These notes had a face value of about $140,000 and there was evidence on behalf of the prosecution from which the jury might infer that their real value was less than $20,000, when the deposits charged in the information were received. If this evidence as to values was correct, then the bank was insolvent. It was a question for the jury.

We have considered and discussed the assignments of error that we think merit it. There are others relating to the admission of testimony, to allowing the special prosecutor to participate in the trial, and to misconduct of the special prosecutor. We have considered them and find that the rulings of the court were not prejudicial to the legal rights of defendant.

The judgment of the district court is

AFFIRMED.

EBERLY, J., dissents.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. SECURITY STATE BANK OF PLAINVIEW, GEORGE I. PARKER, RECEIVER, APPELLEE: AMERICAN SURETY COMPANY OF NEW YORK, INTERVENER, APPELLANT.

FILED NOVEMBER 16, 1933. No. 28683.

1. Banks and Banking: INSOLVENCY: ORDER ALLOWING CLAIM. Where, in a bank receivership, the court allows a claim for a deposit, the order of allowance is a judgment.
2. Judgment: VACATION AFTER TERM. A district court has power to vacate or modify its judgments or orders after the term at which they were made, only for the reasons stated and within the time limited in chapter 20, art. 20, Comp. St. 1929.

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

Montgomery, Hall & Young, for appellant.

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

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

GOSS, C. J.

This appeal was taken by American Surety Company of New York, intervener, because the district court denied reclassification of intervener's two claims as preferred claims. They had been allowed as general claims in favor of the respective depositors and had been assigned later to intervener.

The Security State Bank of Plainview was taken over by the department of trade and commerce on October 12, 1927, and operated for a time by the guaranty fund commission. It was found insolvent and a receiver was appointed by the district court for Pierce county on March 27, 1929. When the receiver took charge there was in the bank on deposit to the credit of the city of Plainview the sum of $6,203.58 and to the credit of School District No. 5, Plainview, the sum of $3,124.06. C. R. Christiansen was, at all times concerned with these deposits, the president of the bank, the treasurer of the

city and acting treasurer of the school board. Neither the city nor school authorities had ever designated the bank as a depository. The record shows that on June 22, 1929, the court allowed the city and school district the above respective amounts as valid claims for deposits. Later, while the claimants still owned the claims, there was paid by the receiver to each claimant a 10 per cent. dividend.

American Surety Company of New York was surety on the official bonds of C. R. Christiansen, both as treasurer of the city and of the school district. On September 12, 1929, the school district duly assigned to the surety all rights and claims against the receiver. On June 1, 1931, the city council likewise assigned to the surety its interest in the deposits.

No appeal was taken from the order of June 22, 1929, allowing the claims as deposits. On September 30, 1929, the March term of court adjourned *sine die* and the September, 1929, term began. In 1930 March and September terms were held, the latter adjourning March 9, 1931, when the March, 1931, term began. During this term, on July 15, 1931, American Surety Company filed its petition setting forth its rights as subrogee and assignee.

Without detailing the facts, it may be said the cash assets were always ample to have paid the claims if they had been allowed with priority to these depositors.

It does not appear in the record whether the bank or the city and the school district furnished the respective bonds and paid the premiums thereon. So the question as to whether the deposits were otherwise secured is not raised here as it was in the current case of *State v. State Bank of Omaha, ante*, p. 492. Nor, in view of the conclusion we reach, is it necessary to consider whether, on other grounds, these deposits were trust funds and entitled to be so rated if timely adjudication had been sought.

The order allowing the claims for these deposits was

made June 22, 1929. It was made by the court. The claimants, the city and the school district, did not ask for a reclassification nor did they appeal. They allowed that term to adjourn, *sine die,* and three succeeding terms to pass, before the American Surety Company, as assignee of the original claims, intervened and petitioned to have the claims adjudicated as based upon trust deposits. The petition of American Surety Company specifically alleged, with respect to each claim, that "such claim has been erroneously classified * * * as a general deposit" and prayed that "it be decreed to be a first lien upon the cash assets * * * with a right to priority of payment over all other claims."

In *Bliss v. Bryan,* 123 Neb. 461, it was held: "Where a court in a receivership proceeding allows a depositor of an insolvent bank a preferred claim payable from the guaranty fund, the order is a judgment." That the rule just quoted refers to the guaranty fund and to a preferred claim raises no distinction in favor of the claims here. The real point in controversy was whether, when the court allows a claim in a receivership matter, the order is a judgment. The writer of the opinion cites in argument a number of receivership cases in which interest was ordered upon claims after they were allowed by a court in a receivership matter and then said: "While it is not directly stated in these cases that the allowance of the claim by the court is a judgment, the principle upon which the court held that interest was allowable was based upon the assumption that an allowance of the claim was in the nature of a judgment." The cases cited on that feature of the case just referred to are: *State v. Nebraska State Bank,* 118 Neb. 660; *State v. Farmers State Bank,* 113 Neb. 679; *State v. Octavia State Bank,* 116 Neb. 825; *State v. Security State Bank,* 116 Neb. 526; *State v. Security State Bank,* 116 Neb. 530; *State v. Monowi State Bank,* 115 Neb. 396.

We have taken jurisdiction and considered as involving final judgments numerous cases on appeal from classifica-

tions by the court of claims in bank receiverships where either the claimant or receiver felt aggrieved. We are of the opinion that the correct rule is this: Where, in a bank receivership, the court allows a claim for a deposit, the order of allowance is a judgment.

American Surety Company as subrogee or assignee took the claims as it found them. Neither it nor they could modify the judgments after the term in which they were rendered except by invoking and bringing themselves under chapter 20, art. 20, Comp. St. 1929, providing for the vacation or modification of judgments at a subsequent term of the district court. This they failed to do. A district court has power to vacate or modify its judgments or orders after the term at which they were made, only for the reasons stated and within the time limited in chapter 20, art. 20, Comp. St. 1929.

The judgment of the district court is

AFFIRMED.

JOHN M. FLANNIGAN V. STATE OF NEBRASKA.

FILED NOVEMBER 16, 1933. No. 28548.

1. **Banks and Banking: INSOLVENCY: RECEIVING DEPOSITS.** In a prosecution against a banker for receiving deposits knowing the bank to be insolvent, intentional fraud, deceit, false reports of banking affairs and wrongful entries on bank books are not elements of that felony as defined by the Nebraska statute. Comp. St. 1929, sec. 8-147.
2. ———: ———: INSTRUCTION. An instruction that a bank may be deemed insolvent when it is unable to meet the demands of its creditors in the usual and customary manner and when the cash value of its assets is insufficient to pay its liabilities, allowing a reasonable time to realize on such assets, *held* not prejudicially erroneous in a prosecution against a banker for receiving deposits knowing the bank to be insolvent.
3. ———: ———: RECEIVING DEPOSITS. In a prosecution against a banker for receiving deposits knowing the bank to be insolvent, the amount of deposits, the relative value of the assets and the extent of the reserve are material inquiries.

4. ———: ———: PROOF: OPINION OF EXPERT. An expert in banking may express an opinion as to the solvency of a bank, based on knowledge of its liabilities and on information disclosed by detailed examination of depreciated and worthless assets in connection with a depleted reserve.
5. ———: ———: RECEIVING DEPOSITS. A banker who controls a bank as president and principal owner, is familiar with its condition and affairs and authorizes deposits to be received knowing the bank to be insolvent, may be criminally liable for receiving them though he did not personally accept them.
6. Criminal Law: TRIAL: IMMATERIAL TESTIMONY. In a criminal prosecution, remote, immaterial matter brought into the record by the state to counteract other remote, immaterial matter erroneously introduced by defendant in the first instance does not entitle him to a reversal of his conviction on that ground where he was not thereby prejudiced.
7. Witnesses: IMPEACHMENT. Former verified statements of a witness, if at variance with his testimony on the trial of a case, may be admitted in evidence to impeach his credibility.
8. Criminal Law: TRIAL: REFUSAL OF INSTRUCTION. Where there is no occasion for the giving of a requested instruction containing the maxim *Falsus in uno, falsus in omnibus*, the trial court may refuse to give it.
9. ———: ———: MISCONDUCT OF COUNSEL. In a criminal prosecution, offensive misconduct of opposing counsel in directing abusive, unwarranted statements to each other personally is not necessarily prejudicial to defendant, or a sufficient ground for the reversal of a conviction, where the trial court promptly rebuked them from the bench and directed the jury to pay no attention to such statements.

ERROR to the district court for Holt county: HARRY D. LANDIS, JUDGE. *Affirmed.*

J. J. Harrington and *J. C. Cook*, for plaintiff in error.

Paul F. Good, Attorney General, William C. Ramsey and *Irvin A. Stalmaster, contra.*

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

ROSE, J.

In a prosecution by the state in the district court for Holt county, John M. Flannigan, defendant, who had

been president of the Citizens Bank of Stuart, was charged in each of eleven counts of the information with feloniously receiving deposits, knowing the bank to be insolvent. He pleaded not guilty and upon a trial was convicted on three counts and acquitted on the others. For each of the three felonies of which the jury found him guilty, he was sentenced to serve a term of two years in the penitentiary, the terms to run consecutively. As plaintiff in error defendant presents for review the record of his conviction.

At the bar and in the brief counsel for defendant vigorously argued that the evidence is insufficient to support the verdict and that consequently the conviction should be reversed. The determination of this question required a critical examination of a complicated record containing more than 1,200 pages of typewritten and printed matter. The sufficiency of evidence essential to a conviction is of course a material inquiry. The statute under which defendant was accused reads as follows:

"No corporation transacting a banking business under this article shall accept or receive on deposit for any purpose any money, bank bills, United States treasury notes or currency, or other notes, bills, checks, drafts, credits or currency, when such corporation is insolvent, and if any corporation transacting a banking business under this article shall receive or accept on deposit any such deposits when said corporation is insolvent, the officer, agent or employee knowingly receiving or accepting or being accessory to, or permitting or conniving at the receiving or accepting on deposit therein or thereby, any such deposit as aforesaid, shall be guilty of a felony, and, upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one year nor more than ten years." Comp. St. 1929, sec. 8-147.

Intentional fraud, deceit, false reports of banking affairs and wrongful entries on bank books are not elements of the particular felony defined by the statute and charged in the information. Moral turpitude is not necessarily

an issue. Good motive in accepting deposits, knowing the bank to be insolvent, is not a defense in a prosecution of this kind. *State v. Kastle,* 120 Neb. 758. A commercial state bank is conducted under a charter from the state. Its business is affected with a public interest. It is entrusted with and uses money of depositors. It keeps its own records and books of account. Its executive officers have at hand the means of ascertaining facts that impart knowledge of its condition. They are naturally prompted by self-interest to look constantly into the condition of the bank's liabilities and assets. Insolvency of a bank may bring calamity on a community and increase public burdens imposed by resulting litigation and the support or care of additional paupers. To protect the people at large and depositors as a class, the legislature by law warned bankers at their peril not to accept deposits knowing the bank to be insolvent and this without regard to motive or intent to deceive. *Banks v. State,* 185 Ark. 539, 82 A. L. R. 1051. In considering the sufficiency of the evidence to sustain the verdict, therefore, intent and deceit will not be regarded as material issues.

One or the other of two definitions of insolvency has been adopted in different jurisdictions. One is known as the "bankruptcy rule" and defines insolvency as "the inability of a bank to pay its obligations as they become due in the ordinary course of business." See note and cases collected in 81 A. L. R. 1160, and 85 A. L. R. 812. See, also, *Adler & Sons Clothing Co. v. Hellman,* 55 Neb. 266. The other rule may be stated, in substance, as follows: A bank may be deemed insolvent when it is unable to meet the demands of its creditors in the usual and customary manner and when the cash value of its assets is insufficient to pay its liabilities, allowing a reasonable time to realize on such assets. In the case at bar it is unnecessary to determine which of these rules should govern in testing the sufficiency of the evidence herein, since the trial court gave defendant the benefit of the more liberal definition and so instructed the jury.

The deposits which defendant was convicted of receiving in violation of statute were as follows: November 22, 1930, $250 by Frank McDermott; November 22, 1930, $140 by W. S. Arter; November 26, 1930, $30.47 by Mary Higgins. The bank was permanently closed by the department of trade and commerce for insolvency December 1, 1930. It was conclusively shown that the Citizens Bank of Stuart was "a corporation transacting a banking business" under the banking laws of Nebraska during November, 1930, when the three deposits in question were received; that those deposits were made on the dates mentioned while defendant was president of the bank in active control. To justify a verdict of guilty the state was required to prove further, beyond a reasonable doubt, that the bank was insolvent when the deposits were received and that defendant received them knowing of such insolvency. Does the record contain such evidence?

George W. Woods was banking commissioner of the state under the department of trade and commerce. In that capacity he had supervisory control of state banks open for the transaction of commercial banking, with power to close a bank for insolvency. He was a witness at the trial and testified defendant called him by telephone December 1, 1930, and said in substance: "We can't make it. We are unable to open tomorrow. You'll have to send a man to take us over." This was four days after the last of the three deposits was received and eight days after the two deposits of November 22, 1930, were received. The evidence shows that defendant had been connected with the bank more than 30 years and that he and his brothers had been interested in other banks; that he had at hand the means of ascertaining the facts telephoned to Woods; that previously, within two weeks, he had considered and discussed with the vice-president and cashier the affairs of the bank in reference to insolvency. In connection with these and other evidential circumstances the jury were at liberty to find from the telephone communication to which Woods testified that

the bank was insolvent December 1, 1930, and that defendant then knew it. Is the evidence also sufficient to support the verdict that the bank was insolvent eight days earlier, November 22, 1930, and that defendant then had knowledge of the insolvency? Were insolvency and knowledge first learned by defendant after November 26, 1930, between the date of the last deposit and the notice by defendant to Woods that the bank was insolvent?

The amount of the deposits, the relative value of the assets and the extent of the reserve were material inquiries on the issue of insolvency. *Westbrook v. State,* 120 Neb. 625; *State v. Brewer,* 202 N. Car. 187, 81 A. L. R. 1424. In response to a call, defendant, president, and his brother James, vice-president of the bank, appeared before Woods, commissioner of banking, July 30, 1930, at Lincoln, and were examined in regard to many items carried on the books of the bank as assets but which had been criticized in a report of an examiner July 14, 1930. The testimony of Woods tends to prove the following summarized facts: One by one he inquired of defendant about each of the criticized items of assets in the examiner's report and gave him an opportunity to supply any additional information and to correct any errors. In the examination by Woods it was shown that the conceded deposits were $454,000 and the reserve was then about 8 per cent., though the legal reserve was 15 per cent. After different items listed as assets had been discussed in detail, defendant was told by Woods that he was convinced the losses would aggregate at least $100,000.

During the examination commenced July 30, 1930, Woods, according to his testimony, turned directly to defendant and inquired of him: "John, have you got the property? Have you got the financial ability? Can you and your brothers put in money in the next few months, if we give you time, to make this bank solvent—to cover these losses and protect these depositors?" The answer of defendant, to which Woods testified, was: "Yes, sir; we can, and we'll do it." Defendant was then

given until December 1, 1930, to restore the bank to solvency with private funds or property. It is a fair inference from the testimony of Woods and from the promise of defendant to restore solvency that the bank was insolvent July 30, 1930, that defendant then knew it and that it could only be put on a solvent basis by resort to private means beyond the credit and resources of the bank itself. Stockholders and executive officers are not required to replace worthless paper or impaired assets of a bank with their own bankable paper or private funds, but they may do so voluntarily. They have the alternative of allowing the bank to be closed. In making the examination of criticized assets with defendant participating, Woods acted under his oath and bond as a public officer. In testifying at the trial he was bound by his oath as a witness. His evidence shows that he was an expert in banking and as such competent to express an opinion as to insolvency, based on his knowledge of the bank's admitted liabilities of $454,000 and information disclosed by his detailed examination of depreciated and worthless assets to the extent of $100,000 in connection with a reserve depleted to about 8 per cent. of deposits, though there are decisions to the contrary. *State v. Brewer,* 202 N. Car. 187, and cases cited in 81 A. L. R. 1431-1434.

The cashier of the bank was also examined as a witness for the state and testified in effect that he and the vice-president frequently discussed the affairs of the bank with defendant in absence of others between November 16, 1930, and November 30, 1930, when the deposits in controversy were received; that on one occasion when the officers were present, either defendant or the vice-president said in substance: We can't make the grade, boys, unless we are able to liquidate some of our banks; or, boys, we can't make the grade unless we get the reserve up. There is also evidence from which the following facts may be inferred: The condition of the bank grew steadily worse after November 14, 1930, until it was

closed December 1, 1930, when the reserve was reduced to about 2 per cent. of deposits. Neither defendant nor any one else replaced worthless notes or depreciated or valueless property with bankable paper or private funds or with the resources or credits of other banks to an extent restoring solvency. The bank's interest in real estate was carried on its books as available assets in amounts far in excess of values. Income from real estate had been diminished or lost. Other real estate had not been converted into cash or bankable paper, though represented as bank assets for more than five years. Chattel security had been lost or had become worthless. Witnesses examined by the state testified in detail to the worthlessness or depreciation, for banking purposes, of paper and other forms of property held by the bank to an extent evidencing losses exceeding in the aggregate $150,000. A single deposit subject to check exceeded the cash on hand for payment of deposits generally. Within two weeks prior to the closing of the bank good notes were exchanged for unpaid deposits subject to check and also for immatured or past-due certificates of deposit and friends or relatives of defendant received part or all of their deposits. The conclusion upon a full review of the record is that the verdict is supported by competent evidence on the issues of insolvency and knowledge.

The verdict is also challenged on the ground that the evidence is insufficient to prove beyond a reasonable doubt that defendant personally received the three deposits enumerated in the verdict of guilty. After the examination by the banking commissioner, July 30, 1930, the bank was permitted to receive deposits during the time allowed for restoring it to solvency. It was the policy of the bank and its officers during that period to receive deposits. Defendant owned four-fifths of the capital stock and was in control. He had been connected with the bank from its organization in 1895. While he had been absent on the business of the bank at short intervals, he had intimate knowledge of its transactions. He had per-

sonally brought deposits to the bank and at times had made entries in its books. In addition he testified in substance that he was fully informed as to what was going on in the bank; that he was familiar with its condition during the last two weeks it was open; that during the last week of November, 1930, the deposits were received with his permission. From evidence of the facts and circumstances outlined, the jury were at liberty to find that the acts of receiving the three deposits enumerated in the verdict of guilty were the acts of defendant.

An assignment of error and a vigorous argument were directed to the proposition that the trial court erred to the prejudice of defendant in permitting one of his witnesses to testify on cross-examination by the state, over proper objections, that the bank declared large dividends in 1900 and later. The extreme example in this line of testimony is evidence that on April 26, 1903, the bank took $20,000 from its profits and added that much to its capital stock, which was equivalent to a dividend of 400 per cent. The vice-president of the bank, defendant's witness, so testified on cross-examination. The obvious purpose of the state in disclosing this remote and immaterial matter was to counteract other immaterial matter first brought into the record by defendant himself on cross-examination of the cashier who testified that it was always the policy of the bank to assist the farmers and ranchmen and to promote their interests; that the Flannigans shipped in dairy cows and distributed them among the farmers; that the bank did not lend money to packing houses or railroads or deal on the board of trade but confined its business to agricultural interests. This testimony and the immaterial testimony showing profits in 1900 were of course erroneously admitted. Both parties brought error into the record by inquiring about remote, collateral matters, but it does not follow that defendant was prejudiced by the immaterial evidence of remote profits. While cross-examining the vice-president on this collateral matter, special counsel for the prosecution

stated in open court that nothing illegal was disclosed by it. Solvency and prosperity of the bank 30 years ago, though immaterial, were inferences favorable to defendant. The issues submitted to the jury did not include the collateral matter of which defendant complains and the errors were harmless as to him.

It is also insisted there was error in the admission of verified income tax reports showing defendant drew as president of the bank a salary of $3,000 in 1928 and 1929, though his annual salary never exceeded $1,800. The reports were properly admitted to impeach the credibility of defendant as a witness. *Flannigan v. State, ante,* pp. 163, 169.

It is further argued that the trial court erroneously refused to give an instruction containing the maxim, *Falsus in uno, falsus in omnibus.* The record does not disclose an occasion for the giving of such an instruction. Other rulings in the giving or refusing of instructions are also challenged as erroneous but are found to be free from error prejudicial to defendant.

A serious demand for a reversal of the conviction is made on the ground of misconduct of special counsel appointed by the attorney general to assist the county attorney in the prosecution. When the misconduct occurred, J. O. Jamison was on the witness-stand. He had testified on direct examination as a witness for defendant, and was being cross-examined by the state. After he had been asked about some papers, there was a recess. Immediately upon the reconvening of court special counsel for the state propounded the following: "Mr. Jamison, you were standing over there and talking to Jim Flannigan, and you asked him if 'I have to produce those papers'—isn't that right?" Referring to what the question implied, counsel for defendant said: "That's an absolute falsehood," and those identical words were repeated by him. The rejoinder was: "Do you think I'm a liar? I heard it with my own ears." This was followed by special counsel's resentment of interference with the

state's cross-examination. Counsel for defendant retorted: "He deliberately tried to deceive this jury, and I charge him with doing so." Special counsel then stated he had been listening to defendant's attorney framing witnesses in the hotel. "You're a liar" was hurled back. The presiding judge was finally able to stop the torrents of shameless misconduct of counsel on both sides and addressed them and the jury as follows:

"The court instructs the jury to disregard the statements of both counsel, and directs the attention of both counsel that from the standpoint of courtesy and orderliness and decency, both to the court and to the jury, that an exhibition of this kind between counsel, both of them, is unwarranted. The statements made by counsel, each of them, the court instructs the jury to pay no attention to, and at no time to pay any attention to statements of counsel, except as the same may be sustained by the evidence. * * *

"Counsel for the defense has called the court's attention to a statement relative to the framing of witnesses, and the court directs the jury to pay no attention to that statement. There is nothing in the evidence or the conduct of counsel to warrant it, and counsel are admonished not to make similar remarks because such remarks are unwarranted, and the court also, upon its own motion, suggests to counsel for the defendant that the use of epithets that were used should not have been used in open court. Any contest between lawyers may be had without the use of such words. The court also condemns the use of the words 'framing witnesses' as without foundation, regrettable and unfair, and the statement should not have been made, and directs the jury to pay no attention to that, or to the conduct of counsel, or any conduct of counsel which is not supported by the evidence."

Neither counsel out-stripped the other in misconduct and the trial court properly treated both alike. The episode condemned in its entirety by the trial court was introduced by provocation on the part of counsel for

defendant, but no amount of provocation could justify the misconduct of special counsel. Neither did the provoking conduct of special counsel in wrongfully accusing his opponent of framing witnesses justify the offensive epithet. In departing from proper decorum neither counsel performed any worthy service for his client nor aided the court in the administration of justice. Misconduct of counsel tends to bring reproach upon the court of which they are trusted officers. They were admitted to the bar to serve clients according to law and correct standards of ethics and to aid the courts in the high aim for judicial independence, impartiality, purity, dignity and excellence. The first duty imposed on attorneys by statute is "To maintain the respect due to the courts of justice and to judicial officers." Comp. St. 1929, sec. 7-105. There was no justification for the departures from professional or statutory standards. Improper and offensive statements by each attorney were directed to the other and not to defendant, upon whom no reflections were cast. Neither party gained an advantage by misconduct of counsel. There is no good reason to suspect that the jury disobeyed the positive instructions of the court to pay no attention to the unwarranted statements of counsel. The verdict is based on competent evidence. The conclusion is that defendant was not prejudiced by misconduct of counsel in view of the rebuke from the bench and the instructions to the jury. Prejudicial error in the proceedings and judgment has not been found.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. BANK OF OTOE, E. H. LUIKART, RECEIVER, APPELLANT: BOWLES LIVE STOCK COMMISSION COMPANY ET AL., INTERVENERS, APPELLEES.

FILED NOVEMBER 16, 1933. No. 28603.

1. **Banks and Banking: CHECKS: PAYMENT.** When a bank gives

to a customer credit for a check, drawn upon it by another of its customers, having funds to his credit in the bank sufficient to pay the check, and charges such check against his account, such credit is equivalent to the payment of the check so deposited.

2. ———: TRUST FUNDS. A bank becomes agent of depositor and holds deposit as a trust fund when, with knowledge of the fact, it accepts a deposit made for the purpose of paying a specific claim.

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

F. C. Radke, Barlow Nye, G. E. Price and *Edwin Moran,* for appellant.

Herbert S. Daniel, Jessen & Dierks and *Fred A. Wright, contra.*

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

GOOD, J.

The receiver of the insolvent Bank of Otoe has appealed from a judgment allowing to intervener, Bowles Live Stock Commission Company, a preferred claim against the bank.

The record discloses the following pertinent facts: E. W. Schutz desired to purchase from intervener a carload of cattle and arranged with one Hillman to borrow $1,200 to pay therefor. The president of the now insolvent bank was informed by Hillman and Schutz of this arrangement, and that Hillman would lend the amount to Schutz to pay for the cattle. Schutz purchased the cattle and tendered to intervener a check on the bank for the purchase price, $1,141.12. Before accepting the check intervener sent the following telegram to the bank: "Will you honor check for eleven hundred forty-one dollars twelve cents signed E. W. Schutz." On the same day the bank wired its answer to intervener as follows: "E. W. Schutz check will be paid." Hillman gave to Schutz a check on the Bank of Otoe, and Schutz deposited the

check in the bank for the express purpose of paying for the cattle, and the bank's president was so informed. The bank stamped the check paid, charged it to the account of Hillman and gave credit to Schutz. After the exchange of telegrams, intervener accepted Schutz's check on the Bank of Otoe for the purchase price of the cattle, and this check was transmitted for payment through the usual channels to the Bank of Otoe, which did not remit to intervener but retained the check until the bank was closed several days later. Hillman had on deposit in the bank sufficient funds to pay his check to Schutz.

It is stipulated that at the time the Hillman check was deposited there were funds in cash and bills of exchange in other banks, the property of the Bank of Otoe, amounting to about twice as much as the Hillman check. Schutz has assigned his interest in the claim to intervener.

It is intervener's contention that, when the Hillman check was stamped paid, and the amount thereof charged against Hillman's account in the bank, the check was paid, and the bank then received and held a trust fund for the payment of Schutz's check to intervener. The receiver, on the other hand, claims that the deposit to the credit of Schutz was a general and not a special deposit; that the assets of the bank were not augmented by the transaction; that it was a mere bookkeeping transfer of credits; that no trust fund arose, and that intervener, therefore, was not entitled, as the beneficiary of a trust, to have its claim preferred.

The receiver cites and relies upon *Milligan v. First State Bank of Barnard*, 55 S. Dak. 528; *Hornick, More & Porterfield v. Farmers & Merchants Bank*, 56 So. Dak. 18; *Beard v. Independent District of Pella City*, 88 Fed. 375; and *Empire State Surety Co. v. Carroll County*, 194 Fed. 593. It may be conceded that these authorities appear to sustain his contention. However, a different rule obtains in this jurisdiction and in many other states. We think that the rule, as it exists here and in most of the states, is that a deposit made for a specific purpose,

as for the payment of a particularly designated claim, partakes of the nature of a special deposit and is in a distinct class by itself. When a deposit is so made in a bank, it acts as the agent of the depositor, and if it fails to apply the deposit as directed, or should misapply it, the deposit may be recovered as a trust fund. 7 C. J. 631, 632; *Hudspeth v. Union Trust & Savings Bank,* 196 Ia. 706, 31 A. L. R. 466, and annotation to said case appearing at page 472 *et seq.*

The supreme court of North Carolina, in the case of *Corporation Commission v. Merchants Bank & Trust Co.,* reported in 57 A. L. R. 382 (194 N. Car. 125) held: "A deposit of a check given for the purchase price of real estate subject to a lien, under the agreement that the bank will immediately honor a check against the deposit sufficient to satisfy the lien, is impressed with a trust in the hands of a receiver of the bank to the extent of the lien." See, also, note to that case beginning on page 386 of 57 A. L. R.

In *Morton v. Woolery,* 48 N. Dak. 1132, it was held: "Where a person makes a deposit in a bank for the specific purpose of meeting certain checks to be thereafter issued, the bank on accepting the deposit becomes bound by the conditions imposed, and if the money so deposited is misapplied it can be recovered as a trust deposit."

The following cases announce the same rule: *Northwest Lumber Co. v. Scandinavian American Bank,* 130 Wash. 33, 39 A. L. R. 922; *Lusk Development & Improvement Co. v. Giinther,* 32 Wyo. 294; *Blummer v. Scandinavian American State Bank,* 169 Minn. 89; *In re Warren's Bank,* 209 Wis. 121; *Winkler v. Veigel,* 176 Minn. 384; *Goodyear Tire & Rubber Co. v. Hanover State Bank,* 109 Kan. 772; *American Nat. Bank v. Miller,* 229 U. S. 517, 57 L. Ed. 1310.

In *Bartley v. State,* 53 Neb. 310, it was held: "The giving of credit as a deposit for the amount of a check, by the bank upon which it is drawn, is, in contemplation of law, a payment of the check in money, to the same

extent as though the currency had been paid over the counter on the check and immediately redeposited by the payee."

In *Scotts Bluff County v. First Nat. Bank,* 115 Neb. 273, it was held: "When a bank gives to one of its depositors credit in his pass-book for a check drawn by another of its depositors, having on its books ample funds to pay the check, such credit is equivalent to a payment of the check so deposited; and the depositor of the check is entitled to be considered a depositor of the cash represented by the check even though, without knowledge or connivance on his part, it was not entered on the books of the bank and the money was not further actually transferred."

In *Nutrena Feed Mills v. Superior Wholesale Grocery Co.,* 122 Neb. 728, it was held: "When a draft with a bill of lading attached is sent to a bank for collection and the drawee of the draft tenders to the bank its check on the collecting bank for the amount of the draft, the drawee being a depositor in the said bank with sufficient funds on deposit to pay the check, and the bank has sufficient cash on hand to pay the same, and the bank accepts and retains such check in payment of the draft, marks the draft 'Paid' and delivers it to the drawee, together with the bill of lading, the draft and the account it represents are paid. The delivery and acceptance of the check, under such circumstances, is equivalent to payment in cash."

In *State v. Citizens State Bank,* 124 Neb. 562, it was held: "Money paid to a bank for the sole purpose of paying a specific debt, and converted to its own use by the bank, *held* trust funds, payable in full from bank assets in hands of receiver."

In *State v. State Bank of Touhy,* 122 Neb. 582, it was held: "Converted proceeds of a check delivered to and received by a bank for the sole purpose of paying a specific debt of the payee *held* trust funds payable in full from bank assets in the hands of the receiver, and not

deposits." See, also, *State v. State Bank of Wahoo*, 42 Neb. 896; *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786; *State v. Farmers State Bank, ante* p. 427, decided at the present term of court.

Under the facts disclosed by the record and in view of the authorities above quoted, we are impelled to hold that, when the Bank of Otoe accepted the Hillman check, stamped it paid, and charged it to his account, it was then paid as effectually as if the cash had been handed to Mr. Schutz; that, when Schutz deposited the Hillman check for the specific purpose of having the proceeds thereof used to pay for the carload of cattle, which purpose was made known to the bank and the deposit was accepted on that condition, the bank then held that fund as the agent of Schutz, and, on its failure to pay the Schutz check to intervener, Schutz, or his assignee, is entitled to have the claim treated as a trust fund and allowed preference accordingly.

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

AFFIRMED.

E. J. DEMPSTER, RECEIVER OF DUNBAR STATE BANK, APPELLANT, V. WILLIAM S. ASHTON ET AL., APPELLEES: FIRST NATIONAL BANK OF OMAHA ET AL., INTERVENERS, APPELLANTS.

FILED NOVEMBER 16, 1933. No. 28589.

1. Corporations: LIABILITY OF STOCKHOLDERS: REMEDY. In pursuing the remedy provided by section 24-213, Comp. St. 1929, "Creditors of an insolvent corporation cannot maintain an action against a part of the stockholders for the payment of corporate debts until it is shown that the stockholders who are not made parties defendant and who are not served with process are nonresidents of the state or for other good and sufficient reason cannot be reached by the process of the court." *Gedney Co. v. Sanford*, 105 Neb. 112.

2. **Dicta.** Certain statements appearing in the opinion in *Bourne v. Baer*, 107 Neb. 255, examined and *held obiter dicta.*

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

F. C. Radke, Barlow Nye, Albert S. Johnston and *Thomas E. Dunbar*, for receiver, appellant.

Finlayson, Burke & McKie, for interveners, appellants.

Jessen & Dierks, George H. Heinke, D. W. Livingston, Tyler & Peterson, B. M. Spencer, Edwin Moran, William H. Pitzer and *Marshall Pitzer, contra.*

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

EBERLY, J.

This was, as evidenced by plaintiff's amended petition, a proceeding in equity against seventy-eight persons named therein, alleged to be stockholders in the Dunbar Grain Company, a bankrupt corporation, commenced by E. J. Dempster, receiver (E. H. Luikart substituted receiver) of the Dunbar State Bank to recover for the bank and the other creditors of the grain company similarly situated the liability imposed by section 24-213, Comp. St. 1929, for that company's failure to give notices annually of the amount of its existing debts.

The original petition filed November 1, 1930, set forth the items of indebtedness due the petitioner, pleaded the names of the alleged stockholders and the exhaustion of the corporate assets, and contained a paragraph alleging in substance that the subscribers of the capital stock of the grain company had not paid the full amount of such subscriptions. The prayer of this petition included: "That the defendants and each of them are jointly and severally liable for the payment of said amounts to the amount of their unpaid subscriptions to the capital stock of the Dunbar Grain Company, a corporation, and in addition thereto in the amount of the capital stock of said corporation owned by each of them," etc.

To the original petition of the plaintiff George Roos and Mary Roos, for themselves, and the First National Bank of Omaha, Nebraska, filed petitions of intervention against the identical defendants named in the original petition, set forth their respective claims, and alleged the amount remaining unpaid thereon; admitted and incorporated the charge that the original subscriptions for the stock of the grain company had never been fully paid, and substantially admitted all facts alleged in the original petition, including a total failure to comply with the statute requiring the publication by corporations of notices of their existing indebtedness. The pleadings of the interveners were not thereafter amended. However, on December 15, 1930, the plaintiff filed an amended petition which was subsequently again amended as hereinafter set forth.

On January 25, 1932, upon motion in writing by plaintiff, leave was given by the district court to make Albert Rambat a party defendant and for leave to amend the petition accordingly. On that day summons was issued in this cause and was duly served on Albert Rambat on January 26, 1932. Thereafter the defendant Rambat demurred to the amended petition, as amended January 25, 1932, "for the reason that said amended petition as amended January 25, 1932, discloses that any cause of action in favor of the plaintiff and against this defendant accrued more than one year prior to the time that he was made a party defendant herein and is barred by the statute of limitations." It appearing from the record then before the court that plaintiff's cause of action had accrued not later than April 4, 1930, this demurrer the district court sustained, and plaintiff's action as to this defendant was thereupon dismissed. Appellant and interveners do not challenge the correctness of this dismissal.

It appears from the present record as an undisputed fact that one Albert Rambat, a resident of Otoe county, became a stockholder of the Dunbar Grain Company while

it was a going concern; that the stock records of that corporation disclosed that long prior to the commencement of the present litigation, to wit, September 26, 1925, certificate of stock No. 84 had been issued to him, which in terms was "transferable only on the books of this corporation in person or by attorney upon surrender of this certificate properly indorsed." The corporate record was for a long time prior to the commencement of this action, and thereafter for a period of time continued to be, in the possession of the duly appointed and qualified trustee in bankruptcy of the grain company, whose residence was in the county where this action was instituted. Indeed, prior to his employment in the instant case one of plaintiff's attorneys had this corporate record in his possession and caused a list of the stockholders of the Dunbar Grain Company to be copied by a person in his employ, who it seems inadvertently omitted from the copy thus made the name of Albert Rambat. The entries in the stock record also disclosed no transfer by Rambat of the stock issued to him, and in fact none had ever been made, and he was at the time of the commencement of this proceeding, and thereafter continued to be in truth and in fact, a stockholder of the Dunbar Grain Company. However, his name as a stockholder was, due to the error of the copyist above referred to, omitted from the petition, from plaintiff's amended petition as originally filed, and was wholly omitted from the pleadings of the interveners.

After the dismissal of Rambat issues were duly made up between the plaintiff, the interveners, and the defendants, one of which was a challenge to the pleadings of plaintiff and interveners based upon alleged defect of parties defendant. On the hearing on the merits these issues thus joined were determined in favor of the defendants, and the proceedings of plaintiff and interveners dismissed. They appeal.

A single question is decisive as to appellants' rights in this hearing. The district court held that the failure

of plaintiff and interveners to seasonably make Rambat a party defendant created a defect of parties defendant, and no recovery could be had in the present action.

On this subject, in the thirteenth paragraph of its decree, the trial court employed the following language:

"On the issue presented by the several answers of the defendants to the amended petition of plaintiff and the petitions of intervention herein, that there is a defect of parties defendant by reason of the fact that all resident solvent stockholders of Dunbar Grain Company were not made defendants, the court finds in favor of the defendants and against the plaintiff and all interveners; that all of the stockholders of Dunbar Grain Company were not made parties defendant to this action; that Albert Rambat was at the time of the commencement of this action a stockholder in Dunbar Grain Company, a resident of Otoe county, Nebraska, and solvent, and that his omission as a party defendant in this action until January 25, 1932, is not excused by the facts pleaded and shown in evidence by and on behalf of plaintiff and the said interveners; that the judgment of dismissal as to said Albert Rambat of this action heretofore entered herein was made necessary by the omission and neglect of plaintiff to make said Albert Rambat party defendant herein until January 25, 1932, at which time the statute of limitations was available to said Albert Rambat as a defense, and was by him pleaded and sustained; that he is a necessary party defendant in said action and that by reason of plaintiff's said omission and neglect to make him party defendant not in any way waived by the other defendants, neither the plaintiff nor the petitioners in intervention can now maintain this action against the defendants." Thereafter the cause was dismissed for want of equity.

After a careful reading of the record we concur in the view expressed by the trial court, that the omission of Albert Rambat as a party defendant in this action until January 25, 1932, is not excused by the facts pleaded and established by the evidence.

The sole question that remains is: Was he a necessary party in the sense of being an indispensable party under the facts disclosed by the record, in view of the form of the action and the nature of the remedy sought?

The following constitutional and statutory provisions are pertinent:

Section 4, art. XII of our Constitution, provides: "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock."

The particular portion of section 24-213, Comp. St. 1929 (enacted in 1891) applicable to the question here presented is (after providing for the giving of a notice of its indebtedness by a corporation): "And if any corporation shall fail to do so, after the assets of the corporation are first exhausted, then all the stockholders of the corporation, shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such notice is given, to the extent of the unpaid subscription of any stockholder to the capital stock of such corporation, and in addition thereto the amount of capital stock owned by such individuals."

This court is committed to the view that the provisions of the statute quoted providing for a liability, which it creates, to follow as a consequence of the doing or omission of some act, and the extent of which is not measured or limited by the damages caused by the act or omission, are in the nature of a penalty and the statute is penal in its character. *Kleckner v. Turk*, 45 Neb. 176.

This court has also adopted the principle of construction as related to constitutional provisions imposing liability on corporate stockholders that they are self-executing. No legislative act is necessary for their enforcement.

These constitutional provisions may not be limited or extended by legislative act. Indeed, the stockholders' liability thereby created is free from legislative interference. *State v. Citizens State Bank,* 118 Neb. 337.

It is obvious that section 24-213, Comp. St. 1929, is in no manner effective to change the stockholders' liability provided by section 4, art. XII of the Constitution. This liability so created is not a joint and several liability. *Kleckner v. Turk,* 45 Neb. 176; *Globe Publishing Co. v. State Bank of Nebraska,* 41 Neb. 175; *Thomas v. Scoutt,* 115 Neb. 848; *Van Pelt v. Gardner,* 54 Neb. 701.

So, too, the principle is established in this jurisdiction that the statutory liability of stockholders for the failure of the corporation to publish annual notice of its debts is penal in its nature and should not be enlarged by construction. *Thomas v. Scoutt,* 115 Neb. 848.

Section 24-213, Comp. St. 1929, limits the recovery possible under its terms by two items, viz., "to the extent of the unpaid subscription of any stockholder to the capital stock," and to "the amount of capital stock owned by such individuals." The first mentioned is created by, and finds its source in, the constitutional provision quoted.

In a suit presenting the question of stockholders' liability because of failure to give the required notice, this court determined:

"Liability for unpaid subscriptions for capital stock of a corporation is based on the subscriber's contract, of which the provision of the Constitution relating to that subject is an integral part.

"Where an original subscriber for shares of capital stock in a corporation pays therefor in full, neither he nor subsequent holders of the same shares through mesne transfers are liable to subsequent judgment creditors of the corporation for unpaid subscriptions." *Thomas v. Scoutt,* 115 Neb. 848.

In *Bourne v. Baer,* 107 Neb. 255, this court determined, in a case where the nature of the liability for unpaid subscriptions was squarely presented by demurrer in cases

based on the violation of section 24-213, Comp. St. 1929, that recovery could be sustained therein solely because of the provisions of section 4, art. XII of the Constitution, and that the constitutional liability was in no manner increased by the terms of the statute.

As created by this constitutional provision, unpaid subscriptions for stock of a corporation are in equity trust funds for the payment of its creditors. *Gilkie & Anson Co. v. Dawson Town & Gas Co.*, 46 Neb. 333.

In *Van Pelt v. Gardner*, 54 Neb. 701, this court held:

"As between the stock subscribers and the creditors of a corporation, each stock subscriber is liable to the extent of his unpaid stock subscription. As between themselves, each stock subscriber is liable for his proportionate share of the corporate debts, and one stock subscriber who has been compelled to pay more than his proportionate share may sue his cosubscribers for contribution.

"One creditor of a corporation cannot maintain an action in his own name and for his own benefit against the debtor stock subscribers of a corporation; but, to subject unpaid stock subscriptions to the payment of corporate debts, all debtor stock subscribers and all creditors of the corporation should be made parties, and a receiver appointed."

See, also, *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593; *Rogers v. Selleck*, 117 Neb. 569.

Section 24-213, Comp. St. 1929, provides for the enforcement of the constitutional liability created by section 4, art. XII of the Constitution, in connection with the ascertainment of the additional amount due from each stockholder where the corporation has failed to give the required notice. The constitutional liability must be determined, as we have seen, by an action in behalf of all creditors against all the stockholders involved. Such stockholders are necessary parties. In the instant case the original petition sought, and the pleadings of the interveners sought, a recovery for unpaid subscriptions against all stockholders, which necessitated that all stock-

holders be made parties defendant in the proceeding. In addition, the obvious purpose of section 24-213, Comp. St. 1929, was to provide for the collection of the liability for unpaid stock subscriptions imposed by the Constitution and the application of the proceeds thus realized to diminish the amount of unpaid creditors' claims before the enforcement of the additional liability of the stockholders provided for therein. The right to insist on this being done was necessarily jointly vested in all stockholders whose stock may have been fully paid, and indeed all stockholders irrespective as to the condition of their stock payments. The fact that they were jointly entitled to insist on the right of contribution or exoneration to the extent of the amount to be realized on unpaid stock subscriptions inevitably suggests that they were necessary parties in the instant case. And whether the reasons above suggested are valid or not, the fact remains that this court has established by a uniform course of decisions the requirement that an action to recover the penalty provided by section 24-213, Comp. St. 1929, must be brought in equity in behalf of all creditors and against all stockholders. *Hastings v. Barnd,* 55 Neb. 93; *Pickering v. Hastings,* 56 Neb. 201; *Emanuel v. Barnard,* 71 Neb. 756; *McCall v. Bowen,* 91 Neb. 241; *Rogers v. Selleck,* 117 Neb. 569; *Brownell v. Adams,* 121 Neb. 304; *Fremont Package Mfg. Co. v. Storey,* 2 Neb. (Unof.) 325.

Indeed, the controlling case, in view of the facts disclosed in the record of the instant case, is the case of *Gedney Co. v. Sanford,* 105 Neb. 112. This was a case properly brought so far as plaintiffs were concerned. It appears from the transcript of the pleadings filed in this court on the appeal that the action was against stockholders of a corporation, and based solely on the liability for the penalty for failure of a corporation to give the required annual notices of existing indebtedness, and that nothing else was involved.

It appears that certain stockholders in this *Gedney* case were made defendants, but summons was returned by the

officer serving the same as "not found." Failure to have process served upon them was not otherwise accounted for. The evidence at the trial on the merits disclosed that three stockholders were neither made parties nor served with summons. It did not appear that these stockholders not served with process and the three stockholders who were wholly omitted were nonresidents of Nebraska, and no good reason for their omission from the action was pleaded or proved. At the close of the evidence the presiding judge, Leonard A. Flansburg, late a justice of this court, in a written opinion now forming a part of the transcript in this court, dismissed the case for the sole reason that stockholders liable were omitted and not brought in, and that no reason or justification is shown why the case could properly proceed without them. The question was thus squarely presented to this court. The judgment of the trial court was here affirmed, and the following rule announced:

"Creditors of an insolvent corporation cannot maintain an action against a part of the stockholders for the payment of corporate debts until it is shown that the stockholders who are not made parties defendant and who are not served with process are nonresidents of the state or for other good and sufficient reason cannot be reached by the process of the court."

The action of the trial court in the instant case was justified and required by the terms of the rule thus announced.

Appellants insist that the instant case is controlled by the views of the writer of the opinion in *Bourne v. Baer*, 107 Neb. 255, to the effect that the demurrer for defect of parties defendant then under consideration, which was based on the fact "that the defendant James A. Shell was not brought into court and is not shown to be a nonresident of the state," was not well taken. However, from the statements of the opinion it fairly appears that Shell was regularly made a party defendant by the terms of plaintiff's petition, but the summons issued thereon as

to him was returned "not found" by the serving officer. This petition was not thereupon amended, but all defendants who were served with summons, except Slote (who answered) and one Henry Poppe, Sr., "demurred to the petition by general demurrers (based on the statute of limitations) and for defect of parties defendant." It is to be noted that "the defect of parties defendant" did not appear on the face of the petition where Shell was properly set forth as a party defendant but solely in the officer's return on the summons issued thereon showing no service made on this defendant. These facts enumerated are not only to be gathered from this opinion but are fully confirmed by the transcript on appeal in *Bourne v. Baer, supra,* filed in this court. In this condition of the record it is obvious that the language of the opinion relied upon by plaintiff as controlling in this cause is wholly without force and effect as a judicial precedent. It is to be noted that the point under consideration is in no manner referred to or reflected in the syllabus of this case as approved by the court. *Holliday v. Brown,* 34 Neb. 232; *Williams v. Miles,* 68 Neb. 463, 481; *Brumbaugh v. Jones,* 70 Neb. 786, 791; *State v. Marsh,* 107 Neb. 637.

While reference is made in the opinion in *Bourne v. Baer, supra,* to section 7648, Rev. St. 1913, as supporting the conclusion expressed by its author, a cognate provision, now section 20-601, Comp. St. 1929, is not referred to, nor are then existing decisions of this court to the contrary, hereinbefore cited, given consideration. These decisions are neither considered, distinguished, nor overruled. But, more serious still, the point discussed by the author of that opinion was not presented by the record then under consideration. On its face the petition demurred to in *Bourne v. Baer, supra,* presented regularly the name of James A. Shell as a defendant. The defect in the proceeding was that there was a failure to serve him with summons; a fact which was disclosed only by the officer's return thereto. The petition thus did not dis-

close the defect. Certain defendants who were properly served with process then demurred to this petition by general demurrers and for defect of parties defendant.

Section 20-806, Comp. St. 1929, provides: "The defendant may demur to the petition *only when it appears on its face,* either; * * * Fourth, That there is a defect of parties, plaintiff or defendant." Section 20-808, Comp. St. 1929, provides in part: *"When any of the defects enumerated in section* * * * (20-806) *do not appear* upon the face of the petition, the objection may be taken by answer." (Italics ours)

The Code provisions above referred to appear in substance in nearly all of the Codes of Procedure of the several Code states. 6 Standard Ency. of Procedure, 898. And under these provisions it has been held without exception that a demurrer for defect of parties will not reach the objection that a necessary party joined as a defendant has not been served. 6 Standard Ency. of Procedure, 899. See, also, *Forbes v. Delashmutt,* 68 Ia. 164; *Belanewsky v. Gallaher,* 105 N. Y. Supp. 77; *Smith v. Day,* 39 Or. 531; *Columbia Savings & Loan Ass'n v. Clause,* 13 Wyo. 166; *Bulkley v. Norwich & W. R. Co.,* 81 Conn. 284; *Hill v. Powers,* 16 Vt. 516.

It is obvious that the portion of the opinion in *Bourne v. Baer, supra,* upon which appellants rely in the instant case, relates to a question not presented by the record for decision, and which was not and could not have been decided by this court, and the conclusion there appearing must be deemed *obiter dicta,* and wholly without binding force and effect as a judicial precedent.

It follows that the action of the trial court in dismissing the proceeding was correct, and is

AFFIRMED.

LOGAN I. GRAY, APPELLANT, V. AUGUST BURDIN ET AL., APPELLEES.

FILED NOVEMBER 16, 1933. No. 28916.

Master and Servant: WORKMEN'S COMPENSATION LAW: AWARD: RES JUDICATA. A final order denying compensation, entered by the compensation commissioner after a hearing on the merits in a proceeding properly brought, and not legally appealed from, is an absolute bar to a subsequent suit based upon the same cause of action, except as otherwise expressly provided by the terms of the workmen's compensation act.

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

Gerald E. LaViolette, for appellant.

Prince & Prince, Brome & Thomas and *G. H. Seig, contra.*

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

EBERLY, J.

This is an action prosecuted by the plaintiff Gray against the defendant Burdin and another under the workmen's compensation act of Nebraska. From an order allowing compensation entered in the department of labor, the defendants appealed to the district court for Hall county, where on hearing *de novo* the plaintiff's petition was denied. He now appeals to this court.

In this proceeding the plaintiff Gray's petition filed with the department of labor on December 14, 1932, sets forth as the basis of recovery certain accidental injuries suffered by him on February 24, 1928, arising out of and in the course of his employment by the defendant August Burdin resulting from the breaking of a scaffold in St. Mary's Cathedral at Grand Island, Nebraska. The allegations of this petition descriptive of the injuries for which recovery was sought are as follows: "That about 5 p. m. on February 24, 1928, while plaintiff was at work on said

scaffold, standing immediately above the supports thereof, the plank on which he stood, which was a part of said scaffold, broke in two at or about the center thereof, causing plaintiff to be thrown down upon the floor, and to fall upon a heavy iron paint bucket with great force and violence. That in consequence of the violence and force of his fall plaintiff was rendered intermittently unconscious for a period of two hours thereafter; sustaining, along with a severe shock to his whole nervous system, a transverse fracture of the 11th rib, and a fracture of the 6th, 7th and 8th ribs; fragments of said broken ribs puncturing the plaintiff's lung; a severe contusion and sprain of the left shoulder, resulting in rebrachial neuritis of the left arm. The plaintiff was confined to a hospital for 25 days, during which time he suffered continuous and excruciating pain and a great loss of blood, and that ever since the date of said accident the plaintiff has been and is now unable to perform any work. The plaintiff has suffered from loss of sleep, lost much weight and has been almost continuously under the care of a physician. That plaintiff's injuries are permanent; that he will continue to suffer pain and loss of sleep in the future. * * * That prior to said accident the plaintiff was an able-bodied man, in good health, and earning $45 per week."

Among the defenses tendered by the defendants was that of *res judicata,* viz., that a previous judgment or final order was entered in a proceeding had in the department of labor on or about March 3, 1932, between the plaintiff herein and this defendant based on the same injuries now in suit; and after a hearing on the merits plaintiff's claim for relief had been therein denied and his action dismissed; and that this adjudication still remains in full force and effect.

This defense, as well as others tendered by defendants, was in effect overruled by the representative of the department of labor by his judgment and finding awarding compensation to plaintiff for the period of 93 weeks at $15 each week from and after November 5, 1932, and there-

after the still further sum of $12 each week for the remainder of his life or until total disability shall have ended.

The question of *res judicata* appears to be the controlling issue in this case. The record before us discloses that on October 30, 1931, plaintiff herein filed a petition in the department of labor, which, so far as the description of the injuries sustained is concerned, is in language substantially identical with that contained in his petition filed in the department of labor on December 14, 1932. The allegations of this petition first filed were put in issue by suitable pleadings on behalf of defendants, and after a hearing on the merits the representative of the department of labor on or about the 3d day of March, 1932, entered a final order or judgment in writing in said cause finding:

"That the disability of which plaintiff now complains is not the result of an accident arising out of and in the course of his former employment by the defendant August Burdin, and that his petition should therefore be dismissed."

In accordance with the foregoing finding a dismissal was duly entered. Plaintiff sought to appeal, but failed in his compliance with the statute regulating appeals, so the judgment thus entered remains in full force and effect.

It is to be observed that the issues as made up by the pleadings on the subject of nature and extent of the injuries alleged are substantially identical in the two cases to which reference has been made.

Our statute provides: "Every order and award of the compensation commissioner shall be binding upon each party at interest," until an appeal is perfected as provided therein. Comp. St. 1929, sec. 48-157. See, also, sections 48-137 and 48-139, Comp. St. 1929.

"There is no rehearing. Recourse is appeal to higher courts." Gant, Procedure Under Workmen's Compensation Law of Nebraska, p. 46.

It is obvious that our compensation statute contemplates that the final order entered by the compensation commissioner shall as between the parties thereto have the full force and effect of a judgment, except in so far as expressly modified by the terms of the act itself. The conclusion follows that proceedings before the representative of the Nebraska department of labor being wholly statutory, the authority of the department and its representatives is limited to that granted by the compensation act, and the compensation commissioner has no authority, after denying compensation, to review such decision upon the filing of another petition, substitute another decision in its stead, or ignore his previous determination and allow compensation upon a cause of action theretofore examined and denied by him, on the ground that such former decision was erroneous. This conclusion finds support in the precedents found in other jurisdictions. *Centralia Coal Co. v. Industrial Commission,* 297 Ill. 451; *Stromberg Motor Device Co. v. Industrial Commission,* 305 Ill. 619; *Salt Lake City v. Industrial Commission,* 61 Utah, 514.

Such conclusion necessarily supports the further contention of appellees in the instant case, viz., that the order of March 3, 1932, denying compensation to plaintiff must be deemed a judgment or decree in the technical sense of these terms; and that such decree, except in so far as modified by the express terms of our compensation act, is an absolute bar to a subsequent action based upon the same cause of action. *Naud v. Kind Sewing Machine Co.,* 159 N. Y. Supp. 910; *Moffitt v. Reed,* 124 Neb. 410; *School District D v. School District No. 80,* 112 Neb. 867; *Southern P. R. Co. v. United States,* 168 U. S. 1; *Turner v. Columbia Fire Ins. Co.,* 96 Neb. 98; *State v. Broatch,* 68 Neb. 687; *Hanson v. Hanson,* 64 Neb. 506; *Roller v. Murray,* 71 W. Va. 161, L. R. A. 1915F, 984.

The judgment of the district court dismissing plaintiff's action and denying compensation is correct, and is

AFFIRMED.

ANNA F. ROH, APPELLEE, V. JOSEPH OPOCENSKY, APPELLANT.

FILED NOVEMBER 24, 1933. No. 28605.

1. **Trial:** INSTRUCTIONS. "A party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence." *Boice v. Palmer*, 55 Neb. 389.
2. **Evidence:** RES GESTÆ. Under the circumstances of this case, statements of the driver of the car in which plaintiff was injured, made within a few minutes after the injury, *held* to be a part of the *res gestæ* and admissible in evidence.
3. **Damages.** Verdict *held* not excessive.

APPEAL from the district court for Douglas county: FRED A. WRIGHT, JUDGE. *Affirmed.*

Kennedy, Holland & De Lacy, for appellant.

Frederick L. Wolff and *Frost, Hammes & Nimtz, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

GOSS, C. J.

This is an action for damages to plaintiff as a guest in defendant's automobile, driven by his wife. Defendant appeals from a judgment against him.

The injury occurred June 29, 1931. The driver owed the guest the duty of ordinary care. *Garrotto v. Butera*, 123 Neb. 682. It should be noted that the action did not come under the guest statute approved May 1, 1931 (without an emergency section), exempting the owner or operator from liability unless guilty of gross negligence. Laws 1931, ch. 105. The legislature adjourned May 2, 1931. The act did not take effect until three calendar months thereafter. Const. art. III, sec. 27.

Plaintiff, 46, is the wife of a farmer living about two miles east of Abie in Butler county. Defendant is a Willys automobile distributor in South Omaha. The families had been friends since 1921. On June 29, 1931, the Bishop

was to be at the Abie church at 2 o'clock to confirm children. Several of the Roh children were to be confirmed. Anna Roh, 13, daughter of plaintiff, wrote to Josephine Opocensky, 39, wife of defendant, requesting her to be sponsor for her on this occasion. Mrs. Opocensky accepted and invited Helen Stava, married daughter of plaintiff living in Omaha, to accompany her. She accepted and went to the home of defendant to start. For the trip defendant provided a nearly new sedan, used for demonstration purposes, and Mrs. Opocensky drove it to the Roh home on the morning of June 29. Mrs. Stava testified she had previously heard her brother, 26, ask defendant to bring out a demonstrator as his father was in the market for a new car; that when witness called his attention to the fact they were to take the Willys car, defendant informed her he wanted his wife to show it to the folks and if she sold it she would get a fat commission. After a midday dinner, Mrs. Opocensky started to drive her car to church with Anna, the daughter, in the front seat and with Mrs. Roh, Mrs. Stava, and two other of her children in the rear seat. Mr. Roh and other children followed in their family car. The road west to the village was a dirt road with some hills on the way. Mrs. Opocensky had driven a car steadily for the past two years and had driven intermittently before that. She testified that she drove over a hill or two, took a start for the next one "and as I got on top of the hill going down, why my car started swaying, I held it and did all I could to keep it in the road, and I don't know what happened; all at once I was out and all of a sudden it was turned upside down and I didn't know what happened."

The evidence shows that the car finally turned rather sharply to the right and then turned over toward the left just off the traveled part of the roadway at a point where there was no ditch but where it was practically on a level with the roadway. It turned only half way over so it rested on its top with its wheels in the air. The left front tire was partly off the rim in the vicinity of the stem.

The casing was not injured, so it was not what is called a blowout. But the inner tube was deflated with a rip running each way from the stem. There was also some testimony that the tracks of the car as it came down the hill did not differ from the ordinary. From this evidence it might be inferred that the inner tube was torn and deflated in the last movement of the car just before it turned over, but from the swerving of the car as it went down the hill, the jury might infer that the tire became deflated at some distance before it stopped. Both theories are presented in the evidence and arguments.

Helen Stava, when asked what happened at the hill before the car upset, testified: "Mrs. Opocensky was driving quite fast, and I remarked to her, 'Josie, you may be going about forty but, I says, back here it seems like we are sailing;' and she says, 'Don't worry, Helen, I am all right.' "

Stanley Stava, husband of Helen, employed by defendant in his garage, testified that, after the accident, he and defendant drove to the Roh home, arriving that afternoon; Mrs. Opocensky was waiting for them at the house gate when they arrived; defendant asked her, " 'How fast were you going?' she says, 'Well, I wasn't going so fast until the second hill before we came to this place, I was going to give the car a run so we could go up the next hill, and give the folks a thrill like a roller coaster, and when we got on that next hill the car began to give a weave, and it went so fast I don't know what happened after that.' "

In the petition the acts of negligence of the driver of the automobile are charged in narrative form in one long sentence; so in the first instruction the court abstracted the charges from the petition and in his own words particularly stated the negligence charged against the driver as follows:

"(a) That she operated said automobile at a high and dangerous rate of speed, without having the same under proper control;

"(b) That she so operated said automobile without attempting to stop or decrease the speed thereof, when one of the tires became deflated;

"(c) That she negligently operated said automobile so that it swayed first to one side and then to the other, for a distance of about 100 yards, and then swerved to the right side of the highway and fell on its left side."

A later instruction, giving the elements required to be established by a preponderance of the evidence, contained one element to the effect that the negligence of the driver must be so established in one or more of the particulars set out in the first instruction and that such negligence was the proximate cause of plaintiff's injuries.

Defendant argues that the court erred in giving the instruction (a), just quoted, and in giving, in connection therewith, an instruction outlining the statute prohibiting driving on a highway "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, nor in any case at a rate of speed exceeding forty-five miles per hour." Comp. St. 1929, sec. 39-1102. After quoting the foregoing provisions, the instruction advised the jury that, while a failure to observe the provisions of the statute was not conclusive evidence of negligence, yet, if they found it had been violated in any particular, such evidence of violation might be considered, in connection with all the other evidence and circumstances proved, in determining whether or not the violator was guilty of negligence in the premises. Defendant argues that there was no evidence of a speed of over 40 miles an hour and that such speed over a "level and dry country road" is not evidence of negligence. That was the limit of speed in miles per hour testified to by any witness. It must be admitted that this evidence of speed from witnesses who were inside the car and did not testify from the indication of the speedometer is not of the highest value. Yet it was for the jury to consider. Moreover, Anna Roh, the daughter who sat with Mrs.

Opocensky, when asked what she noticed, if anything, about whether she used the brakes, answered, "She didn't use the brakes, she stepped on the gas, because we would go faster."

Defendant cites *Kelly v. Gagnon,* 121 Neb. 113, as an authority that all negligence as to speed should have been withdrawn from the jury. There the road was level—that is, without hills—the speed was only 30 miles an hour and "no negligence was shown in the manner of driving." The case is not applicable here where the road was hilly and where there were facts from which the jury might infer excessive speed. We deem these instructions appropriate to the proofs. The trial court would have been charged with invading the province of the jury if he had decided as a matter of law that there was no negligence arising out of the rate of speed and lack of control.

Defendant assigns and argues that the court erred in giving instruction (b), heretofore quoted, relating to speed or failure to stop when the tire became deflated; and in connection with that subject, in failing to give defendant's requested instruction to find for defendant on that point. In his answer defendant alleged that his wife was driving the party to church "and that while she was so doing she was exercising reasonable care and driving with care and caution, and that while she was so doing a tire on said automobile blew out causing the car to overturn, and in this connection your defendant alleges and says that the said accident was not in any wise the result * * * of an unavoidable accident because of the fact that said tire blew out while said car was in motion."

While defendant stated in his answer it was a blowout that precipitated the trouble, yet the evidence shows that there was at no time what is commonly called a blowout. Somewhere between the top of the hill and the point where the car stopped the left front tire deflated. Defendant says elsewhere in his brief: "The accident in this case was caused by the left front tire becoming deflated as alleged in plaintiff's petition." He tried the case on this

theory. He requested an instruction in detail on that point, which was properly refused by the court because it assumed facts which were and should have been left to the jury. In giving this instruction the court presented the theory of defendant as much as that of plaintiff. "A party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence." *Boice v. Palmer,* 55 Neb. 389; *Chicago, R. I. & P. R. Co. v. Buckstaff,* 65 Neb. 334. See *Link v. Campbell,* 72 Neb. 310.

Defendant assigns error as to the giving of instruction (c), heretofore quoted, relating to negligent operation and weaving of the car, and argues that there was no evidence of negligence of the driver warranting this instruction. This was a rather general charge of negligent driving to which almost any bit of evidence or circumstance resulting in the swerving of the car would be applicable. In addition to the applicable evidence already recited, there was the testimony of Mrs. Stava on this particular subject. She testified that, from the time the car first started to swerve, Mrs. Opocensky would "grab the wheel and pull it one way and then the other, and let go of it altogether, and she kept doing it until finally she let go altogether and run it up on the side dirt, and then finally the car rolled over on its top." Mrs. Opocensky, in her account to her husband in the presence of Stanley Stava, and in her own testimony, gives a frank explanation of the situation by saying, "I don't know what happened after that." All of these items of the evidence justified the court in giving the instruction complained of.

Defendant claims the court erred in admitting the testimony of Mrs. Stava, who testified that, when plaintiff's husband came up and assisted plaintiff out of the car and they were helping plaintiff to the family car, Mrs. Opocensky said: "Oh my G——, Mrs. Roh, here I was trying to give you a thrill, and I just about killed you; what will I do? I wasn't going fast, I was just going to give you a

roller-coaster thrill on the hill; and now, here, you are going to be in bed, and doctor bills." This occurred at the place of the accident and within two or three minutes thereafter. Defendant objected that it was hearsay and not a part of the *res gestæ*. Under the principles announced in *Ridenour v. Lewis*, 121 Neb. 823, and *Perry v. Johnson Fruit Co.*, 123 Neb. 558, what Mrs. Opocensky said on the occasion was admissible as a part of the *res gestæ*. In such a situation, spontaneous declarations by an agent constitute a part of the fact in the *res gestæ* and have whatever probative value the jury may give to them as against the principal. They constitute an exception to the rule as to hearsay evidence.

"Statements made as part of *res gestæ* are substantive evidence of matters stated.

"Driver's declaration that he knew he was driving fast, made while injured plaintiff was being removed from automobile struck by driver, *held* admissible as *res gestæ* against owner of automobile." *Duncan v. Rhomberg*, 236 N. W. 638 (212 Ia. 389).

"No hard and fast rule can be laid down as to the admissibility of evidence as a part of the *res gestæ*. The facts and circumstances presented in different cases vary so widely that the courts have come to the point of adjudging this question as it is presented by the particular case under consideration." 22 C. J. 448.

Under the circumstances of this case, statements of the driver of the car in which plaintiff was injured, made within a few minute after the injury, *held* to be a part of the *res gestæ* and admissible in evidence.

Defendant claims the verdict of $5,000 is excessive. Expert testimony on his behalf described plaintiff as an "hysteric" and that this condition is prolonged by the examinations by doctors and lawyers and by conversations or thoughts about the subject of the accident. The evidence on behalf of plaintiff showed a gash from her forehead to the middle of the top of her head, an injury in the cervical region, two broken ribs, and injuries to her knees.

She was confined to her bed for three weeks during which the family doctor was in attendance twice a day and at least once a week thereafter until plaintiff was able to go to his office. At the time of the trial, eleven months after the accident, there was evidence from which the jury might infer that this farm housewife was unable to do those domestic things at which she was proficient and energetic before her injury, that she has lost 40 pounds, does not maintain her equilibrium when walking, has dizzy spells, faints—frequently as often as twice a week—cannot prepare meals, and that, in the opinion of one physician, her condition is permanent and will become worse. Upon consideration of all the evidence we do not feel justified in deciding the verdict was excessive.

Other errors were assigned. We have considered those that were relied upon and are of the opinion the trial court did not err in its ruling thereon. The judgment is therefore

AFFIRMED.

THOMAS REILLY, APPELLEE, V. GEORGE H. MERTEN, APPELLANT.

FILED NOVEMBER 24, 1933. No. 28595.

Appeal: PARTIES. "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Barkley v. Schaaf*, 110 Neb. 223.

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

William McDonnell and *George H. Merten*, for appellant.

Anson H. Bigelow, contra.

Heard before GOSS, C. J., ROSE, GOOD and PAINE, JJ., and SHEPHERD, District Judge.

ROSE, J.

This is a suit in equity in which George H. Merten and Ross L. Shotwell were called to account for fraud and resulting loss of trust funds in their settlement of the estate of Thomas Dean, deceased, testator, under their appointment by the county court as administrators with the will annexed. Other equitable relief sought was the setting aside of an order in which the county court approved the final report of the administrators, discharged them and released the surety on their bond. The suit in equity was begun and tried in the district court for Douglas county. There was a decree in favor of plaintiff and against defendant Merten and others who participated in the fraud. Merten, alone, appealed.

Thomas Dean, testator, willed his property to the United States Trust Company of Omaha in trust for his three sisters and one brother. The trustee was directed to pay the income from the estate of testator to his sister, Maria Lund, a widow, during her life, and at her death to divide the residue, when reduced to cash, among two other sisters and a brother. Thomas Larkin and Emma Larkin were nominated in the will as executors. The trustee named in the will and the Larkins declined to serve. The will was probated May 10, 1923. Merten and Shotwell were appointed executors with the will annexed and executed their bond with the Southern Surety Company as surety. Merten was also appointed trustee to execute the trust created by the will instead of the United States Trust Company. The final report of the administrators was approved by the county court September 25, 1924, and they and their surety were then discharged.

An item for which the administrators did not account was the proceeds of a 12,000-dollar note payable to testator and secured by a mortgage on a tract of land. Upon a trial of the issues raised by the pleadings in equity the district

court set aside the county court's order approving the final account of the administrators, ordered Merten to account for $8,315.15, as property lost to the estate by his fraud, and entered judgment against him and his surety therefor. In some respects the judgment extended to other defendants who participated in the fraud. Shotwell was exonerated and dismissed from the proceeding.

Merten, alone, is appellant. The only other party to the appeal is Thomas Reilly, plaintiff, who sued as an heir entitled to a share of testator's estate.

The bill of exceptions does not contain the evidence of fraud on which the judgment of the district court is based. In the appellate court Merten relies for a reversal on the defenses that plaintiff was without legal capacity to maintain the suit in equity and that the county court alone had jurisdiction of the subject-matter of the litigation. The trial court ruled against him on both propositions. These questions are not reviewable herein for the reason there is a fatal defect of parties to the appeal. Merten, alone, is appellant and Thomas Reilly, only, is appellee. The other parties whose rights and liabilities were adjudicated are not parties to the appeal. Shotwell, a joint obligor on the bond of the administrators, is neither an appellant nor an appellee. He did not appear in the appellate court. He would be adversely affected if the relief sought by Merten were granted. The following principle controls:

"All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Barkley v. Schaaf*, 110 Neb. 223.

The appeal cannot be entertained.

Fifteen pages of the brief of plaintiff contain matter not in the record and, pursuant to supreme court rule 16, costs therefor will not be taxed in his favor.

APPEAL DISMISSED.

AURORA BUILDING & LOAN ASSOCIATION, APPELLEE, V. GRAND ISLAND CULVERT & METAL WORKS, APPELLANT.

FILED NOVEMBER 24, 1933. No. 28677.

Mortgages: FORECLOSURE: APPOINTMENT OF RECEIVER. "In an action to foreclose mortgages where the petition prayed for the appointment of a receiver pending the action, but the application was not heard until final hearing, the court erred in appointing a receiver upon the final hearing, before the institution of an appeal or an application for a stay." *Chadron Banking Co. v. Mahoney*, 43 Neb. 214.

APPEAL from the district court for Hamilton county: HARRY D. LANDIS, JUDGE. *Reversed.*

Charles F. Adams and *Lloyd W. Kelly*, for appellant.

Craft, Edgerton & Fraizer, contra.

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

ROSE, J.

In a suit to foreclose a mortgage on residence property in the city of Aurora, plaintiff prayed also for the appointment of a receiver on the ground that the encumbered real estate was probably insufficient to satisfy the debt due plaintiff. The petition was filed July 9, 1932. Defendant waived the right to defend against foreclosure but resisted the appointment of a receiver. A decree of foreclosure was entered August 18, 1932, and at the same time a receiver was appointed. From the order appointing a receiver, defendant appealed.

The appeal presents the question: Did the district court err in appointing a receiver when the decree of foreclosure was entered August 18, 1932, on the ground that the mortgaged property would probably not sell for enough to satisfy plaintiff's lien? Defendant had not then taken a stay and never appealed from the decree of foreclosure. The sheriff subsequently sold the property for $829.44, a sum equal to the debt, interest and costs, and the sale was

confirmed June 23, 1933. On the record presented the following precedent controls the decision herein:

"In an action to foreclose mortgages where the petition prayed for the appointment of a receiver pending the action, but the application was not heard until final hearing, the court erred in appointing a receiver upon the final hearing, before the institution of an appeal or an application for a stay." *Chadron Banking Co. v. Mahoney*, 43 Neb. 214. See, also, *Philadelphia Mortgage & Trust Co. v. Goos*, 47 Neb. 804.

The order appointing the receiver is therefore

REVERSED.

REINHART EVERTS ET AL., APPELLEES, V. RUPERT M. YOUNG, COUNTY CLERK, APPELLANT.

FILED NOVEMBER 24, 1933. No. 28673.

1. County Boards: DECISIONS: COLLATERAL ATTACK. The act of a county board, in passing on sufficiency of remonstrance petition against continuation of budget for farm bureau and on qualifications of signers to such petition, is quasi judicial and is not subject to collateral attack.
2. ———: ———: REVIEW. Those aggrieved by county board's ruling on petition, remonstrating against continuation of budget for farm bureau, have adequate remedy at law by proceedings in error and cannot review such ruling by resort to injunction suit.

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

Waring & Waring and *W. J. Hammond*, for appellant.

McNeny, Gilham & Sprague, contra.

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

GOOD, J.

This is an action to enjoin the county clerk of Fillmore county from obeying an order and direction of the county

board of said county, requiring him to place upon the ballot, at the next ensuing election thereafter, the proposition as to whether or not the Fillmore county farm bureau budget should be continued. The trial court granted the injunction and permitted its judgment to be superseded. Defendant has appealed.

From a stipulation of the parties, it appears that Fillmore county has a population between 13,000 and 15,000; that in 1928 a farm bureau was duly organized in Fillmore county, pursuant to the provisions of section 2-1101 to section 2-1103, inclusive, Comp. St. 1929. The farm bureau continued in existence until 1932, when a remonstrance petition was filed, requesting the county board to submit to the voters of the county the question of a continuance of the appropriation for the support of the bureau. After an examination and hearing, the county board determined that the remonstrance was in due form and signed by a sufficient number to require the submission of the question to the legal voters, and thereupon adopted a resolution directing the county clerk to place the proposition upon the ballot at the ensuing election.

Section 2-1101, Comp. St. 1929, provides, in counties having a population of 13,000 to 15,000, for the filing of a petition, signed by not less than 500 persons, who are *bona fide* residents of the county and are actively and actually engaged in farming therein, requesting the county board to appropriate a sum of money out of the general fund of the county, for the purpose of promoting improvement in agricultural methods and other objects, including employing and maintaining an agricultural agent in said county under the administration of a farm bureau. Section 2-1102 provides that if such petition is filed in the time, manner and form prescribed it shall be the duty of the county board to accept and allow the petition and to annually allow such budget without further action on the part of the farm bureau. It further provides that, if there be filed with the county clerk within the prescribed time, either the same year or any second year

thereafter, a remonstrance against the allowance of the budget, the county board shall submit the question to the people of the county at the next general election held thereafter. It also provides that such remonstrators shall be *bona fide* residents of the county, actively and actually engaged in farming in said county, and shall be more than one-eighth in number than there are signers on the petition for the organization of the farm bureau; and provides further that, in considering the sufficiency of a remonstrance, the county board shall ignore the names of such remonstrators which also appear on the original petition or petitions.

By the stipulation it appears that 835 names of persons were upon the original petition for the farm bureau, filed in 1928; that there were 1,295 names on the remonstrance petitions filed in 1932. Plaintiffs in their petition allege, and under the stipulation of facts contend, that the remonstrance petitions were not signed by a sufficient number of qualified persons to require submission of the question to the voters of the county; that a number of the signers were not actively engaged in agriculture, and that others had signed the original petition favoring the organization of the farm bureau and could not, by withdrawing their names therefrom, qualify as signers of the remonstrance petition. For reasons hereinafter stated, we find it unnecessary to pass upon any of those questions.

Since the judgment in this case was entered in the district court, this court has adopted an opinion in the case of *State v. Tighe,* 124 Neb. 578, which we think controls the decision in this case. That was an action to compel the county board of supervisors by mandamus to allow money to finance the county farm bureau. It involved the sufficiency of the petitions favoring the farm bureau and budget therefor. It was there held that the county board, in passing upon the sufficiency of the petition, performed a quasi-judicial act, and that its judgment could not be coerced by mandamus; that the remedy

was by a direct review by proceedings in error, and not by collateral atack.

We think it is clear that in the instant case the county board acted quasi judicially in passing upon the sufficiency of the remonstrance petitions and the qualifications of signers thereto, and that its judgment may not be attacked in a collateral proceeding but can only be reviewed in a direct proceeding in error. An injunction action will not lie to correct errors of an inferior tribunal, where there is an available remedy in a direct proceeding by appeal or error. Error proceedings were available to the plaintiffs. It follows that the injunction should not have been granted.

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

REVERSED AND DISMISSED.

WINFRED H. MOORE V. STATE OF NEBRASKA.

FILED NOVEMBER 24, 1933. No. 28924.

1. Criminal Law: SENTENCE: SUSPENSION. In a criminal prosecution, after guilt of defendant has been legally established and subject to conditions prescribed by statute, "the court may, in its discretion, enter an order, without pronouncing sentence, suspending further proceedings and placing the accused on probation." Comp. St. 1929, sec. 29-2214.
2. ———: ———: ———. Where in a criminal cause the defendant has been legally sentenced, the trial court is powerless to suspend such sentence, but it may suspend its execution to permit a review of its judgment by an appellate court.
3. ———: ———: ———. Order by district court, purporting to suspend sentence legally pronounced in a criminal action, for the purpose of placing defendant on probation, is a nullity.

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

G. W. Irwin, for plaintiff in error.

Paul F. Good, Attorney General, and *William H. Wright, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

GOOD, J.

From an order of the district court revoking a former conditional order directing suspension of a jail sentence imposed upon Winfred H. Moore, for a violation of the liquor law, Moore, hereinafter called defendant, prosecutes error.

October 12, 1931, defendant pleaded guilty to an information charging him with a violation of the state liquor law. The court sentenced defendant to pay a fine of $100 and costs and to imprisonment in the county jail for 90 days, and entered a further order directing that the jail sentence be suspended on condition that the fine and costs be paid at once, and that defendant should be law-abiding and of good behavior for a period of two years.

It appears from the record that in April, 1933, the premises where defendant resides were visited by the sheriff with a search warrant, and that, on search of the premises, 75 gallons of alcohol, 25 gallons of whisky, and other intoxicating liquors were found. Thereupon, complaint was filed against defendant, charging him with another violation of the liquor law, and the county attorney then made application to vacate the order suspending the jail sentence, entered October 12, 1931. Upon hearing, the court entered an order vacating the former order suspending the jail sentence.

Defendant contends that the court was without power to vacate the former order without the filing of a verified information, and that the evidence is insufficient to show that defendant had violated the conditions of the order of suspension.

The view taken of the situation presented by the record renders it unnecessary to consider the contentions made by defendant, but it is deemed proper to call attention to the case of *Sellers v. State*, 105 Neb. 748, wherein it was held: "In a proceeding to vacate a parole granted by

the district court, the correct practice requires a verified information stating specifically the conduct constituting a violation of probationary conditions, but a proceeding by motion, stating that defendant violated his parole, may be sustained, if defendant had timely notice of a hearing, the assistance of counsel, the testimony of witnesses, and a fair and impartial trial."

The only statute authorizing district courts to place a defendant in a criminal proceeding upon probation is found in sections 29-2214 and 29-2215, Comp. St. 1929.

Section 29-2214 provides: "In case the said judge should find from the age of the accused, his former course in life, disposition, habits and inclinations, or that the offense of which he is found guilty is his first offense, and that from all the information obtainable the judge should be of the opinion that the accused would refrain from engaging in, or committing further criminal acts in the future, the court may, in its discretion, enter an order, *without pronouncing sentence,* suspending further proceedings and placing the accused on probation under the charge and supervision of a probation officer, or other suitable person." (Italics ours)

Section 29-2215, Comp. St. 1929, provides: "When any court suspends sentence and places a defendant on probation it shall determine the conditions and period of probation, which period shall not exceed, in the case of any defendant convicted of an offense less than a felony, two years. * * * The conditions of probation shall be such as the court shall in its discretion prescribe, and it may include among other conditions any or several of the following: That the probationer * * * shall pay in one or several sums a fine imposed at the time of being placed on probation. * * * The court * * * may, in case of violations of the probationary conditions, issue a warrant for the arrest of the probationer; and may at any time discharge the probationer; and in case of violation of the probationary conditions, the court may impose any penalty which it might have imposed before placing the defendant on probation."

We are convinced, from a careful analysis of the sections quoted above, that the district court is empowered to place on probation a defendant in a criminal proceeding only before pronouncing sentence. After sentence has been pronounced, the court is without further power in the premises except to grant a new trial or to suspend the sentence for the purpose of permitting review by an appellate court. The word "suspend" has many and divers meanings. Among the definitions are: To delay; to withhold. When we consider the whole of section 29-2215, Comp. St. 1929, it is clearly apparent that the word "suspend" is used in the sense of to delay or withhold. We are led to this view because, in the closing part of the section, it appears that upon a revocation of the probationary order the court may impose any sentence which it might have imposed prior to placing defendant on probation. The legislature had in mind that, upon a showing made, the court might place the defendant upon probation without passing sentence. If the court then passed sentence, it might give defendant a light or even a minimum sentence, but later, on a showing that the probationary order had been violated, it might be made to appear to the court that defendant was of vicious habits and criminal tendencies, and the court would then be empowered to impose any sentence which the law would have permitted in the first instance.

In the case of *Myers v. Fenton*, 121 Neb. 56, this court held: "A trial court is without power to set aside a sentence after the defendant has been committed thereunder and a portion thereof served, and impose a new or different sentence increasing the punishment, even at the same term at which the original sentence was imposed. A judgment which attempts so to do is void, and the original judgment remains in full force." A like holding was made in the case of *Hickman v. Fenton*, 120 Neb. 66.

Clearly, under this section, if sentence had been imposed before placing the defendant on probation, a greater sentence could not be imposed at a subsequent time for

the same offense. Yet, the statute provides that upon the revocation of the probationary order the court may impose any sentence that it had power to impose if no probation had been allowed. By giving to the word "suspend" the meaning above indicated, no inconsistency appears in the statute. It is true that the court is empowered to suspend the execution of a sentence pending review of the cause by proceedings in error, but that has no application to an attempt to suspend sentence for the purpose of placing defendant on probation.

Our attention is directed to subdivision "i" of section 29-2215, Comp. St. 1929, which provides for the payment in one or several sums of the fine imposed at the time defendant is placed on probation. We think it is evident that the fine here mentioned is not a fine for the violation of the statute for which defendant has been convicted, but it is a fine to be exacted as a condition to being placed on probation. If this is not the proper view, then we would have the situation that a defendant had partially performed the judgment against him in a criminal action and had paid a fine of some amount, and yet would be subject, on violation of the conditions of his probation, to any sentence which the court might, in the first instance, have imposed. Such action is not permissible. *Myers v. Fenton, supra.*

We think it is clear that the district court was without power to enter the order wherein it attempted to suspend the jail sentence imposed upon defendant, and that the order was without any legal efficacy whatever. That being the case, defendant may not now complain of the revocation of a void order.

We think the district court was right in vacating its void order, and it should, and probably did, order a *mittimus* to issue, directing that the jail sentence, imposed October 12, 1931, should be carried into effect.

JUDGMENT AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, RELATOR, V. ROLLAND F. IRELAND, RESPONDENT.

FILED NOVEMBER 24, 1933. No. 28228.

1. **Attorney and Client:** DISBARMENT. The purpose of a disbarment proceeding is not so much to punish the attorney as it is to determine in the public interest whether he should be permitted to practice.
2. ———: OBLIGATIONS OF ATTORNEYS. Attorneys, upon their admission to practice law, assume certain obligations and duties, and in their performance they must conform to certain standards in re ation to clients, to courts, to the profession, and to the public.

Original proceeding by the state to disbar the respondent. *Judgment of disbarment.*

Paul F. Good, Attorney General, and *Paul P. Chaney,* for relator.

Rolland F. Ireland and *Ralph S. Moseley,* for respondent.

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

EBERLY, J.

The attorney general of the state commenced this as a disbarment proceeding against Rolland F. Ireland, an attorney at law, by filing a complaint in this court. After certain preliminary proceedings issues were joined by the defendant, and Honorable Herbert W. Baird was appointed referee to take evidence and report thereon his findings of fact and conclusions of law. A public hearing was had at which defendant was represented by counsel, and evidence was introduced in behalf of the state and of the defendant.

"In substance the charges upon which the proceeding was tried and upon which evidence was adduced were (as stated in the referee's report) that Rolland F. Ireland obtained $12 from the City National Bank of Crete, Nebraska, on October 19, 1929, upon the faith of a check which he did not have funds on deposit in the bank to pay; that he

obtained $17 from the Bank of Wilber on the 17th day of March, 1931, under the same circumstances; that he obtained $15 from the First National Bank of Friend, Nebraska, on an unknown date but by the drawing and delivery of a check for which he had not sufficient funds on deposit. Further, that Rolland F. Ireland misconducted himself by soliciting and receiving from his clients for court costs in promised litigation, which was never commenced, certain moneys which on repeated request and demand he failed to expend or apply to the specified and agreed purposes, or return to his said clients, and that the persons from whom he obtained said funds were Elvin Thompson of Western, Nebraska, from whom he received $75 about October 15, 1930; C. D. Kunz of Elmwood, Nebraska, $125 about October 9, 1930; Dr. E. T. McCrea of Table Rock, Nebraska, $125 about November 1, 1930; August H. Bornemeier, Elmwood, Nebraska, $125 about October 20, 1930; Nels S. Swanson of Swedeburg, Nebraska, $125 about November 8, 1930; Edgar Ericson, Wahoo, Nebraska, $125 about November 2, 1930; R. L. Panska, Elmwood, Nebraska, $75 about October 8, 1930. That the said Ireland did not undertake said litigation in good faith and did not expect to commence any of said suits."

At the conclusion of such hearing the referee made findings of fact, which may be summarized as follows:

"That the defendant obtained money by the passing of checks, intending thereby to defraud the payee of said checks; that his acts in each instance constituted a misdemeanor involving moral turpitude; that no prosecution has been instituted in any case based on these acts but that they are admitted by the defendant by virtue of a stipulation herein filed. Your referee further finds that the defendant has been guilty of professional misconduct in the matter of the claims heretofore enumerated which he solicited for suit against the National Mortgage & Loan Co., and the sums that he collected for suit upon such claims, for the reason that the defendant knew that, through lapse of time and other causes, said claims were

uncollectible and even after his being employed and receiving compensation made no adequate effort to bring suit and collect upon said claims nor to return the funds solicited by him to his clients."

In consideration of the objections of the defendant to the report of the referee, as well as the motion of the attorney general for disbarment of the defendant, we have carefully read the evidence and our conclusion is in accord with the conclusions of the referee.

As we said in *State v. Priest,* 123 Neb. 241: "The purpose of a disbarment proceeding is not so much to punish the attorney as it is to determine in the public interest whether he should be permitted to practice. Attorneys, upon their admission to practice law, assume certain obligations and duties, and in their performance they must conform to certain standards in relation to clients, to courts, to the profession, and to the public. *State v. Kern,* 203 Wis. 178; *State v. Barto,* 202 Wis. 329; *In re Egan,* 52 S. Dak. 394."

"In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts." *State v. Burr,* 19 Neb. 593.

The evidence establishes that the defendant has failed to conform to the high standards of his profession. He has been disloyal to the solemn trust imposed upon him by his clients, and, in fact, as we view the evidence in the record, secured the money paid him, as charged in the complaint, by the equivalent of fraud and deceit. Further, extended discussion is wholly unnecessary, for such conduct by an attorney cannot, and will not, be condoned.

It is the judgment of this court that we approve and confirm the findings and conclusions of the referee herein; and it is ordered that the admission of the defendant Rolland F. Ireland to the bar of this state shall be canceled and annulled, and his name be stricken from the rolls of attorneys and counselors at law.

JUDGMENT OF DISBARMENT.

MORRILL COUNTY, APPELLANT, V. CLARENCE G. BLISS ET AL., APPELLEES.

FILED NOVEMBER 24, 1933. No. 28764.

1. New Trial: NEWLY DISCOVERED EVIDENCE. "A new trial will not be granted upon the ground of newly discovered evidence, unless it is made to appear that such evidence, if it had been offered and admitted on the trial, would probably have produced a different result." *Dickinson v. Aldrich*, 79 Neb. 198.
2. ———: DISCRETION OF COURT. The application for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its action thereon will not be overruled unless a clear abuse of discretion is shown.
3. Evidence examined, and *held* to sustain the final order entered by the trial court denying the application for a new trial.

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

R. O. Canaday, William Ritchie, Jr., C. G. Perry and *H. Arey*, for appellant.

Montgomery, Hall & Young, Kennedy, Holland & De Lacy, Perry, Van Pelt & Marti, Butler & James, Neighbors & Coulter, C.-M. Skiles, I. D. Beynon, Sloans, Keenan & Corbitt and *Gaines, McGilton & Gaines, contra.*

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

EBERLY, J.

This is an appeal from a judgment of the district court for Morrill county entered on February 16, 1933, in terms denying plaintiff's petition for a new trial. Reference is hereby made to the case of *Morrill County v. Bliss, ante*, p. 97, for issues, facts, and history of the proceeding of which this forms a part.

Plaintiff's petition for a new trial was filed under the provisions of section 20-1145, Comp. St. 1929. The sole basis of the proceeding was newly discovered evidence. The final order sought to be affected by the instant proceeding

was a judgment entered in this cause on February 9, 1932, by the terms of which the district court for Morrill county found "generally against the plaintiff and in favor of the defendants and each and all of them; * * * that the defendants, who were members, officers, or special agents of the guaranty fund commission, performed their duties in connection with the Bridgeport Bank, Bridgeport, Nebraska, in a legal manner, in the utmost good faith, and to the best of their ability; * * * that the evidence wholly fails to establish any irregular or illegal transactions on the part of any of the other defendants, who were not members, officers, or special agents of the guaranty fund commission, or their bondsmen, but that all transactions complained of in plaintiff's petition were regular and legal in all respects," and thereupon "plaintiff's petition, and each and every cause of action therein contained, was dismissed."

Thereupon plaintiff prosecuted an appeal to this court from the above named "final order" of February 9, 1932. Upon the hearing thereof in this court a judgment of affirmance was entered therein. *Morrill County v. Bliss, ante,* p. 97. It will be noted in passing that the following language was employed in the opinion of this court above referred to, in discussing the contentions of plaintiff presented in argument in that case, that acts of the defendants complained of were in contravention of the terms of the Nebraska statute:

"The bank was not operated in violation of law. It was open for business and all the money withdrawn and transactions of the bank were in the usual and ordinary course of banking business. * * * The trial court filed an able opinion in this case, to which we are indebted for a careful and helpful analysis of the case. After careful and painstaking consideration, we reach the same conclusion. It is, therefore, ordered that the appeal be dismissed."

The newly discovered evidence alleged in plaintiff's petition as ground for a new trial is the alleged advice of the general counsel of the guaranty fund commission charged

to have been given in 1925-1927 during the continuance of business of the Bridgeport bank "as a going concern," to the effect: "That it was illegal to accept deposits while said bank (of Bridgeport) was being held by the said guaranty fund commission and before it had been turned over to a receiver, and that at said time it was illegal to sell and dispose of the property of the bank except by way of a necessary compromise, and also that it was illegal to liquidate the bank while it was being held by the guaranty fund commission."

In consideration of the record here presented, it will be remembered that applications for new trials on the ground of newly discovered evidence are not favored by the courts. *Wiegand v. Lincoln Traction Co.*, 123 Neb. 766; *Smith v. Goodman*, 100 Neb. 284; *Fitzgerald v. Brandt*, 36 Neb. 683.

"A new trial will not be granted upon the ground of newly discovered evidence, unless it is made to appear that such evidence, if it had been offered and admitted on the trial, would probably have produced a different result." *Dickinson v. Aldrich*, 79 Neb. 198. See, also, *Williams v. Miles*, 73 Neb. 193; *Smith v. Goodman*, 100 Neb. 284; *Ogden v. State*, 13 Neb. 436; *Simonsen v. Thorin*, 120 Neb. 684; *Wiegand v. Lincoln Traction Co.*, 123 Neb. 766.

The application for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its action thereon will not be overruled unless a clear abuse of discretion is shown. *Christensen v. Omaha & C. B. Street R. Co.*, 85 Neb. 694; *Peterson v. Kouty*, 103 Neb. 321; *Allender v. Chicago & N. W. R. Co.*, 119 Neb. 559; *Blaha v. Chicago & N. W. R. Co.*, 119 Neb. 611.

It is obvious in the instant case that the trial court by its judgment of February 9, 1932, determined and adjudicated, with the detailed evidence of the various challenged transactions before it, that the acts performed therein by the defendants were each legal and in conformity with the provisions of the Nebraska statute. From its inher-

ent nature this decision was not in any manner based on the legal effect of the advice of counsel received, relied on or in any manner acted upon by the defendants. It involved solely the construction of the Nebraska statute as applied to the facts disclosed by the testimony before it. On this as one of the bases of its judgment, it sustained the defenses tendered by the defendants.

On appeal this court in a hearing *de novo* affirmed the judgment of the trial court, reaching the same conclusion. This determination thus made became "the law of the case" so far as the present proceeding is concerned, and is binding on all parties in this action. 2 Freeman, Judgments (5th ed.) sec. 630; *Chicago, B. & Q. R. Co. v. Cass County,* 72 Neb. 489.

It is obvious that, conceding the existence of the "newly discovered evidence" to be as alleged by plaintiff, and giving it the force and effect its inherent nature would entitle it to receive, in view of the controlling "law of the case," the determination appealed from is correct. For the purpose of this case and as between the parties thereto, in this proceeding the defendants are conclusively deemed to have complied with all the requirements of the Nebraska statutes relative to the guaranty fund commission and to have in no manner violated the same. However, the examination of the testimony of the general counsel of the guaranty fund commission, as contained in his last deposition which was received in evidence, is to the effect that the advice alleged to have been given to the members of the guaranty fund commission was never imparted by him. There thus being substantially a failure of proof to sustain the necessary allegations of plaintiff's petition, of course on this ground alone the proceeding must fail.

A careful reading of all the evidence, in connection with the due consideration of the "law of the case," leads inescapably to the conclusion that if the so-called newly discovered evidence as established by the proof in the record had been presented at the former trial it would not have changed the result. At least we are unable to state, in

the light of the entire record, that the action of the trial court in denying the petition for a new trial was aught than a legitimate exercise of judicial discretion.

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

AFFIRMED.

HENRY C. WINTERS, A MINOR, BY SAMUEL L. WINTERS, HIS FATHER AND NEXT FRIEND, APPELLANT, V. WILLIAM T. RANCE, APPELLEE.

FILED NOVEMBER 24, 1933. No. 28688.

1. Trial: INSTRUCTIONS. It is not error for the trial court to limit the jury to a determination of the one disputed question as made by the pleadings and evidence, upon which a verdict, if recovered, would be allowed to stand.
2. Physicians and Surgeons: MALPRACTICE: BURDEN OF PROOF. The burden of proof in a malpractice case is upon the plaintiff, first, to prove the negligence in the treatment as alleged, and second, to prove that this negligence was the proximate cause of the injury complained of.
3. Evidence: EXPERT WITNESSES: IMPEACHMENT. Medical authorities are not admissible in evidence as independent evidence of the statements therein expressed, yet a cross-examiner may use such text-books in an effort to contradict an expert medical witness.

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

B. S. Baker and *S. L. Winters,* for appellant.

Kennedy, Holland & De Lacy, contra.

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

PAINE, J.

This is a damage action, brought by the father and next friend of a minor, for malpractice in setting a frac-

tured elbow. After a trial in the district court, the jury returned a verdict for the defendant.

On the afternoon of June 30, 1927, the plaintiff, a 7-year-old boy, fell out of a tree and broke his right arm at the elbow. The father, Samuel L. Winters, an Omaha attorney, was out of town, and the mother called Dr. William T. Rance, the defendant and appellee, who set the broken arm at the home in the evening, and the next day took the lad to the hospital and reset it.

In the petition the plaintiff charges that the defendant wrongfully, carelessly, and negligently bandaged the arm and elbow so tightly that it stopped all circulation in the arm, the fingers at times being blue-black, and continued this until it caused ischemic paralysis, followed by Volkmann's contracture; that this resulted in the loss of the power to use the hand, the same being hopelessly crippled.

The defendant in the answer alleges that the fracture was at the lower end of the humerus; that it was almost compound, and was a Y-shaped fracture, and that he carefully and properly treated the same, and was guilty of no negligence of any kind in the treatment thereof. No reply was filed.

The trial of the case developed into a battle between experts. The plaintiff presented Dr. William T. Coughlin, director of surgery at Washington University, and who has been for some years surgeon-in-chief at St. Mary's Hospital, St. Louis, and Dr. John J. O'Hearn. The defendant called as expert witnesses professors of surgery and of orthopedic surgery from the two medical schools in Omaha, and other surgeons of standing.

The facts as disclosed by the evidence show that at the lower end of the humerus, which is the large bone in the upper arm, there are two knobs, called condyles, and this fracture went across the shaft of the humerus and extended in a Y shape down into the joint, and it is technically known as a supra-condylar Y-shaped fracture. This is the most serious type of fracture one can have in the region of the elbow. In addition, the skin was caught

in this fracture, and a superficial vein was pierced, and there was discoloration when the defendant arrived in response to the first call.

The evidence further disclosed that, upon being called to the home, Dr. Rance set the fracture and used adhesive tape at the wrist and on the outside of the arm to hold it in position, no tape going clear around at either place, but just to give support for a piece of tape to go over the shoulder and hold the hand up to the chest. By observing the radial pulse, he found it was not as strong as that in the other arm, so he cut the tape and lowered the arm a little until the radial pulse in both arms was the same. The arm was then supported in a loose sling. Dr. Rance told the mother that he would have the boy taken to the hospital the next morning for X-ray pictures. There it was set in the dark room, with the assistance of a fluoroscope, and after Dr. Rance had set it, Dr. Duncan, an expert, thought he could improve it a little, and did so. The arm was then taped up as before, with the tape going over the shoulder to hold the arm flexed, and again a cloth, about the size of a dish-towel, was made into a loose sling in which to rest the arm in what is known as Jones' position. After three days the swelling began to recede. Nine X-rays were introduced, showing about a 99 per cent. reduction of the fracture. Volkmann's contracture resulted, drawing up the fingers. This frequently follows a severe injury in the elbow joint when ischemic paralysis occurs, which is due chiefly to local and temporary deficiency of the blood.

It is admitted by the experts of both parties that the method used by Dr. Rance in suspending the arm after setting the fracture is the method first described by Sir Robert Jones, of Liverpool, and is an approved method. Dr. Coughlin, plaintiff's expert, testified, by deposition taken in St. Louis, that in this particular fracture the surgeon is allowed to get the broken parts as nearly in their natural position as possible, by such a method as may be best in each particular case; that there is a wide

liberty of choice. At the time that he was testifying, Dr. Coughlin stated that he then had a patient with the same type of fracture, who was in pain and was delirious and screamed in the night, and the evidence in the case at bar showed that the plaintiff suffered great pain.

Dr. O'Hearn testified that in his opinion the Volkmann's contracture was produced by interference with the return circulation of the blood, and while it was thought that tight bandaging might produce it, yet it sometimes occurred when there was no bandaging at all. The plaintiff's witnesses failed to point out wherein any of the technique used by the defendant, Dr. Rance, was wrong.

In the motion for a new trial, instructions 1, 3, 4, 7, 9, 10, and 14 are attacked, as well as certain errors in the trial of the case. Plaintiff insists that the court narrowed the issues submitted to the jury too strictly, in that the instructions confined the question that the jury were to pass upon, as far as negligence was concerned, solely to the circular bandage referred to in the testimony, when the petition charged other acts of negligence in the treatment of said arm.

The plaintiff, in his petition and his evidence, stressed the circular bandage, and in permitting the case to go to the jury the trial court rightly limited the jury to the one question upon which it would allow a verdict for the plaintiff to stand.

The burden of proof in a malpractice case is upon the plaintiff, first, to prove the negligence in the treatment as alleged, and, second, to prove that this negligence was the proximate cause of the injury complained of.

When a case demands the skill and judgment of a surgeon, with respect to the employment of scientific technique of which a layman can have no knowledge at all, then such negligence must be proved by expert witnesses. *Tady v. Warta*, 111 Neb. 521; *McDaniel v. Wolcott*, 115 Neb. 675; *Snearly v. McCarthy*, 180 Ia. 81; *Merriam v. Hamilton*, 64 Or. 476; *McGuire v. Rix*, 118 Neb. 434; *Schrage v. Miller*, 123 Neb. 266.

Dr. Duncan, a leading expert, testified positively that the Volkmann's contracture was caused by the injury itself, and that the bandage did not have anything to do with it. *Hilmer v. Western Travelers Accident Ass'n,* 86 Neb. 285.

In the case at bar, a large number of medical authorities were used in the examination of experts, and quotations from such authorities were embodied in the questions put to such experts. While medical books are not admissible in evidence as independent evidence of the opinions expressed therein, yet the cross-examiner may properly use these text-books in an effort to contradict an expert witness. If an expert has based his opinion upon a particular authority, then a paragraph from such authority could be read in evidence to contradict him. *Kern v. Pullen,* 138 Or. 222, 82 A. L. R. 434; *Oliverius v. Wicks,* 107 Neb. 821; *Van Skike v. Potter,* 53 Neb. 28; 3 Wigmore, Evidence (2d ed.) 649; *Hutchinson v. State,* 19 Neb. 262.

The plaintiff calls our attention to the very recent case of *Van Der Bie v. Kools,* 264 Mich. 468, being a malpractice case founded upon a Volkmann's contracture, in which the judgment for the plaintiff was affirmed. A careful reading of this case discloses that, when originally set on October 24, 1931, the forearm of a 3-year-old child was wound with adhesive tape and the arm was flexed, and then the forearm was taped to the upper arm to hold it in this position, where it was left until November 9, when sores had developed and the bandages were removed, and in spite of approved treatment thereafter by a bone specialist, Volkmann's contracture developed. The court found that the malpractice consisted in flexing the forearm so acutely and bandaging it too tightly with adhesive tape for such a long period of time.

The facts in the case at bar are entirely different from those recited in this late case, for the defendant in the case at bar lowered the forearm until the radial pulse in the injured arm was the same as the one in the other

arm; that no adhesive tape was applied to hold the forearm to the upper arm, and that no adhesive tape at any place went entirely around the arm; that the arm was dressed at least daily.

It is proved in the testimony that Volkmann's contracture results frequently when no bandages of any kind are applied to the arm, and has resulted in some cases when the arm was not flexed at all, showing that the injury following a Y-shaped fracture of an elbow often results in such damage to the circulatory system as to produce ischemic paralysis, followed by Volkmann's contracture.

In the case at bar, an experienced trial judge limited the questions submitted to the jury to a greater extent than other trial judges might have done, but a careful examination of the evidence and the authorities discloses no reversible error in the admission of evidence, or in the giving of instructions, and the jury after deliberation returned a verdict in the defendant's favor.

This young plaintiff has been deprived of the use of this arm and hand by a most unfortunate accident, but the jury decided that his present condition was not the result of negligence on the part of the defendant. Finding no error in the judgment of dismissal, on said verdict, the same is hereby

AFFIRMED.

FARM INVESTMENT COMPANY, APPELLANT, V. SCOTTS BLUFF COUNTY, APPELLEE.

FILED NOVEMBER 24, 1933. No. 28682.

1. **Taxation:** VOID TAX SALE: REIMBURSEMENT: PROCEDURE. Section 77-2030, Comp. St. 1929, does not require a foreclosure action to be begun or a demand for a deed to be made on a void tax sale certificate before instituting proceedings before the board of county commissioners for reimbursement, provided the proceedings are begun within five years from the date of the certificate.

2. ———: ———: ———: ———. Section 77-2054, Comp. St. 1929, refers only to a purchaser of valid tax sale certificates which shall cease to be valid by reason of being adjudged invalid by a court of competent jurisdiction over the subject-matter, before he can call upon the county to hold him harmless.

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

Wright & Wright and *Dysart & Dysart,* for appellant.

Rush C. Clarke and *Robert W. Patterson, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

BEGLEY, District Judge.

This is an action begun by filing an application before the board of county commissioners of Scotts Bluff county for reimbursement for the amount paid on a tax sale certificate and subsequent taxes paid thereunder, for the reason, as alleged, that the title of the property was in the United States and it was not subject to taxation. The county commissioners denied the application and an appeal was taken to the district court. The defendant demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer and the plaintiff has appealed.

The principal question involved is whether it is necessary to first attempt to foreclose or to demand a deed on a tax sale certificate before filing a claim with the county board. The tax sale certificate was dated November 20, 1926. The proceeding begun before the county commissioners was filed November 12, 1931, which was within five years after the issuance of the certificate.

The appellant contends that its action was properly brought under the provisions of section 77-2030, Comp. St. 1929, wherein it is provided that when by mistake or wrongful act of the county treasurer or other officer land has been sold on which no tax was due, etc., the county

shall hold the purchaser harmless by paying him the amount of the principal, interest and costs to which he would have been entitled, had the land been rightfully sold.

The appellee contends that, before the appellant could maintain his action before the board of county commissioners, he must comply with the provisions of section 77-2054, Comp. St. 1929, which provides that whenever, for any reason, real estate has been sold for the payment of any tax or special assessment levied by any county, municipality, drainage district or other political subdivision of the state, and it shall thereafter be determined by a court of competent jurisdiction that said sale was void, it shall be the duty of said county, etc., which levied the tax or special assessment to hold said purchaser harmless by paying him the amount of the principal paid by him at the sale, with interest thereon at the rate of 6 per cent. per annum from the date of sale.

In construing these sections it will be noted that section 77-2030 does not require a foreclosure action to be begun on a void tax sale certificate before instituting proceedings before the board of county commissioners for reimbursement, provided the proceedings are begun within five years from the date of the certificate. In the case of *Haarmann Vinegar & Pickle Co. v. Douglas County*, 122 Neb. 643, it was held: "If a tax has been levied that is absolutely void, and has been paid, though voluntarily, the amount thereof may be recovered in an action for that purpose."

Section 77-2054 refers only to proceedings on valid tax sale certificates which shall cease to be valid by reason of having been adjudged invalid by a court of competent jurisdiction before he can call upon the county to hold him harmless.

The appellee has cited the case of *Fuller v. County of Colfax*, 33 Neb. 716, in support of its position. In the *Fuller* case the title to land when taxed was in the United States but was later privately owned and the private

owner enjoined the enforcement of the tax. After years of litigation the tax was held to be void. The holder of the tax sale certificate was not a party to that litigation and did nothing with his certificate until eleven years after its date when he filed his claim with the county board. The court held that the action was barred by the statute of limitations. In the present case the real estate was, and still is, in the name of the United States and the action in this case was begun before the county board within five years, which differentiates it from the *Fuller* case.

In this case it is admitted by the demurrer that the title to the land in question is in the United States and not subject to tax and therefore the tax sale certificate had failed and was void. No proceedings for a valid foreclosure were possible because no service could be had upon the owner of the land and there was no title holder that could be brought into court and the validity of the certificate can only be properly litigated in a proceeding begun before the county board and appealed to the district court as was done in this case as provided by section 26-119, Comp. St. 1929.

The district court therefore erred in sustaining the demurrer and the judgment is reversed and the cause remanded to the district court for further proceedings.

REVERSED.

JESSIE B. HILL, ADMINISTRATRIX, APPELLEE, V. H. M. CAMPBELL, APPELLANT.

FILED NOVEMBER 24, 1933. No. 28704.

1. **Judicial Sales:** SETTING ASIDE. "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *Metropolitan Life Ins. Co. v. Heany*, 122 Neb. 747.
2. **Mortgages:** FORECLOSURE SALE: NOTICE. Mere surplusage in a notice of sale which is without prejudice to the resisting party is not such an irregularity as will prevent confirmation.

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

W. A. Stewart, Jr., and *Cook & Cook*, for appellant.

Frank M. Johnson, contra.

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

LANDIS, District Judge.

This is a suit to foreclose a mortgage on land in Dawson county. The district court entered a decree of foreclosure July 27, 1931. The mortgaged realty was sold at sheriff's sale for $29,496.17. The sale was confirmed and defendant H. M. Campbell, mortgagor, has appealed to this court from the order of confirmation.

Inadequacy of price is mainly relied upon for reversal. Estimates of value as shown by the testimony ranged considerably, but the discrepancies between the estimates and the sale price are insufficient to overturn the confirmation within the meaning of the rule announced in *Metropolitan Life Ins. Co. v. Heany*, 122 Neb. 747: "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake."

Another objection to confirmation is based on the notice of sale containing surplusage, in that a defendant, Lexington State Bank, is named therein which had had its interest satisfied and released of record before the sale. The notice was not misleading, correctly describes the amount of the decree and costs and is otherwise regular and sufficient. This surplusage was without prejudice to appellant.

Judgment affirmed, with leave to redeem before the mandate is issued.

AFFIRMED.

HENRY TRAMPE, APPELLEE, V. JOHN D. TILLEY ET AL., APPELLANTS.

FILED NOVEMBER 24, 1933. No. 28707.

Record examined and proceedings on foreclosure sale found to be regular and order confirming sale affirmed.

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

W. I. Tillinghast, for appellants.

Mayer, Kroger & Mayer and *L. A. DeVoe, contra.*

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

REDICK, District Judge.

This is an appeal by John D. and Anna Tilley from an order confirming a sale of 680 acres of land in Arthur county, upon foreclosure of an option contract for its purchase from plaintiff, Henry Trampe. The option for purchase was contained in a lease of the land and granted defendants leave to purchase for $10,000, payable $2,500 on or before March 1, 1927, and the remainder later. Defendants were unable to make payment March 1, 1927, but in February, 1927, paid $1,000 in accordance with modified terms of the option. No further payments were made and decree of foreclosure was entered October 5, 1931, for $9,494. Stay was taken and sale was had August 9, 1932, to plaintiff, for $10,031.44, the full amount of the decree. Some objections are made to the order of sale and notice thereof, but are not of such importance as to render the sale irregular, and the same was duly confirmed. The only evidence of the value of the land is contained in an affidavit of plaintiff, who fixes it at $5,000, but plaintiff bid the full amount of his decree. Under these conditions we know of no rule of law by which defendants can be granted relief, and the order confirming the sale will be affirmed; defendants given leave to redeem at any time before mandate issues.

AFFIRMED.

J. I. CASE COMPANY, APPELLANT, V. ED. THOS. HRUBESKY, APPELLEE.

FILED NOVEMBER 29, 1933. No. 28650.

1. **Trial.** "In a jury trial, the party who, by the pleadings, is required to first produce evidence is entitled to open and conclude the argument to the jury." *Bennington State Bank v. Petersen*, 114 Neb. 420.
2. **Bills and Notes: PLEADING: PROOF.** A payee, who pleads a negotiable instrument as the sole basis of his cause of action against the maker, is not required to prove it when the answer admits the execution, delivery and ownership of the instrument.
3. **Fraud: BURDEN OF PROOF.** Fraud is never presumed but must be proved and the burden of proving it is upon the party alleging it.
4. **Bills and Notes: FRAUD.** To the general rule that one who signs an instrument without reading it, when he can read and has an opportunity, cannot avoid the effect of his signature, this is an exception: Where the execution of the instrument is obtained by fraud, sufficient to excuse the maker's failure to read or to cause it to be read to him, it is not binding upon him.

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

John J. Ledwith and *L. F. Otradovsky*, for appellant.

W. B. Sadilek and *George W. Wertz*, *contra*.

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

GOSS, C. J.

Plaintiff appeals from a judgment in favor of defendant in a suit on a trade acceptance.

The petition, filed May 7, 1932, in the district court, alleged that plaintiff was a Wisconsin corporation, authorized to do business in Nebraska, engaged in selling farm machinery, implements and accessories, and that defendant is a resident of Schuyler, Nebraska; that on or about August 19, 1929, defendant executed and delivered to plaintiff a trade acceptance of which plaintiff is the owner

and holder, no part of which has been paid, on which it prays judgment for the amount due with interest at 10 per cent. The petition sets out a trade acceptance for $365, in favor of J. I. Case Company, due September 1, 1929, bearing 10 per cent. interest from maturity, accepted August 19, 1929, by defendant. The instrument recites: "This acceptance is drawn to cover purchase price of goods furnished by the drawer to the acceptor."

The answer was very informal and rather confusing. It was evidently the county court answer, or a copy thereof, allowed to be refiled in the district court. It dealt with six causes of action, only the last of which now remained unsettled. Without detailed recitals, its effect as to the sixth cause of action was to admit the corporate capacity and authority of plaintiff to do business in Nebraska, to admit the execution and delivery to plaintiff of the trade acceptance, and to admit that plaintiff is the holder thereof. As matters of defense the answer alleged that defendant was the local representative of plaintiff handling tractors; that in August, 1929, plaintiff sent its sales agent, Earl Lound, to defendant to make a sale of a large tractor to Sayers Brothers of Leigh and Lound told defendant the sale could be made if defendant would take in an old tractor in part payment; defendant informed Lound he would not participate in any trade and if the company wished to do so it could consider the matter as a company trade; that Lound sold a tractor for a total of $1,389.90, accepting $850 cash and an old tractor therefor; afterwards Lound told defendant the trade was made for the company, that defendant would get his full commission when Lound resold the old tractor, asked defendant to execute his commission slip, and, by deception and fraud, got defendant to sign the trade acceptance instead of a commission slip; that it was obtained by fraud and deception, was without consideration and void; that as soon as he discovered the real facts he disavowed all interest in the deal made by Lound for the company except that he claimed and still claims his

commission. He prayed that the action be dismissed. Plaintiff's reply was a general denial.

One assignment of error is that the court refused to give plaintiff the right to open and close the argument to the jury.

Section 20-1107, Comp. St. 1929, provides, with respect to jury trials: "Third. The party who would be defeated if no evidence were given on either side must first produce his evidence. * * * Sixth. * * * In argument, the party required first to produce his evidence shall have the opening and conclusion."

It is true that, when the trial opened, plaintiff produced the first witness and then rested. The witness, James P. Cody, was in charge of plaintiff's sales and collections at the Lincoln office. He testified briefly, without objection, to the corporate capacity and authority of plaintiff to do business in Nebraska, to the capacity and signature of B. C. Cook, the drawer of the trade acceptance, to the signature of Hrubesky, as the acceptor thereof, and to other immaterial matters settled by the parties when they settled other causes of action in the original case in the county court and evidenced the settlement by a stipulation filed in this case in the district court, by virtue of which the controversies were narrowed from six causes of action to one. His testimony was wholly unnecessary to establish plaintiff's claim. If no proof had been offered by defendant, plaintiff would have been entitled to judgment on the pleadings.

In the instructions the court, after briefly stating the pleadings, told the jury in the second instruction that, as a matter of law, the trade acceptance was signed by defendant with all due formalities of law, that there was "no dispute regarding the signing of same, and you are not concerned with that angle of the case;" and that the jury should proceed at once to determine whether the instrument was obtained by plaintiff from defendant through fraud and deceit. This instruction then placed the burden of proving this affirmative defense upon de-

fendant, who had alleged it. No error is assigned as to this instruction, nor, for that matter, as to any instruction to the jury.

Fraud is never presumed, but must be proved, and the burden of proving it is upon the party alleging it. 12 R. C. L. 424, sec. 172; *Clark v. Tennant,* 5 Neb. 549; *Hampton v. Webster,* 56 Neb. 628; *Kernan v. Modern Woodmen of America,* 120 Neb. 333.

In an action upon notes, defendant made answer alleging payment of the notes. It was held that he had the right and duty to open and close the testimony and the right to open and close the argument. *Osborne & Co. v. Kline,* 18 Neb. 344. See, also, *Suiter v. Park Nat. Bank,* 35 Neb. 372; *Hickman v. Layne,* 47 Neb. 177; *Brumback v. American Bank of Beatrice,* 53 Neb. 714; *Farmers State Bank v. Cavanaugh,* 112 Neb. 142; *Thompson v. Wall,* 112 Neb. 196; *Bennington State Bank v. Petersen,* 114 Neb. 420. From the foregoing, and many other cases which might be cited, it appears that the right to open and close the evidence and the argument to the jury is to be ascertained from the state of the pleadings. *Farmers State Bank v. Cavanaugh,* 112 Neb. 142, was similar to the case at bar. The action was upon a promissory note. Defendant "admitted that she signed the note in question, but pleaded that her signature thereto was obtained by fraud and deceit, * * * the details of which were fully set forth in the answer. The trial resulted in a verdict and judgment in favor of the defendant. Plaintiff appeals. * * * It is well settled that where the defendant in his answer admits the plaintiff's cause of action, but sets up new matter as a defense, which defense would fail without proof thereof, the defendant is entitled to open and close."

We think the court did not err in refusing plaintiff's request to open and close the argument.

The only other assignments of error are that the court failed, at the close of defendant's evidence and at the close of all the evidence, to sustain plaintiff's motions for

a directed verdict, and that the court overruled plaintiff's motion for a new trial based upon the grounds that the verdict is not sustained by sufficient evidence and is contrary to law.

Plaintiff seeks to compel defendant to carry out the terms of the trade acceptance and thus to pay for the second-hand tractor. In short, plaintiff insists that defendant is liable on the instrument because he signed it. In support of this proposition plaintiff cites 12 R. C. L. 386, sec. 136, which says, citing cases in the footnote: "It is well settled that a person who signs an instrument without reading it, when he has the opportunity to read it and can read, cannot avoid the effect of his signature merely because he was not informed of its contents" (citing cases in support of this very generally known rule). But the section then proceeds to specify certain exceptions from which we quote further: "But the rule is otherwise where the execution is obtained by fraud, and in such case the instrument is not binding on the party executing it though he did not read it or request that it be read to him. The same is true where he is prevented from reading it or having it read by some fraud or device on the part of the other party. Nor does the general rule apply where there is a relation of trust and confidence between the parties."

Defendant could read but did not read the instrument. He pleaded the fraud and deceit wrought upon him by plaintiff, through its agent Lound. He testified sufficiently to submit to the jury, that Lound induced him to sign the trade acceptance, believing it was the usual commission slip by virtue of which plaintiff would pay defendant a commission on a sale made in his territory. The testimony of Mr. Lound and other evidence and circumstances made a very sharp conflict of fact, upon which would rest a decision whether defendant was relieved from liability by virtue of fraud and deceit. That question was for the jury. It was submitted to the jury under instructions which are not challenged. We find no legal

justification for disturbing the verdict nor for reversing the judgment based thereon.

The judgment of the district court is

AFFIRMED.

COMMERCE TRUST COMPANY OF LINCOLN, APPELLEE, V. HARRY P. BRADLEY ET AL., APPELLANTS.

FILED NOVEMBER 29, 1933. No. 28730.

Mortgages: FORECLOSURE: SALE: CONFIRMATION. On appeal from an order confirming a judicial sale in a suit to foreclose a mortgage, confirmation will not be set aside for inadequacy of price, where it is not so low as to evidence fraud or as to otherwise invalidate the sale, and where the evidence does not prove that a resale would result in a better price.

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

Hastings & Hastings, for appellants.

M. M. Maupin and *G. H. McGinley, contra.*

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

ROSE, J.

This is a suit to foreclose a mortgage on a tract of land in Perkins county. The property was sold under an order of sale issued pursuant to a decree of foreclosure. From a judgment confirming the sale defendants appealed.

On appeal a reversal is sought on the ground of inadequacy of price at the foreclosure sale. Defendants are not entitled to such relief for the reason that the price is not so low as to evidence fraud or as to otherwise invalidate the sale. Moreover, the evidence is insufficient to prove that the price would be increased at a resale. *Nelsen v. Doll,* 124 Neb. 523. Confirmation of the fore-

closure sale, therefore, will be affirmed, but defendants will be permitted to redeem any time before the issuance of a mandate.

AFFIRMED.

SELMA MALM, APPELLEE, V. STATE FARMERS INSURANCE COMPANY OF OMAHA, APPELLANT.

FILED NOVEMBER 29, 1933. No. 28671.

1. Insurance: AGENCY. One who solicits an application for insurance and, with authority, receives the premium for the policy to be issued, although such person may not issue the policy himself, shall be deemed, to all intents and purposes, the agent of the insurance company.
2. ———: POLICY: AVOIDANCE. An insurance policy may not be avoided because of misstatement or misrepresentation of a fact, material to the risk, which is due to the mistake, fraud, negligence, or other fault of the agent, and not to fraud or bad faith on the part of the insured.

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

Arthur F. Mullen, Paul P. Massey and *John C. Mullen,* for appellant.

Jack Koenigstein and *George W. Dittrick, contra.*

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

GOOD, J.

This is an action on a fire insurance policy. The defense tendered was that the policy was procured by fraud in misrepresenting the size and value of the insured building. A trial to the court without a jury resulted in a judgment for plaintiff, and defendant has appealed.

The record discloses that plaintiff was the owner of a farm and dwelling-house thereon. The business affairs of plaintiff were usually conducted by her husband, and it was he who attended to procuring the insurance in

question. In March, 1928, one Williams, an agent of defendant, solicited plaintiff's husband for insurance. The agent resided in Madison county. Plaintiff's farm and buildings were located in Holt county, some 75 miles distant from the agency. Plaintiff's husband told the insurance agent of the ownership of the farm and buildings, and informed him of the amount of insurance desired upon the dwelling-house, barn and granary, being a specific amount upon each of the buildings.

Defendant's agent was engaged in the real estate business and had associated with him in that business one Maas. Maas went to the plaintiff's premises, measured the buildings and reported to the agent the size of the dwelling-house and addition thereto. There is contained in the record an application for the policy, purporting to be signed by plaintiff, but it appears without question that she did not sign the application. Her husband testified that he did not sign, or did not think he signed, the application. The agent testified that he might have signed the name of plaintiff thereto; first testified that he thought he had done so, but later he was inclined to think he had not signed. In the application the dimensions of the insured dwelling-house are stated. The agent testified that this information was given to him by his partner Maas, and from that he wrote into the application the dimensions of the building; that neither plaintiff nor her husband was present when this was done; nor did they know that the dimensions were so written. It appears that the dimensions, as stated in the application, were very much greater than the actual dimensions of the dwelling. It also appears that neither plaintiff nor her husband made any statement to the agent as to the dimensions of the building or value thereof, and that the only information, respecting the dimensions and value of the building, was received by the agent from his partner Maas. The dwelling-house was totally destroyed by fire on the 7th of October, 1931.

Under the valued policy statute, if any recovery is per-

mitted, plaintiff is entitled to the total amount of insurance upon the building, regardless of its value at the time of the fire. Comp. St. 1929, sec. 44-344.

Defendant contends that by bringing suit on the policy plaintiff has ratified the signing of her name to the application and is bound thereby to the same extent as if she had actually signed it, knowing that it contained the untrue statements regarding the dimensions of the building; that the misrepresentations as to the dimensions are material to the risk, and, but for them, on which the defendant relied, the policy would have not been issued, and that the court should have found in favor of the defendant and rendered judgment accordingly.

Defendant cites and relies upon a number of cases which hold that the acceptance by a principal of the fruits of an unauthorized contract, made by his agent, or an attempt to enforce the same, is a ratification of such agent's conduct, the ratification relating back to the date of performance of the act ratified, and the principal is bound by the effect thereof and the results flowing therefrom, as much so as if he, himself, had performed the act. Defendant also cites a number of cases holding to the effect that a principal who attempts to enforce, or who accepts the benefits of, a contract, executed in his behalf by an agent, is chargeable with the instrumentalities employed by the agent in procuring the contract. We have no quarrel with the cases so cited, but think they are not applicable to the facts disclosed by the record in this case.

Williams was the agent of the company. Maas was his partner in the real estate business. Williams and Maas solicited the insurance from plaintiff's husband. They were representing the company. They were not the agents of the plaintiff. Plaintiff neither made any application, nor authorized any application to be made, to the defendant for the insurance. Neither plaintiff, nor any one in her behalf, made, or authorized to be made, any statements relative to the dimensions or value of the insured building.

Section 44-307, Comp. St. 1929, provides: "Any person, firm or corporation in this state who shall with authority receive or receipt for any money on account of, or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who shall with authority receive or receipt for money from other persons to be transmitted to any such company or individual aforesaid for a policy or policies of insurance, or any renewal thereof, although such policy or policies of insurance may not be signed by him or them, as agent or agents of such company, or who shall in any wise make or cause to be made any contract or contracts of insurance, for or on account of such company aforesaid, shall be deemed, to all intents and purposes an 'agent' or 'agents' of such company."

In 26 C. J. 308, it is said: "The insurer will not be permitted to avoid the policy by taking advantage of any misstatement, misrepresentation, or concealment, of a fact material to the risk, which is due to the mistake, fraud, negligence, or other fault of his agent, and not to fraud or bad faith on the part of the insured. The rule has been applied to a misdescription of the property insured, and to misstatements as to title or interest, encumbrances, other or additional insurance, and the value of the property insured."

In *Robinson v. Union Automobile Ins. Co.*, 112 Neb. 32, this court held that one who solicits an application for insurance of any kind, or who, with authority, receives or receipts for money on account of any contract of insurance made by him, although the policy may not be signed by him, shall be deemed, to all intents and purposes, the agent of the insurance company. In the instant case, Williams and Maas collected the premiums for the policy.

In *Home Fire Ins. Co. v. Fallon*, 45 Neb. 554, it was held: "An insurance company is liable on its policy issued on a written application misstating the facts, where such misstatements were written in the application by the company's agent, the insured having correctly stated

the facts and acted otherwise in good faith, not consenting to or knowing of the misstatement." This holding was reaffirmed in *Busboom v. Capital Fire Ins. Co.*, 111 Neb. 855.

In *State Ins. Co. v. Jordan*, 29 Neb. 514, it was held: "The agent of an insurance company, who is authorized to procure applications for insurance and to forward them to the company for acceptance, is the agent of the insurer, and not of the insured, in all that he does in preparing the applications or as to any representations as to the character and effect of the statements so made."

Under the holdings above announced, we are clearly of the opinion that defendant cannot avoid the policy because of any misstatements that were made in the application, since these misstatements were not attributable to the plaintiff and were unknown to her, but were made by defendant's agent.

We find no valid ground for interfering with the judgment of the district court, and it will be affirmed, with an allowance to the plaintiff of $125 for attorney's fee in this court, to be taxed as part of the costs.

AFFIRMED.

HAROLD MISCHNICK, BY AUGUST MISCHNICK, HIS NEXT FRIEND, APPELLANT, V. IOWA-NEBRASKA LIGHT & POWER COMPANY, APPELLEE.

FILED NOVEMBER 29, 1933. No. 28687.

Negligence: PERSONAL INJURY: LIABILITY. Plaintiff cannot recover in a personal injury action by proving a mere possibility that his injury resulted from defendant's negligence.

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

Boehmer & Boehmer, for appellant.

Crossman, Munger & Barton and *Flansburg, Lee & Sheldahl, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

PAINE, J.

This is an action for damages for personal injuries sustained by a five-year-old boy by reason of a fire or explosion, alleged to have been caused by a defective gas meter and connecting pipes. At the close of the plaintiff's evidence, the trial judge sustained a motion to direct a verdict for the defendant, and plaintiff appealed.

Among the facts disclosed by the pleadings and the evidence are: That the family of the plaintiff lived in a two-story, six-room, stucco house, under which there was a full basement with a cement floor. The house was heated by a hot air furnace, using coal for fuel, located in the furnace room, 16 by 13 feet in size, which was inclosed clear to the ceiling with partition. The gas service pipe and meter of defendant company were in the southwest corner of this furnace room, the meter being nine feet from the furnace door, and the service pipe entering the basement about three feet two inches above the floor, and had been in use for many years. Directly beneath the meter was a cardboard box, holding at this time waste paper and rubbish, being wrappings of Christmas presents.

The plaintiff's father banked the fire, closed the furnace door and the door to the furnace room, and retired about 9 p. m., all of the family sleeping on the second floor. About 4 a. m., December 28, 1931, the father and mother awoke and found the house filled with smoke and gas. They rushed downstairs, opened the front door, and called to neighbors, and an alarm of fire was sent in. They found the stairs in flames, and could not get back upstairs for the two little boys. The firemen arrived and the boys were carried down a ladder, and were treated first in the yard and then taken to a hospital. Fire Captain Barney was the first person to go in the basement, and found that a large hole had been burned through two boards of the partition above the box of

rubbish. Terrific heat was caused by gas escaping from a joint of the feed-pipe, and flames of the burning gas were shooting out for a distance of 8 or 10 feet near the meter. The firemen shot a stream of water against this flame, directing it upward, and then shut off the supply of gas below the meter at the intake pipe, and then put out the fire. The two little boys were taken to the Lincoln General Hospital, where the younger died, and the older one, being the plaintiff, was treated for monoxide poisoning and pneumonia, and the attending physician testified that he had never fully recovered from the effects of the fire and the exposure.

The plaintiff charged that the negligence of the company consisted, among other things, in a failure to inspect the pipes after changing over to the use of natural gas, and in permitting the service pipe and joints thereof to become and remain in a bad state of repair, which allowed gas to escape, and that a leak developed in such service pipe and joints, and gas accumulated in the furnace room and became ignited by fire from the furnace, and caused the fire in the house; that the joints in the service pipe and meter were sufficient to conduct manufactured gas, but that natural gas is a drier gas, which had dried out the gaskets used to tighten the joints, and that the company had failed to properly inspect the same.

The superintendent of gas distribution of the defendant company testified that the service pipe belongs to the property owner, and if it needs repair the defendant company repairs it, but charges the cost to the customer, but that the company installs the meter, which is owned by the company.

The plaintiff relied upon these errors for reversal: That the court erred in sustaining the motion for a directed verdict, and erred in sustaining objections to evidence offered on the part of the plaintiff, especially in not allowing the plaintiff to prove that, on the morning after the fire, gas was escaping through a joint in the

service pipe and could be ignited there, and in excluding evidence of an employee of defendant that he repaired leaks in the joints of the service pipe in said house two months after the fire; and erred in excluding evidence that the door leading to the furnace room had been fastened the night before the fire and was open the next morning.

The defendant insists that the trial court was right in directing a verdict, because there was no evidence of any negligence on the part of defendant company, and, further, that it was not a case for the application of the rule of *res ipsa loquitur,* because the plaintiff, having alleged specific acts of negligence, was required to prove such negligence, and failed; that it appears from the testimony of the appellant's own witnesses that there was only a possibility that the fire had been caused by escaping gas, and that it was not a probability. That evidence of the condition of gaskets, pipes and meter after such parts had gone through an intense fire does not prove the condition of such parts prior to the fire, and that evidence relating thereto was properly excluded. That the examination made by Fire Captain Barney after the fire disclosed, according to his testimony, that the fire started first in the box of rubbish, and then burned the boards in the partition above it, and while such evidence discloses where the fire started, it does not, according to Mr. Barney, tell how the fire started. Against this, is the evidence of Professor Frankforter, that in his opinion it did not originate there.

It is possible that the fire may have been caused by a leak in the gas pipe, or by spontaneous combustion in the box of rubbish, or there might have occurred a slight explosion in the furnace, which threw out a flame which ignited some combustible substance, or it might have occurred in some entirely different manner. Proof is entirely lacking as to its exact cause.

There is some testimony that, prior to the fire, gas had been smelled in this home. However, the evidence does

not disclose that it might not have escaped from some burner. This testimony did not prove that the equipment was in bad repair, or that the company was negligent.

The doctrine of *res ipsa loquitur* proceeds on the theory that, under special circumstances which invoke its operation, the plaintiff is unable to specify the particular act of negligence which caused the injury, but if the petition alleges particular acts of negligence, then the plaintiff, in order to recover, must establish the specific negligence alleged, and the doctrine of *res ipsa loquitur* cannot be applied. 45 C. J. 1225; *Marshall Window Glass Co. v. Cameron Oil & Gas Co.*, 63 W. Va. 202; *Knies v. Lang*, 116 Neb. 387.

The appellant bases his right to recover on inferences not proved by the facts, and negligence cannot be predicated upon an inference drawn from another inference, for it is well settled that actionable negligence may not be predicated upon an inference drawn from another inference, but if the negligence is only supported by an inference, such inference must be supported by some fact established by direct evidence. *St. Marys Gas Co. v. Brodbeck*, 114 Ohio St. 423.

In a number of cases cited by the plaintiff, gas leaks occurred in the main in the street, and gas came into houses and injured persons, but such cases are hardly applicable to the facts proved in this case. In *Hollon v. Campton Fuel & Light Co.*, 127 Ky. 266, it was held that evidence as to the condition of the gas apparatus the following morning after the fire was improperly admitted. Where evidence of leaking pipes, allowing the escape of gas, was only given after an explosion occurred, it was held that this was too uncertain to sustain a recovery. *Lodge v. United Gas Improvement Co.*, 209 Pa. St. 553; *Moore v. Heat & Light Co.*, 65 W. Va. 552.

"It is not enough, it has been said, for the plaintiff to show that he has sustained an injury under circumstances which may lead to a suspicion that there may have been negligence on the part of the defendant, but he must

give evidence of some specific act of negligence." Broom's Legal Maxims (9th ed.) 214.

This was a most unfortunate case, but we cannot find that the appellant established a causal connection between the fire and the negligence charged. There being no prejudicial error in the record, the judgment of dismissal is

AFFIRMED.

D. MELSON, APPELLEE, V. R. M. TURNER, APPELLANT.

FILED NOVEMBER 29, 1933. No. 28619.

1. Contracts: PLEADING. Where the cause of action alleges a direct promise or a direct contract between plaintiff and defendant, a demurrer to the petition on the ground that the petition does not state a cause of action should be overruled, since such is not a promise to answer for the debt or default of another but is an original and not a collateral promise.
2. Courts: APPEAL: PLEADING: AMENDMENT. "In all cases of appeal from municipal court to district court, such district court, for the purposes of supplying deficiencies and omissions in pleadings before it, is empowered by statute to permit amendments thereto, when substantial justice is promoted thereby, to the same extent and in the same manner as though the action had been originally instituted in such court." *Baxter v. The Maccabees*, 124 Neb. 160.
3. Contracts: APPROVAL OF WORK: QUESTION FOR JURY. Under the provisions of a contract to drill a well providing that the quality of the water should be satisfactory to the defendant, his opinion or decision must be made with entire good faith and not captiously or capriciously, and whether he so acts is a question of fact for the jury.
4. Trial: QUESTION FOR JURY. Where the facts are disputed, it is solely the province of the jury to determine the same, and whether the facts are disputed or undisputed, if different minds might honestly draw different conclusions from them, the case is properly left to the jury.
5. Evidence examined and *held* to support the verdict of the jury.

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

H. J. Whitmore, for appellant.

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

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

BEGLEY, District Judge.

This is an action wherein the plaintiff below, a well contractor, sued the defendant to recover for drilling and equipping a two-inch tubular well on the farm of Mrs. H. F. Vosper, near Denton, in Lancaster county, Nebraska, on a contract between the plaintiff and the defendant. The jury returned a verdict for the plaintiff for $216.45, and the defendant has appealed. The plaintiff alleged that he entered into a contract with the defendant as follows:

"I hereby agree to drill a 2-inch well on the farm of Mrs. H. F. Vosper (R. M. Turner, agent), furnishing and using the best of materials (except lumber for platform) which well is hereby guaranteed to furnish an inexhaustible supply of water, which shall be of quality that is satisfactory to said Turner. I do not guarantee against a trace of salt in this territory. Heavy overhead force pump to be supplied and P & R pipe. Full brass cylinder.

"This well is guaranteed to cost not more than $1.25 per foot, or less than $1.25 per foot, but the exact cost is unknown and will be governed by the depth of well. In case of failure to comply with this agreement, there will be no charge.

"Date Oct. 8, 1931. (Signed) D. Melson."

Plaintiff further alleges that, although the defendant did not sign the said contract set forth in the petition, he was in fact a party thereto, and that, at the instance and request of the defendant, the plaintiff performed labor and furnished material in drilling and equipping a well for the defendant under said contract; that plaintiff completed said well and tested its supply of water by pumping the same for a period of ten to twelve hours and at that time requested defendant to inspect and approve

said well, including the supply and quality of water, but that defendant failed and arbitrarily refused to inspect the same, and thereafter said defendant unreasonably, arbitrarily, capriciously, and without just cause, refused to approve said well and the supply and quality of water; that he was not in good faith with plaintiff in so doing; that said well, including the supply and quality of water, was satisfactory and suitable for use for domestic purposes and for live stock on said farm and was accepted, appropriated and used by the defendant and the tenants on said farm with the knowledge and approval of defendant; that the defendant and tenants received the benefit thereof, and that by said acts the defendant waived any pretended right he claimed under said contract to reject said well or to object to the supply and quality of water and is estopped from denying his liability to pay the plaintiff therefor.

The defendant is an uncle of the owner of the farm, who lives in Los Angeles, California. The defendant pleaded that he had merely acted as the agent of the owner, as the plaintiff was informed, and had assumed no personal obligation or liability, and further that the well was to supply water of good quality, satisfactory to him, and that he had refused to approve the bill for the well and forward it to Mrs. Vosper because the water was not satisfactory; that his only connection with the matter was that of judge of the quality of the water.

The defendant demurred to the plaintiff's petition on the ground that it did not state a cause of action, which was overruled, and he alleges that as error. It will be noted that the petition alleges a direct promise by the defendant to pay plaintiff for his labor and material on the well. This is not a promise to answer for the debt or default of another but is an original promise and states a cause of action. *De Witt v. Root,* 18 Neb. 567; *Waters v. Shafer,* 25 Neb. 225; *Peyson v. Conniff,* 32 Neb. 269; *Witt v. Old Line Bankers Life Ins. Co.,* 89 Neb. 163.

The appellant also complains because the plaintiff below

was permitted to amend his petition on the second day of the trial. "In all cases of appeal from municipal court to district court, such district court, for the purposes of supplying deficiencies and omissions in pleadings before it, is empowered by statute to permit amendments thereto, when substantial justice is promoted thereby, to the same extent and in the same manner as though the action had been originally instituted in such court." *Baxter v. The Maccabees,* 124 Neb. 160.

Appellant also complains of error in overruling his motion for a directed verdict and also his motion for a new trial. The evidence shows that the parties entered into the contract, and that pursuant thereto the appellee sunk the well and completed the same by furnishing pipe and pump as required by the contract and also built a platform; that he requested the appellant to come and examine the well while he was testing it out; that the appellant refused, and after the appellee had removed the machinery from the well, the appellant informed him that he refused to accept same because the same was not satisfactory to him; that thereafter the water was used for both stock and domestic purposes by the tenants on the farm, and that same, while containing a certain amount of salt, was the same kind of water that is found in most wells of that community.

The appellant contends that under the contract he was the sole judge of the quality of the water, but we think that under the provisions of the contract, providing that the quality of the water should be satisfactory to appellant, his opinion or decision must be made with entire good faith and not captiously or capriciously, and whether he so acts is a question of fact for the jury. 6 R.C.L. 952-956, secs. 333-335; *Flower v. Coe,* 111 Neb. 296; *Thurman v. City of Omaha,* 64 Neb. 490.

The plaintiff's evidence showed that the defendant promised to pay for the well, while same was denied by the defendant. Upon the truth of this testimony hinged the verdict. The jury found for the plaintiff on conflicting

evidence. Where the facts are disputed, it is solely the province of the jury to determine the same, and whether the facts are disputed or undisputed, if different minds might honestly draw different conclusions from them, the case is properly left to the jury. *Ogden v. Sovereign Camp, W. O. W.*, 78 Neb. 806.

The appellant also complains of errors occurring at the trial in the admission of evidence and the giving of instructions. We find that the trial was fairly conducted and that the instructions were pertinent to the issues. The appellant filed merely a general charge of error against all the instructions and, of course, this cannot be considered if any one of the instructions were proper. *Fletcher v. Brewer*, 88 Neb. 196.

The court did not err in refusing to permit said motion to be amended after the statutory time for filing. *Gullion v. Traver*, 64 Neb. 51.

After carefully reading the evidence and instructions of the court, we are of the opinion that the case was fairly tried and submitted to the jury and their verdict should govern in this case.

AFFIRMED.

NORTHPORT IRRIGATION DISTRICT, APPELLANT, V. FARMERS IRRIGATION DISTRICT ET AL., APPELLEES.

FILED NOVEMBER 29. 1933. No. 28845.

1. Pleading: CONSTRUCTION. The rule that, under the Code, pleadings should be construed liberally applies only to ordinary actions. In all cases of application for any extraordinary writ, the petition will receive a strict construction.
2. Dismissal: AFFIRMANCE. An order of the district court requiring a petition to be made more definite and certain will be sustained, unless it clearly appears that the court abused its discretion to plaintiff's prejudice.

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

F. E. Williams, for appellant.

Neighbors & Coulter, contra.

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

BEGLEY, District Judge.

This is an appeal from an action of the district court for Scotts Bluff county in sustaining a motion requiring the plaintiff's petition to be made more definite and certain. The plaintiff elected to stand on its petition, refused to plead further, and on motion of the defendants the action was dismissed, from which the plaintiff has appealed.

On January 10, 1933, the appellant filed its second amended petition in this action in the district court, alleging that the plaintiff and defendant district are duly organized irrigation districts and that defendant district owns, maintains and operates a canal with diversion dam, intake, sluice-way and other structures, necessary for diverting water from the North Platte river in Scotts Bluff county, Nebraska; that defendant district entered into a contract with the United States for the carriage of water through its said canal to Red Willow creek in Morrill county. Article 7 of said contract provides:

"The United States and its assigns agrees to pay annually, beginning with the first year such carrying capacity is used, to the district on or about July fifteenth of each year for the year then current, as an operation and maintenance charge for the carriage of water through the main canal of said district, one-fifth (1/5th) part of such amounts as shall be expended each year by the said district for operation and maintenance of its works used in diverting and carrying the water of the United States or its assigns. The said operation and maintenance charges shall be estimated in advance by the board of directors of the district and shall include the estimated cost of all replacements, betterments and renewals, necessary in connection with the dam, intake, sluice-way, culverts and main canal of the district used in carrying the

water of the United States aforesaid, together with any deficit arising from insufficient estimates of prior years, and less any surplus arising from over estimates of prior years. The district will keep an accurate account of all such sums so expended, rendering statement and vouchers therefor. The United States and its assigns shall not be liable for any such operation and maintenance charge prior to the season in which it avails itself of the opportunity to have water carried in the district's works aforesaid."

That thereafter said contract was duly assigned to the plaintiff by the United States and defendant has recognized plaintiff's rights as assignee; that the plaintiff has duly performed all conditions on its part in said contract to be performed; that it is plaintiff's duty to supply water to its district and under said contract it is entitled to supply water through said canal and it has no other means of supply; that in the month of August, 1932, defendant irrigation district arbitrarily, without reason, threatened to shut down the head-gate of plaintiff's canal at the point of intake of said Red Willow creek and threatened to divert said water from the said canal and to deprive plaintiff's lands or crops growing thereon from the use of said water for irrigation purposes, whereby said lands and crops will be greatly injured and depreciated in value, by reason of which they will suffer great and irreparable damage and that plaintiff has no adequate remedy at law. The plaintiff therefore prayed for an injunction restraining the defendants, their agents and employees from carrying out said threatened acts and depriving the plaintiff of said water as provided in exhibit A, being the contract with the United States government, and for such other and further relief as may seem just and equitable. A temporary injunction was granted by the court.

The defendants filed a motion to require the plaintiff to make its said petition more definite and certain in the following particulars, to wit: "(1) By alleging in said

petition whether or not the operation and maintenance charges for the year 1932 were estimated in advance of July 15, 1932, by the board of directors of the defendant district as provided in article 7 of the contract, exhibit A, attached to plaintiff's petition, and, if such estimate was made, the amount thereof. (2) By alleging whether or not plaintiff paid any part of the operation and maintenance charges for the year 1932 pursuant to the provisions of article 7 of the contract, exhibit A, attached to plaintiff's said petition, and the amounts and dates of any such payments."

The court sustained said motion, and the plaintiff having elected to stand on its petition, on further motion of the defendants the action was dismissed and the temporary injunction dissolved.

The question in controversy is whether or not in an injunction proceeding the plaintiff can be required to make his petition more definite and certain beyond a mere statement that he has duly performed all conditions on his part to be performed of a condition precedent in a contract.

The appellant relies upon section 20-836, Comp. St. 1929, which reads: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part."

It has been held by this court that this provision of the statute applies only to ordinary actions. In all cases of application for an extraordinary writ, the petition should receive a strict construction. *School District v. De Long*, 80 Neb. 667; *State Bank of Nebraska v. Rohren*, 55 Neb. 223; *Wabaska Electric Co. v. City of Wymore*, 60 Neb. 199.

An application for an injunction rests in some degree in the discretion of the chancellor and allegations in the complaint should show candor and frankness. Omission of material facts known to plaintiff will preclude the granting of relief. 32 C. J. 325.

Such application must state facts sufficient upon which to base the relief sought, and in the absence of a showing to the contrary the discretion of the court in requiring more definite pleadings should not be interfered with. The appellant has made no showing that it was unable to comply with the order of the court. Its refusal to set out the facts instead of its conclusions as to compliance with the contract with the United States hardly shows that candor and frankness which are necessary for a plaintiff to show in order to secure affirmative relief from a court of equity.

In speaking on this subject the court in *Headley v. City of Chester,* 22 Pa. Dist. Ct. 900, said: "Plaintiff should not only show his hand, but open it wide."

In the recent Nebraska case of *Scott v. Scott, ante,* p. 32, in sustaining a ruling of the court on a motion to make a petition more definite and certain, the court said: "In plaintiff's original petition she had pleaded her emergence in the last days of 1926 from her mental disability and that it was some time after that before it was possible to procure legal assistance and late in 1928 before she learned the facts with definiteness. She pleaded she had been diligent in behalf of said matters, but in that respect did not plead more than the conclusion. So the court sustained the motion. The result has been to bring out and settle in the pleadings, with a saving of time and expense, what was bound to appear on a trial on the merits. This was an equity case triable to the court. It does not appear that the trial judge abused his discretion to the prejudice of plaintiff. An order of the district court requiring a petition to be made more definite and certain will be sustained unless it clearly appears that the court abused its discretion to plaintiff's prejudice."

The lower court sustained two motions to two different petitions; the plaintiff failed to comply with the order or ruling of the court but avoided setting out the matter required in each of the petitions and the court was

justified in dismissing the case where the plaintiff ignored the previous order of the court. *Ferson v. Armour & Co.*, 109 Neb. 648.

In this case it does not appear that the court has abused its discretion and there is no showing that it prejudiced the ultimate rights of the plaintiff. Therefore, the judgment of the district court dismissing the appellant's petition for failure to comply with the order of the court is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. WESTON BANK, E. H. LUIKART, RECEIVER, APPELLANT: E. C. HUNT, INTERVENER, APPELLEE.

FILED NOVEMBER 29, 1933. No. 28729.

1. **Corporations.** A corporation and its individual stockholders are separate entities, and the fact that all the stock is owned by one person does not alter the principle.
2. ———. A court of equity will disregard the separate entities of a corporation and its stockholders where necessary to prevent fraud or injustice.
3. **Banks and Banking: INSOLVENCY: SET-OFF.** Hunt was the owner of all the capital stock of Citizens Telephone Corporation; he borrowed $1,500 from the Weston Bank giving his individual note therefor; the money borrowed was used to pay a debt of the telephone corporation; the bank failed and is in the hands of a receiver for liquidation; at the time of failure the telephone corporation had on deposit $1,549.92; the note of Hunt came to the receiver as an asset of the bank; Hunt intervened asking that the amount of his note be set off against the deposit of the corporation. *Held,* (1) that at law no set-off was permissible for want of mutuality; (2) nor in equity for the same reason, and the further one, that there was no indebtedness of the bank to Hunt upon which the offset could be applied.
4. ———: ———: ———. The insolvency which will furnish a foundation for the allowance of an equitable set-off in cases not provided for by statute is not the insolvency of a third party, but of the debtor of the party seeking the relief.
5. ———: ———: PRIORITIES. The equity of the receiver of a failed bank as representative of its creditors in a deposit in

said bank is superior to that (if any) of a stockholder of the corporation depositor for money paid out for the benefit of the corporation.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Reversed, with directions.*

F. C. Radke, Barlow Nye, L. T. Fleetwood and *Joe F. Berggren,* for appellant.

Schiefelbein & Donato, contra.

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

REDICK, District Judge.

The Weston Bank was closed and taken over by the state banking department and is now in the hands of a receiver for liquidation. At the time the bank was closed there was due the Citizens Telephone Corporation on a checking account the sum of $1,549.92. Among the assets of the bank was found a note for $1,500, signed by intervener, E. C. Hunt. Hunt filed with the receiver a claim as owner for the deposit standing in the name of the telephone company, together with a request that an offset be allowed on said note against the deposit. The receiver allowed the claim for the deposit to Citizens Telephone Corporation, but refused the request for offset.

Hunt took the cause to the district court for Saunders county by petition in intervention, joining with him the telephone corporation, and after trial duly had the court entered a decree allowing the set-off which the receiver had refused, and receiver brings the cause to this court on appeal.

The question for determination is whether or not a deposit in the name of the telephone company can be set off against the note of Hunt. The right of set-off is claimed by intervener (1) under the statute governing set-offs, and (2) on the ground that the facts entitle him to an equitable set-off.

The claim for a statutory set-off may be disposed of

very briefly. Such a set-off must be one on which the claimant could, at the commencement of the suit, have maintained an action against the plaintiff; and the respective demands must be between the same persons and in the same capacity. It seems clear that these conditions are not fulfilled because Hunt at no time could have maintained an action against the bank or the receiver for the recovery of the deposit in question; and, furthermore, the deposit is in the name of the telephone company while the note is the individual note of Hunt. This leaves for consideration the single question whether or not the facts in the record present a case for the application of the doctrine of equitable set-off.

The record, practically without dispute, establishes the following facts: The Citizens Telephone Corporation was organized under the laws of Delaware, and prior to 1928 E. C. Hunt and one Cheney were the owners of all the capital stock. In 1928 Hunt bought out Cheney and thereafter was the sole owner of the capital stock of the corporation. In 1915 Cheney loaned the corporation on its note the sum of $8,000, of which Cheney spent $1,600 in repairing the Malmo Exchange in Saunders county, belonging to the corporation. November 11, 1928, about the time Hunt purchased Cheney's interest, he borrowed of the Weston Bank the sum of $5,000, the unpaid balance of which is represented by the $1,500 note now in the hands of the receiver, dated May 15, 1931. The proceeds of the $5,000 loan made to E. C. Hunt were withdrawn from the Weston Bank and deposited in Omaha banks, to the personal credit of Hunt. On November 1, 1928, Hunt paid Cheney $1,335.35 and on December 6, 1928, $329.15, a total of $1,664.50, to reimburse Cheney for the amount expended by him in 1915 for repairs on the Malmo Exchange, and these payments are the amount sought to be offset against the deposit in the Weston Bank.

Accounts were kept in the Malmo and Weston banks and a number of banks in other towns where the telephone company operated exchanges, in the name of the

Citizens Telephone Corporation; deposits were also kept in said banks in the individual name of E. C. Hunt. Inasmuch as Hunt was the sole owner of the corporation, there seems to have been little care taken to distinguish, when making deposits, between the funds of the corporation, and the individual funds of Hunt, although the deposits of the different exchanges were kept separately under the name, e. g., "Citizens Telephone Corporation, Malmo."

Upon this state of facts intervener Hunt claims the right to an equitable offset of the deposit against his note, basing his claim upon the proposition that, being the sole owner of the corporation, he and the corporation are one person, and that, having paid a debt or obligation of the corporation in the sum of $1,600, he is the owner of the deposit and entitled in equity to have the same set off against his note. The allowance of the offset would enable the telephone company to recover the full amount of its deposit in the Weston Bank and withdraw from the assets thereof the note of E. C. Hunt, the amount of which would otherwise be distributed among the depositors of the bank. We think this result cannot be accomplished under any rules governing equitable set-offs as applied to the facts of this case.

It is conceded that Hunt and the corporation are separate legal entities. Except in fraudulent transactions or those involving the doctrine of estoppel, the corporation would not be liable for the individual debts of Hunt nor Hunt for the debts of the corporation. The fact that Hunt was the owner of all the corporate stock does not operate to merge his identity with that of the corporation any more than the identity of a group of stockholders would be so merged. That one person becomes the owner of all the stock of a corporation does not necessarily destroy its identity, and property conveyed to the corporation does not become the property of such person. *Harrington v. Connor*, 51 Neb. 214.

Intervener urges that the insolvency of the bank changes

the relations of the parties and raises an equity in his favor entitling him to the offset. However, this is not a case where the claim of offset is made against an insolvent debtor of the claimant, but one where the claim is made against a third party seeking to offset the deposit of a perfectly solvent debtor of the claimant, to wit, the telephone company. E. C. Hunt as an individual has no claim against the insolvent bank which in equity should be set off against his indebtedness to that bank. While his claim of offset is in form against the bank, in reality and substance it is against the telephone company; and if the contest were between Hunt and the company over the amount of the deposit, equity would disregard the separate entities of the parties and adjust the matter between them. In the present case the depositors of the bank are equitably entitled to a distribution of its assets and this right would be destroyed to the extent of Hunt's note if the offset were allowed. If an offset were permissible in this case it would not be difficult for a corporation to insure itself against loss of deposits by the failure of a bank by the simple maneuver of having its directors and stockholders give their individual notes to the bank for loans made for the benefit of the corporation. By this means it would be possible to perpetrate a fraud on persons dealing with the corporation by concealing the amount of its debts, and upon the creditors of the bank by apparently increasing the amount of its assets.

To the proposition that "The insolvency of a party against whom the set-off is claimed is a sufficient ground for a court of chancery to allow it in cases not provided for by statute," intervener cites four cases from this state: *Clark Implement Co. v. Wallace,* 102 Neb. 26; *Richardson v. Doty,* 44 Neb. 73; *Wilbur v. Jeep,* 37 Neb. 604; *Thrall v. Omaha Hotel Co.,* 5 Neb. 295. But in all those cases the party against whom the offset was sought was indebted to the claimant, and unless the offset was allowed claimant stood to lose his debt. If the telephone corporation were insolvent instead of the bank, claimant

might have some equities which could be protected by the application of the deposit, or some part of it, upon his note; but the insolvency of the bank raises no equity in his behalf. In the present case the bank is not indebted to Hunt, but the telephone company which is so indebted is perfectly solvent; therefore, if Hunt is required to pay his debt to the bank, he is amply secured from loss. The cases cited, therefore, are not applicable.

Intervener also cites the case of *State v. Farmers & Merchants Bank,* 114 Neb. 378, but in that case there was only one entity, John R. Dewitt, doing business under the trade-name of Morrill Motor Co. That equity will disregard the separate entity of a corporation and an individual owning all its stock for the purpose of preventing injustice may be conceded; but, as we have attempted to show, there is no equity in Hunt which the court is called upon to protect. The equity of the receiver as representative of the creditors of the bank is superior to any equity of Hunt against the telephone company, by which neither the bank nor its creditors are affected. Equity will not do injustice to the creditors, in order that Hunt may be relieved from a situation of his own making.

The precise question involved in this case has never been passed upon by this court. A number of cases are cited to the effect that "in the absence of equitable considerations" a set-off may not be allowed unless the claim be one upon which the claimant might have maintained an independent suit against the plaintiff at the time of the action, but those cases furnish no comfort to the intervener. As we have shown, there are no equitable considerations as between Hunt and the bank.

It would seem, considering the multitude of cases contained in the various reports of the courts of this country, some precedent for the claim of the intervener in this case exists and could be found, but the industry of counsel and research of the writer have discovered but one, which is cited in the brief of the receiver, to wit, *Gal-*

lagher v. Germania Brewing Co., 53 Minn. 214, holding: "The demands of stockholders individually cannot be interposed as equitable set-offs to a demand against the corporation, even though the plaintiff is insolvent." In that action the plaintiff, as assignee of one Westphal, under a general assignment for the benefit of creditors, brought suit to recover for goods sold and delivered by his assignor to the defendant corporation. Barge and Vander Horck intervened and set up in their complaint that they owned (each one-half) all the capital stock of the defendant, and that each of them had a valid and unsatisfied judgment against Westphal on a cause of action which accrued before the assignment to plaintiff; that Westphal was and had been for over two years utterly insolvent and that his estate was so hopelessly insolvent that it was insufficient to pay even the expenses of administering the assignment. The relief sought was that their claims against Westphal might be allowed, in equal amounts, as equitable set-offs to the claim of the plaintiff against the defendant corporation. In reversing an order overruling a demurrer to the complaint, the court said: "The case is certainly a novel one, for we doubt whether an instance can be found in the books where stockholders ever attempted to set up their several equities by way of set-off to claims against the corporation. * * * The facts of the present case appeal to a natural sense of justice, for while, by fiction of law, a corporation is a distinct entity, yet in reality it is an association of persons who are in fact the beneficial owners of all the corporate property. Hence, if interveners cannot set off their claims, the practical result is that Westphal's estate will collect its entire claim out of what is really their property, while the estate is at the same time indebted to them on claims of greater amount, which they will wholly lose because of Westphal's insolvency; but, as has been often said, hard cases are liable to make bad law." The court, in a well-considered opinion, then discusses the effect of the allowance of offset in that class

of cases and the confusion which would result if the shareholders could set up their several equities against persons having claims against the corporation, or, conversely, if claims in favor of the corporation could be set off against claims against individual stockholders; and, while conceding that owing to the fact that there were but two stockholders in that case, the application of the rule would be comparatively free from embarrassment, the court continues: "But, suppose there were fifty other stockholders (which would not alter the principle) what would be the result? Could interveners then interpose their claims as set-offs, and, if so, could they do so to the full amount of their claims, or only in the proportion which their shares bore to the whole capital stock? And, if the former, would they have a claim for the excess against the corporation, or a right to call on the other stockholders for contribution?" Without quoting further from that case, we recommend its perusal to the student; its reasoning appeals to us and we adopt it as a precedent to be followed in the present case.

We are convinced that the district court erred in allowing the set-off, and the judgment is reversed and cause remanded to the district court, with instructions to enter judgment disallowing set-off and dismissing the petition of intervention.

REVERSED.

LULA M. WENDELL, APPELLANT, V. WALTER B. ROBERTS ET AL., APPELLEES.

FILED DECEMBER 8, 1933. No. 28587.

1. Negligence: INJURY TO INVITEE: BURDEN OF PROOF. Invitee, suing owner of building for damages resulting from fall on steps at public entrance, has burden to establish dangerous and unsafe condition.
2. ———: ———: PROXIMATE CAUSE: BURDEN OF PROOF. In such case, burden is upon plaintiff to establish that condition of steps was proximate cause of accident.

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

J. J. Krajicek, for appellant.

King & Haggart, contra.

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

PER CURIAM.

Plaintiff brought this action to recover damages for an injury caused by a fall upon steps in the public entrance to an office building owned by defendant Roberts. The petition alleges that the plaintiff entered the Arthur building for the purpose of transacting business with one of its tenants and that while leaving the building she fell upon the steps, which fall was caused by the condition of the steps. At the close of plaintiff's testimony, the trial judge directed a verdict in favor of defendants. From this judgment the plaintiff appeals. The only assignment of error is that the direction of a verdict by the court was error.

The plaintiff's evidence to support her allegation was that the condition of the steps was such that "her heel caught and her foot slipped;" that she did not observe the condition of the steps at the time but did examine them more than two months later. There was no other eyewitness to the fall. There is a photograph of the steps which does not indicate a sufficiently defective condition at the point where the accident is alleged to have occurred to establish negligence of the owner. The point of contact is important. Conditions elsewhere do not matter. The plaintiff's husband examined the steps shortly after the accident and testified as to their condition. It was his opinion, not based on measurement, that where the step is cracked one side of the crack "sticks up just a little * * * probably one-eighth of an inch * * * maybe a little more." In *Thompson v. Young Men's Christian Ass'n*, 122 Neb. 843, a similar condition was presented to

this court except that there was a depression in the step, which depression was measured by an engineer who testified that it was 1/8 of an inch, the amount that the husband of the plaintiff estimated was the difference in the levels of the two parts of the cracked step in this case. It was held in that case that the plaintiff had knowledge of the condition, or that it was readily apparent to her, and assumed the danger which was so open and obvious that it could readily have been avoided by the exercise of ordinary care. It is true, as stated by appellant in her brief, that in the *Thompson* case there was an additional allegation that the steps were wet, but that does not change the rules there announced, relating to the permanent condition of the steps, which are applicable here.

The plaintiff herein also alleges that the step slanted downward to the outside and that as a result the plaintiff slipped off the step. There is no testimony sustaining this allegation.

The judgment of the trial court is

AFFIRMED.

BENJAMIN F. PITMAN, ADMINISTRATOR OF ESTATE OF JOHN CASTEK, ET AL., APPELLEES, V. EDWIN T. HENKENS: WILHELMINA HENKENS, APPELLANT: FIRST NATIONAL BANK OF CHADRON, APPELLEE.

FILED DECEMBER 8, 1933. No. 28726.

1. **Appeal.** Appeals in equity are triable *de novo* in the supreme court. Comp. St. 1929, sec. 20-1925.
2. **Pleading: AMENDMENT.** In furtherance of justice, the court may amend a pleading "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." Comp. St. 1929, sec. 20-852.
3. **Appeal: AMENDMENT.** The power of the supreme court to permit a pleading to be amended to conform to the proof is

ordinarily exercised only to sustain a judgment and not to reverse it, unless it appears that a refusal to permit the amendment would cause a miscarriage of justice. *Peterson v. Lincoln County*, 92 Neb. 167.

4. **Mortgages**: FORCLOSURE: PARTIES. "In an ordinary mortgage foreclosure suit, one holding an interest in the proceeds of the sale by reason of rights possessed by him in the mortgage is a necessary party to such suit." *Webb v. Patterson*, 114 Neb. 346.
5. **Usury**: PLEADING. "Usury must be pleaded, and with certainty, to be available as a defense." *McCready v. Phillips*, 56 Neb. 446, 454.
6. **Appeal.** To review errors of law occurring upon the trial of an equity case, a motion for new trial is necessary.

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

Fisher & Fisher, for appellant.

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

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

GOSS, C. J.

This is an appeal from a decree of foreclosure of three mortgages all made by defendants, Edwin T. Henkens, who held title to the 1,520 acres of land, and Wilhelmina Henkens, his wife. The mortgage declared on by plaintiffs was a first lien in favor of John Castek and Jennie A. Castek. John Castek died and plaintiff, Benjamin F. Pitman, as administrator, with the will annexed, of the estate of John Castek, succeeded legally to John Castek's one-half interest. The other plaintiff, Jennie A. Castek, owned the other half interest in the mortgage. The other two mortgages, constituting subsequent liens, were owned by defendant First National Bank of Chadron. To protect the first mortgage, Pitman purchased a certificate of tax sale. This was included and allowed in the decree. Defendant Edwin T. Henkens took a stay. Wilhelmina Henkens is the only appellant.

The petition alleged that no action at law had ever

been brought for the recovery of the amount represented by the note and mortgage, or tax certificate, nor had the same or any part thereof been paid except interest up to March 1, 1930. Defendant went to trial and tried the cause without specifically attacking any defect in this allegation. On the trial she stipulated: "It is stipulated and conceded to be true by and between the parties that no action at law has ever been had in any court for recovery of the indebtedness secured and represented by this mortgage and note of the plaintiff." The decree found "that no action at law has been had in any court for the recovery of said mortgage indebtedness or any part thereof." Defendant now assigns prejudicial error in that the petition failed to include the statutory words "or any part thereof" in alleging no action at law to recover the debt secured by the mortgage. Comp. St. 1929, sec. 20-2144.

Plaintiffs argue that "the greater includes the less" and that the allegation therefore covered any part of the debt, but ask permission to amend the petition here so as to meet the objection.

Appeals in equity are triable *de novo* in the supreme court. Comp. St. 1929, sec. 20-1925. In furtherance of justice, the court may amend a pleading "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." Comp. St. 1929, sec. 20-852; *Allertz v. Hankins,* 102 Neb. 202. The power of the supreme court to permit a pleading to be amended to conform to the proof is ordinarily exercised only to sustain a judgment and not to reverse it, unless it appears that a refusal to permit the amendment would cause a miscarriage of justice. *Peterson v. Lincoln County,* 92 Neb. 167; *Berwyn State Bank v. Swanson,* 111 Neb. 141.

We do not decide whether the failure to plead every call of the statute (section 20-2144) makes a petition in foreclosure fatally defective, but, in the furtherance of

justice, the appellees' request to amend the petition is granted and the record is considered as if the amendment were already so made. As the record and evidence are thus considered, defendant has not been prejudiced in the point discussed.

Misjoinder of parties plaintiff is asserted as erroneous. "In an ordinary mortgage foreclosure suit, one holding an interest in the proceeds of the sale by reason of rights possessed by him in the mortgage is a necessary party to such suit." *Webb v. Patterson,* 114 Neb. 346.

Another error assigned is that, because Benjamin F. Pitman was the agent of and received a commission from John Castek for negotiating the loan, and was the notary before whom the first mortgage was acknowledged, and the witness before whom it was executed, and the mortgage being upon the homestead of defendant, the mortgage was void. Plaintiffs' reply to defendant's answer, presenting this plea, was a general denial. Defendant's brief points out no evidence that Benjamin F. Pitman was disqualified to act as a witness or notary and we find none in the record. It does not appear that he was the agent or obtained a commission or had any personal or financial interest in the mortgage when it was executed.

Defendant argues that the suit brought on January 16, 1932, was premature because the $17,000 note, dated March 1, 1927, was by its terms to become due March 1, 1932. Yet it provided that failure to pay $1,020 interest each March 1 made the principal due. The pleadings and evidence showed the interest due March 1, 1931, and taxes unpaid and delinquent, contrary to the terms of the mortgage. The note and mortgage were defaulted for nonpayment. Edwin T. Henkens did not even answer. To this and other claims of error in that the court had no jurisdiction, a negative answer is indicated by the record and evidence.

Numerous errors of law occurring at the trial are claimed. Defendant filed no motion for a new trial. To review errors of law occurring upon the trial of an equity

case, a motion for new trial is necessary. *Farmers Loan & Trust Co. v. Joseph*, 86 Neb. 256; *Hall v. Bowers*, 117 Neb. 619; *State v. Banking House of A. Castetter*, 118 Neb. 231.

Examination of the record and briefs discloses no error prejudicial to appellant. The judgment of the district court is affirmed, with leave to appellant, also extended to her husband, Edwin T. Henkens, to redeem at any time before issuance of the mandate.

AFFIRMED.

IN RE ESTATE OF ALONZO L. CLARKE.
HELEN CLARKE, CLAIMANT, APPELLANT, V. MARGARET DALE CLARKE ET AL., APPELLEES.

FILED DECEMBER 8, 1933. No. 28625.

Wills: CONSTRUCTION: "HEIRS AT LAW." A will directing payment of the income from a trust estate to testator's son for life and the residue to the son's "heirs at law," *held* not to include as an heir at law an adopted daughter of the son, where the adoption occurred long after the death of testator who had no knowledge of a purpose on part of the son to adopt a child or any reason to anticipate he would do so.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed in part, with directions.*

C. J. Baird and *Barton H. Kuhns*, for appellant.

Carlos W. Goltz, Alfred Pizey, Ivan E. Maginn, Stiner & Boslaugh, Edmund Nuss and *Brogan, Ellick & Van Dusen, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

ROSE, J.

This is a proceeding in equity instituted by Arthur H. Jones and Archie D. Marvel, trustees duly appointed to

execute trusts created by the will of Alonzo L. Clarke, deceased. They pray for the interpretation of two paragraphs of his will and for a judicial order directing distribution of portions of testator's residuary trust estate. The bequests submitted for interpretation read in part as follows:

"22. I give and bequeath to my executors and their successors in trust fifty (50) shares of the capital stock of the First National Bank of Holdrege, Nebraska, and fifty (50) shares of the preferred stock of the Beatrice Creamery Company, in trust, to collect and receive the dividends and income therefrom, and to pay the dividends and income therefrom annually, or at the time they shall be declared or received, to my son, William H. Clarke, during his natural life, and at the time of the death of said William H. Clarke, I give and bequeath said fifty (50) shares of the capital stock of the First National Bank of Holdrege, Nebraska, and said fifty (50) shares of the preferred stock of the Beatrice Creamery Company, and the accrued accumulations therefrom, to the heirs at law of said William H. Clarke, deceased, and direct my said executors or their successors in trust to convey, transfer, deliver and pay the same at said time to his heirs at law, absolutely."

"27. I give, devise and bequeath to my executors and their successors in trust all the rest, residue and remainder of my estate, real, personal and mixed, wheresoever situate, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, in trust, to divide the same into eight (8) equal parts, and for this purpose and to accomplish this end my executors named herein may sell and convey and are hereby empowered and authorized to sell and convey any part or all of the residue of my estate, if it can be done without material loss and injury thereto, and to hold and invest one-eighth (1/8) thereof, to collect and receive the interest, income and accumulation therefrom, and to annually pay the interest, income and accumulation there-

from to William H. Clarke, my son, of Manilla, P. I., during the term and period of his natural life, and at the time of the death of said William H. Clarke, I give, devise and bequeath said one-eighth (1/8) of the said residue of my estate, and the accrued accumulations therefrom, to the heirs at law of said William H. Clarke, deceased, and direct my said executors or their successors in trust to pay, transfer, convey and deliver the same to his heirs at law, absolutely."

Under further provisions of paragraph 27, the income from one-eighth of this residuary trust estate was willed to Gertrude Touzlin Clarke and the residue thereof at her death to the issue of her body by William H. Clarke; the income from one-eighth to Frank N. Clarke and the residue thereof at his death to his heirs at law; the income from one-eighth to Carrie Detweiler Clarke and the residue thereof to the issue of her body by Frank N. Clarke; one-eighth of the residuary trust estate to James N. Clarke, brother of testator; one-eighth thereof to Hattie D. Clarke, sister-in-law of testator; two-eighths thereof to Lida Clarke Seaton, daughter of testator.

The question in controversy is the meaning of the term "heirs at law" as used by the testator in the bequests quoted. To facilitate the interpretation another paragraph of the will is also reproduced:

"23. I give and bequeath to my executors and their successors in trust fifty (50) shares of the capital stock of the First National Bank of Holdrege, Nebraska, and fifty (50) shares of the preferred stock of the Beatrice Creamery Company, in trust, to collect and receive the dividends and income therefrom, and to pay the dividends and income therefrom annually, or at the time they shall be declared or received, to my son Frank N. Clarke, during his natural life, and at the time of the death of said Frank N. Clarke, I give and bequeath said fifty (50) shares of the capital stock of the First National Bank of Holdrege, Nebraska, and said fifty (50) shares of the preferred stock of the Beatrice Creamery Company, and

the accrued accumulations therefrom to the heirs at law of said Frank N. Clarke, deceased, and direct my said executors or their successors in trust to convey, transfer, deliver and pay the same at said time to his heirs at law, absolutely."

A chronology of events follows: September 25, 1915, will of Alonzo L. Clarke executed; May 3, 1918, testator died at Hastings, Nebraska; June 4, 1918, will probated in county court of Adams county, Nebraska; August 18, 1921, Margaret Dale Clarke, daughter of Cyrus Kingsley Clarke, nephew of testator, adopted in the superior court of Santa Barbara county, California, as the daughter of William H. Clarke and his wife Gertrude Touzlin Clarke under a statute of California; January 29, 1932, Frank N. Clarke, son of testator, died at Hastings, Nebraska; February 7, 1932, William H. Clarke, son of testator, died at Santa Barbara, California.

Alonzo L. Clarke survived his wife and left surviving him his two sons, Frank N. Clarke and William H. Clarke, and one daughter, Lida Clarke Seaton, but no other son or daughter or the child of any deceased son or daughter.

Frank N. Clarke left surviving him his widow, Carrie Detweiler Clarke, and his daughter, Helen Clarke, but no other child or child of any deceased child.

William H. Clarke left surviving him his widow, Gertrude Touzlin Clarke, and his adopted daughter, Margaret Dale Clarke, but no child of his blood.

The beneficiaries of the residuary trust estates of which Frank N. Clarke and William H. Clarke were entitled to the income for life appeared in the suit in equity and presented their claims by formal pleadings.

Margaret Dale Clarke filed an answer and cross-petition in which she pleaded her adoption in the superior court of Santa Barbara county, California, as the daughter of William H. Clarke and his wife Gertrude Touzlin Clarke. She alleged also that she is the heir at law of William H. Clarke, deceased, within the meaning of paragraphs 22 and 27 of the will. Her prayer is as follows:

"Wherefore, she asks the court for a finding and decree in her favor that she is the lawful heir of William H. Clarke, deceased, and that the portion of the residuary trust estate from which the said William H. Clarke received the income during his life, and also the assets for distribution to the heirs of William H. Clarke, deceased, contained in the trust estate created by the 22d paragraph of said will, shall be set apart and transferred to her, and for such further order in the premises as to the court seems just and proper."

The claim of Margaret Dale Clarke is contested by Helen Clarke who alleges she is an heir at law of both sons of testator within the meaning of paragraphs 22, 23 and 27 of the will. At the trial Margaret Dale Clarke proved agreements, court proceedings, a statute of California, and a judgment—all showing her legal adoption as pleaded by her. The judgment of adoption contains an order that the adoptee shall be treated by her adopting parents in all respects as their own lawful child, including the right of inheritance.

The district court adjudged that Gertrude Touzlin Clarke, widow, and Margaret Dale Clarke, adopted daughter, were the only heirs at law of William H. Clarke, deceased, within the meaning of paragraphs 22 and 27 of the will and that each was entitled to one-half of the property and funds of which William H. Clarke received the income during his life. From this judgment Helen Clarke appealed.

Did the trial court err in holding that Alonzo L. Clarke, deceased testator, willed to Margaret Dale Clarke, adopted daughter of his son William H. Clarke, deceased, one-half of the residuary estate of which the latter received the income during his life? A search for precedents on this perplexing question seems to reveal a diversity of judicial opinion. The intention of testator, what was in his mind, the language used, his relationship to the objects of his bounty, the consideration of the entire will, the natural tendency to keep in the channel of descent by blood, the

surrounding circumstances, each and all, are familiar aids in the interpretation, when applied to a particular case. To ascertain the intention of testator is the purpose of interpretation. The technical meaning of words, such as "heirs at law" does not necessarily control, if the intention gathered from all proper sources of inquiry is otherwise. The standpoint of testator, when the will was executed, and whom he might then naturally anticipate as heirs at law of his sons should be kept in mind.

In the effort to uphold the decision below, counsel for Margaret Dale Clarke rely on her adoption as conclusive evidence that she is the "heir at law" of her foster father, within the meaning of the will. In this connection it is argued that the laws of California and Nebraska alike confer the right of inheritance upon the adoptee; that the judgment of adoption requires the adopting parents to treat the adoptee as their own lawful child, including the right of inheritance; that adoption statutes should be liberally construed in furtherance of the beneficent purposes of such legislation; that the adoptee's right of inheritance is the same as the right of a natural child; that it is the duty of the Nebraska courts to give full faith and credit to the judgment of the California court; that the question as to who are heirs at law could not be determined until after the death of William H. Clarke; that there is nothing in the will to indicate the words, "heirs at law," were not used in their ordinary sense; that there is a presumption testator knew the law relating to adoption, drew his will in harmony therewith and understood the usual import of his own words. These propositions were skilfully presented and the brief contains references to numerous cases from different jurisdictions in support of the arguments made. There are, however, obstacles in the course of reasoning indicated.

Testator was a stranger to the adoption. Nearly six years prior thereto he had made his will when the adoptee was a mere child. She had never lived in the home of William H. Clarke, a resident of the Philippine Islands

when the will was made. The adoption was in California. The home of testator was in Hastings, Nebraska. He had been dead more than three years at the time of the adoption. There is nothing in the record to show that he had any knowledge of a purpose on part of his son to adopt a child or that he had any reason to suspect such an event. In using the term "heirs at law" of William H. Clarke, testator may have anticipated the birth of a child of the son's own blood and would naturally have in mind his own granddaughter, Helen Clarke, niece and next of kin of the son. When bequeathing to Gertrude Touzlin Clarke, wife of William H. Clarke, the income from one-eighth of the residuary trust estate, testator willed the residue to the issue of her body by William H. Clarke, thus keeping such residue within the natural channel of descent by blood. If he had no reason to anticipate the adoption of a child, how could he have intended to bequeath property to the adoptee who would not have been entitled to a share of his estate under the statute of descent in absence of a will? If the child had been adopted before his death with his knowledge in time to change his will, the situation would be different. William H. Clarke never had any title to any part of the residuary trust estate of which he received the income during his life. He could not by any instrument of his own making change the course of descent directed by the will. He could not, by adopting a child, determine the intention of his father as expressed in the will. The adoption made the adoptee a legal heir of her adopting father, testator's son, but did not necessarily make her the heir of the adopting son's father, within the meaning of the will. The residuary trust estate in controversy passed to the heirs at law by the will and not by the statute of descent. Of course full faith and credit must be given to the California judgment of adoption in any situation to which it applies. The Constitution of the United States requires that. *Bates v. Bodie,* 245 U. S. 520. It does not follow, however, that a court of California,

by a judgment of adoption, can determine the meaning of a will previously executed and probated in Nebraska. The effect of a judgment of adoption after the execution of a will and after the death of testator was recently considered by an annotator who said:

"The question of the right of a child adopted after the testator's death to take under the will, as under other circumstances, is one of intent upon the part of the testator. The fact that the adoption was subsequent to the testator's death raises a grave presumption against an intention to include such adopted child, and the better rule seems to be that the fact that the testator had no knowledge of the adoption at his death overcomes the presumption that his intention was so to draw his will as to harmonize with the adoption laws." 70 A. L. R. 626.

Under this head the cases are collected and discussed. They seem to show that the weight of authority as well as the better reasoning supports the views quoted. See, 70 A. L. R. 626 *et seq.*

The judgment below, in so far as it determines that Margaret Dale Clarke is an "heir at law" of William H. Clarke, deceased, within the meaning of paragraphs 22 and 27 of the will, and orders distribution to her on that basis, is erroneous and to that extent is reversed and the cause remanded to the district court, with directions to enter a judgment in harmony with this opinion.

The conclusion reached does not disturb that part of the judgment in favor of Gertrude Touzlin Clarke.

REVERSED IN PART.

CLARENCE EMERSON, APPELLANT, V. CITIZENS STATE BANK OF THEDFORD ET AL., APPELLEES.

FILED DECEMBER 8, 1933. No. 28621.

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

Harry R. Ankeny, for appellant.

Sullivan & Wilson, Field, Ricketts & Ricketts, Clark Jeary and *Donald Day, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

GOOD, J.

This is an action to rescind a contract for purchase of land by plaintiff from defendant Citizens State Bank of Thedford, to recover money paid on the contract, cancel promissory notes given in part payment therefor, and, in the alternative, for a judgment in damages resulting from fraudulent conspiracy of all the defendants. Defendants denied any fraud or conspiracy. The trial of the issues resulted in a general finding and judgment for defendants. Plaintiff has appealed.

The record reflects the following pertinent facts: Plaintiff and defendant Munger are physicians and surgeons residing in the city of Lincoln, Nebraska, with adjoining offices in the same building. For many years they have been friendly in a professional way, each assisting the other in many surgical operations. For a number of years before this controversy arose, defendant Munger was the owner of a cattle ranch in Thomas county, Nebraska, which apparently had proved very profitable to him. Plaintiff had, from time to time, visited Munger's ranch with Munger, and in 1929 he purchased a ranch in the same vicinity. Munger and plaintiff had discussed the question of a joint enterprise in cattle ranching. In the summer of 1929 plaintiff had asked Munger to be on the lookout for additional ranch lands in the vicinity of their ranches that could be purchased at a reasonable price.

In July of 1929 plaintiff took a vacation trip to Alaska and was gone for some weeks. Some time during the month of July Munger desired to purchase an 80-acre tract of land, adjoining his ranch, on which to erect a

water-tank. He learned that this 80-acre tract was owned by the Citizens State Bank of Thedford. He went to the bank to see if he could purchase this tract. Defendant McMillan, cashier of the bank, informed Munger that the bank owned the 80 acres, but did not desire to sell it separately from a larger tract which the bank had acquired in foreclosure proceedings, but that it wished to sell the entire tract, comprising 1,120 acres. This tract of land also lay adjacent or in close proximity to the ranch which plaintiff had previously purchased. Munger informed McMillan that he did not desire to purchase the entire tract, but he thought he knew of a person who would be interested in it, if it could be bought at a reasonable price. McMillan informed him that the bank would sell the entire tract for $9 an acre. Munger then inquired what commission the bank would pay if he found a purchaser. It was finally agreed that if Munger found a purchaser at $9 an acre for 1,040 acres of the land the bank would convey to him the 80-acre tract which he desired and pay him $1,040 as commission, or, in other words, all in excess of $8 an acre for the 1,040 acres.

Upon plaintiff's return from Alaska, Munger informed him of the opportunity to purchase this land, 1,040 acres, at $9 an acre, and, in effect, said that it was a bargain at that price, but did not disclose the fact that, if plaintiff purchased the land, Munger would receive a commission. In September plaintiff and Munger visited Thomas county, went to the bank, where plaintiff was introduced to McMillan; the latter showed plaintiff the amount for which the land was carried on the books of the bank, and informed him of the price, $9 an acre. Plaintiff asked to be shown the land. The cashier, not being able to leave the bank at that time, directed plaintiff and Munger to go to certain individuals who would show them the land. Plaintiff and Munger followed directions and went to a point either on or very close to the land and were shown the ranch land. At this point, plaintiff testifies, certain fences were pointed out to him and he was told

that all the land lying south and west of this fence was a part of the tract; that a part of this land so shown was fine bottom land and part of it was not, in fact, a part of the 1,040-acre ranch. It may be said on this question that the other witnesses who were there flatly contradict the plaintiff in this and say that they were on the edge of the land in question and pointed out the true boundaries thereof.

Plaintiff and Munger both returned to Lincoln; plaintiff started a correspondence with the bank, and quite a number of letters were exchanged, plaintiff attempting to induce the bank to take a less sum than $9 an acre for the 1,040 acres. Apparently, he conferred from time to time with defendant Munger, and informed him of his efforts to induce the bank to take a less sum. It also appears that on two or three occasions, between that time and the time the contract was finally signed, plaintiff visited Thomas county and the land in question, and his letters indicate that he had offers of other land in the vicinity and dickered with the bank to reduce its price. Finally, the bank consented to take $9,000 for the 1,040 acres. Some time elapsed before they reached an agreement as to time of payments and interest rate on deferred payments. It was finally agreed that plaintiff would purchase the land at $9,000, paying $2,000 in cash and giving promissory notes for the balance. The bank then conveyed to Munger the 80-acre tract above mentioned and gave him credit for $640, being all in excess of $8 an acre for the purchase price. Plaintiff took possession of the ranch, rented it out and has been in possession, receiving the rents and profits thereof, ever since, and until the time of the trial. He did not learn that his friend Munger had received a commission on the sale of the land until about the 1st of September, 1930. He commenced this action on the 17th day of December, 1930.

After plaintiff had discovered and had knowledge of the alleged fraud and conspiracy, he discussed with the president of the bank the question of discounting his notes,

and indicated that he was not, at that time, able to discount his notes, but would pay them as they became due. The evidence also shows that at the time plaintiff was bargaining for the land the price of grass-fed cattle ranged from $8 to $11 per cwt.; that shortly subsequent thereto the price declined very materially, and that ranching became less profitable; in fact, from being a very profitable business, it had become unprofitable. It also appears in the record that plaintiff had looked at and had contemplated buying another ranch previous to the time of negotiating for the one in controversy, which also lay adjacent or in close proximity to the ranch he at first purchased, but that he decided not to buy the land, and that defendant Munger did buy it after plaintiff concluded not to purchase; that plaintiff, in conversations with Munger, expressed regret that he had not purchased that ranch, and thought he had made a mistake in not so doing. It also appears that defendant Munger, probably because of the great decline in the price of grass-fed cattle, was unable to pay for that ranch and subsequently lost it. It appears from the record that neither the bank nor its officers knew of any close friendship between plaintiff and defendant Munger, or had any knowledge as to whether or not plaintiff knew that Munger was to receive a commission if the sale to plaintiff was effected. Plaintiff testified that defendant Munger told him that he had no interest in the sale and that his only desire was that plaintiff might purchase the ranch so that they could engage in the cattle ranching business together. This is flatly contradicted by Munger.

Many witnesses testified as to the actual value of the land contracted for by plaintiff. Testimony offered on behalf of plaintiff tended to show that the land was worth from $4 to $5.50 an acre; that on behalf of defendants tended to prove that it was worth from $8 to $10 or $11 an acre.

Three questions of fact are presented by the record: (1) Is there evidence that would establish conspiracy as

contended by plaintiff? (2) Were misrepresentations made as to the actual boundaries of the land? (3) Was plaintiff overreached and induced to purchase the land at a price in excess of its then value?

In our opinion, the record is absolutely barren of any evidence that would establish a conspiracy between the bank and its officers, on the one hand, and Munger on the other. There is no evidence that there was any agreement that Munger's agency for the sale of the land should not be disclosed. There is no evidence that any officer of the bank had any knowledge or information of anything approaching a confidential relationship between plaintiff and Munger. The charge of conspiracy is not sustained.

The evidence relating to the misrepresentation as to the actual boundaries of the tract is in conflict. Plaintiff alone testified to the misrepresentation; while at least two other witnesses testified that he was shown the exact boundaries, and that there was no misrepresentation as to the actual boundaries. Plaintiff testified that a fence, running diagonally from northwest to southeast, was pointed out to him as the boundary line. He knew that the description of the land followed governmental subdivisions and must have known that the boundary line could not thus run diagonally. In our view, the evidence upon this point preponderates in favor of defendants. The charge of misrepresentation as to the actual boundaries of the land is not sustained.

On the question of value, a number of plaintiff's witnesses did not reside in the vicinity nor in the county, but were persons engaged in appraising land for loan purposes for insurance companies or other lending agencies. The witnesses for defendants were more numerous and for the most part resided in the immediate vicinity; owned land adjacent or in close proximity to the land involved in this controversy, and were in a better position to know the value of land than were the witnesses for the plaintiff. We are constrained to hold that the evidence shows that the value of the land, at the time plain-

tiff agreed to purchase it, was as great as the amount plaintiff agreed to pay for it. It is a matter of common knowledge that, since the fall of 1929, there has been a rapid, continual decline in the prices of farm products, and particularly of live stock, and in land values. At the time plaintiff bargained for the land the raising of cattle on ranches was exceedingly profitable. Because of the conditions that have prevailed generally in this part of the country for the past four years, that industry has become unprofitable, and that fact has, perhaps, induced plaintiff to believe that he was defrauded in the purchase of land. In this connection it may be observed that the conduct of defendant Munger, in failing to disclose his agency for the sale of the land to the plaintiff, is not to be commended. This is an action in equity, and the record presents no question calling for equitable relief. Whether plaintiff might have a right of action against defendant Munger for damages is not properly before us and is not determined.

We find no ground for interfering with the judgment of the district court.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. HORACE STATE BANK, APPELLANT: JACOB STAM, GUARDIAN, INTERVENER, APPELLEE.

FILED DECEMBER 8, 1933. No. 28701.

1. **Banks and Banking: INSOLVENCY: PRIORITIES.** A deposit by the guardian of an incompetent veteran in a bank which subsequently became insolvent, of war risk insurance and disability compensation payments received from the government, is not entitled to priority of payment out of the assets of the bank under section 3466, Rev. St. U. S., U. S. C. A. title 31, sec. 191, as a debt due the United States. *Spicer v. Smith*, 288 U. S. 430.
2. **Insurance: WAR RISK INSURANCE: PAYMENT TO GUARDIAN.** Payment of instalments of war risk insurance and disability compensation to the guardian of a mentally incompetent

veteran vests title in the ward and operates to discharge the obligation of the United States in respect of such instalments. *Spicer v. Smith*, 288 U. S. 430.

3. **Cases Overruled.** *State v. Security Bank*, 121 Neb. 521, and *State v. First State Bank*, 121 Neb. 515, are hereby overruled.

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

F. C. Radke, Barlow Nye, William J. Gartland and *P. J. Barrett*, for appellant.

Lanigan & Lanigan, contra.

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

DAY, J.

The guardian of William Stam, a mentally incompetent person and a world war veteran, deposited in the Horace State Bank money belonging to the ward which had been received as compensation from the United States government. The bank was declared insolvent. The guardian filed a claim for a trust fund, and the receiver classified a part as a trust fund and the rest as a deposit. Upon appeal to the court, the court classified the entire sum as a trust fund.

The action of the trial court was no doubt inspired by the opinions of this court in *State v. Security Bank*, 121 Neb. 521, and *State v. First State Bank*, 121 Neb. 515, in which cases this court held that money paid to the guardian by the United States under the war risk insurance acts is "money of the United States" until it reaches the beneficiary and that as money of the United States it was entitled to priority. We have heretofore held in accord with authority that money of the United States is entitled to priority under federal statutes. *State v. Thurston State Bank*, 121 Neb. 407. Various state courts construed the federal statutes involved. Finally, the supreme court of the United States, because of the various conflicting decisions in the state courts, granted

a writ of certiorari. In the case of *Spicer v. Smith,* 288 U. S. 430, the court held that such a deposit does not belong to the United States and, as indebtedness to it is essential to priority, the guardian's claim to a trust under such provision is without merit. Quoting from the last-cited case: "The guardian, appointed by the county court, was by the laws of the state given the custody and control of the personal estate of his ward and was authorized to collect and receive the money in question. Ky. St. sec. 2030. And unquestionably payment to the guardian vested title in the ward and operated to discharge the obligation of the United States in respect to such instalments."

The same situation obtains in this state. The holding of this court in *State v. Security Bank,* 121 Neb. 521, and *State v. First State Bank,* 121 Neb. 515, is overruled in conformity to the construction placed upon the federal statutes involved by the supreme court of the United States.

But it is urged by the intervener that this was a special deposit and as such impressed with a trust. This contention is untenable since the evidence does not establish a single essential element of a special deposit.

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

REVERSED.

CITY OF OMAHA ET AL., APPELLEES, V. DOUGLAS COUNTY ET AL., APPELLEES: ELIAS HOLOVTCHINER, INTERVENER, APPELLANT.

FILED DECEMBER 8, 1933. No. 28626.

1. Appeal: WITHDRAWAL FROM CASE. Where a city, jointly with another, institutes an action and secures relief from an equity court, it will not be permitted to withdraw from the case, acknowledge its liability, and require the other party to maintain the action on appeal.

2. Parties: INTERVENERS. "To authorize a party to intervene, he must have an interest of such a direct and immediate character that he will either gain or lose by the direct legal operation of and effect of the judgment." *Latham v. Chicago, B. & Q. R. Co.*, 100 Neb. 173.
3. Highways: PRESCRIPTION RIGHTS. Rights may be gained by prescription against a county or city as well as against private persons or corporations.
4. ———: DEDICATION. The right to use a road may be given to the public by dedication. Such dedication may be by parol, may be implied from the conduct of the owner, or may be presumed from lapse of time.
5. ———: LICENSE TO USE: POWER OF COUNTY BOARD. A county board has authority to contract with private landowners to give them an irrevocable license to the use of a road across county property and to bind the county thereby.

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

J. B. Fradenburg, for appellant.

Henry J. Beal, for county of Douglas et al., appellees.

Fred A. Wright, Harry B. Fleharty and *Battelle, Travis & Strelow*, for city of Omaha et al., appellees.

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

BEGLEY, District Judge.

This is a suit in equity brought by the city of Omaha and Frank W. Anderson against the county of Douglas and the county commissioners for an injunction to prevent the maintenance of a barracade on the so-called Woolworth avenue road across the Field Club grounds. Appellant, Elias Holovtchiner, intervened and adopted the answer of the defendant in an effort to prevent the reopening of the road. The trial court found in favor of the plaintiffs and the injunction prayed for was granted. The county of Douglas and the county commissioners accepted the judgment and decree of the district court and did not appeal therefrom. The intervener, Holovtchiner, has brought the case by way of appeal to this court.

The city of Omaha, appellee herein, has filed a motion that the decree of the district court, in so far as it affects the rights of the city of Omaha, be reversed and vacated and the injunction be dissolved and that its petition be forthwith dismissed and then it be found to be entitled to no relief whatsoever in this action. The city of Omaha, together with Anderson, instituted this action and secured the relief from the trial court. It would now be inequitable to permit the said city to withdraw from the case after having secured the decree from the district court. Its said motion is therefore overruled.

The appellees contend that the intervener, Elias Holovtchiner, is without authority to intervene in the suit or to appeal from the decision of the district court. The intervener in his answer merely adopted the answer of the defendants, county of Douglas and its commissioners, who do not appeal. He did not testify and there is no showing that he had any interest different than the general taxpayers. He did not live on property adjoining the highway or street which would be liable for assessment, paving, grading and all other improvements, nor did he plead or prove any interest in the subject-matter of the litigation. Section 20-328, Comp. St. 1929, provides that any person who has or claims an interest in the matter in litigation, in the success of either of the parties to the action, or against both, may become a party to the action by intervention. In the case of *Latham v. Chicago, B. & Q. R. Co.*, 100 Neb. 173, the court said:

"To authorize a party to intervene, he must have an interest of such a direct and immediate character that he will either gain or lose by the direct legal operation of and effect of the judgment."

One who lives apart from the road on another street can have no interest in the road other than that of any other taxpayer of the county. The only interest the intervener claims in his pleading is the same as that of Frank W. Anderson, the plaintiff. The same is not sufficient to authorize him to intervene in the suit, as he is not

attempting to uphold the position of Anderson as plaintiff, who claims the right to use the road by prescription and dedication.

The suit was conducted by and on behalf of the city against the county of Douglas. The city has jurisdiction to open or close this road in a proper case. There is no claim that there was any fraud or failure on the part of either the county or the city to act, nor that the issues were not being properly presented, and it would seem that the county being satisfied with the judgment of the lower court, and the city also having acquiesced in that judgment, this should be an end of the litigation.

Taxpayers, without showing some special interest in the subject of litigation, cannot intervene in matters of public interest that are being prosecuted for or against a county by its proper officials. *State v. Holmes,* 59 Neb. 503; *Parker v. City of Grand Island,* 115 Neb. 892; *State v. Hall, ante,* p. 236.

The evidence shows that for more than ten years prior to 1887 this road was used by the public adversely and as a matter of right. The county erected two bridges over the railroad tracks crossing said tract, one in 1891 and the other in 1901, which had been used continuously by the public; that the county dedicated this to the use of the public as a public road; that in 1923 a part of the road was graded and graveled pursuant to a contract with the promoters of two additions west of the county property under which contract the promoters paid a part of the cost. Nine witnesses testified for the plaintiffs below and they remembered using the road as far back as 1873. It was a county road so designated by a map from 1866 until 1887, when the property was incorporated within the city limits. They testified positively that the road is the same as the present Woolworth avenue road; that it was used generally by the public; that there were no fences or gates to prevent entrance or egress; and that it was the main traveled road from Omaha to the western and southwestern parts of the county. One witness testi-

fied that the road was fenced on both sides in 1873. These facts were not seriously contraverted in the lower court, but the defendant contended that as a matter of law the county commissioners had no authority to dedicate this road, and the right of prescription does not accrue after 1899, and that same was interrupted before that time. The law is well settled in this state that, when the public uses a road adversely to the owner for a period of ten years, it gains a right to its continued use by prescription. This rule applies against a county as well as against a private individual. These rights to be effective must have accrued before 1899. *Burk v. Diers*, 102 Neb. 721; *Agnew v. City of Pawnee City*, 79 Neb. 603. Also, the right to use a road may be given to the public by dedication. Such dedication may be by parol, may be implied from the conduct of the owner, or may be presumed from lapse of time. *Eldridge v. Collins*, 75 Neb. 65.

The contract between the county and the owners of the addition to the city was a license coupled with an interest which makes it irrevocable. The county board had authority to contract with private landowners to give them such license and use of such road across county property and to bind the county thereby. *Clark v. Saline County*, 9 Neb. 516.

In considering the evidence in the case, we are led to the conclusion that the district court did not err in granting the injunction requiring the barriers to be removed from the road. The judgment is therefore

AFFIRMED.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, APPELLEE, V. CECIL LEAHY, APPELLANT: E. H. LUIKART, RECEIVER OF CHADRON STATE BANK, APPELLEE.

FILED DECEMBER 8, 1933. No. 28723.

1. **Land Contracts: FORECLOSURE: PLEADING.** In an action to foreclose a contract for the sale of real estate, it is not

necessary to allege whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, or whether such debt or any part thereof has been collected and paid as provided in section 20-2144, Comp. St. 1929, such an action not being within the terms of this statute.

2. Evidence examined and *held* to support the decree of the trial court.

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

Fisher & Fisher, for appellant.

E. D. Crites, F. A. Crites, Hall, Cline & Williams and *F. C. Radke, contra.*

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

CARTER, District Judge.

In this case the plaintiff brought an action for the foreclosure of a contract of sale of certain real estate situated in Dawes county, Nebraska. From a decree of the district court finding the amount due and ordering a sale of the property, the defendant Cecil Leahy, the owner of the legal title, brings this appeal.

The defendant as appellant in this court contends that the petition filed in the lower court does not state a cause of action, for the reason that it fails to allege that no action at law had been commenced for the recovery of any or all of the amounts due under the contract of sale, as required by section 20-2144, Comp. St. 1929. This contention is without merit. This court has held that the provision of the statute above referred to applies alone to formal mortgages, and not to mortgages or liens arising out of the equities between the parties. *Dimick v. Grand Island Banking Co.,* 37 Neb. 394. This action being one to foreclose a contract of sale of real estate, it does not fall within the provisions of the statute and such an allegation is not required.

The defendant further contends that the trial court

erred in not permitting the defendant to show that his failure to comply with the terms of his contract was caused by an unusual and unprecedented drought which prevented any returns being had with which to meet the delinquent instalments. There being nothing in the contract upon which such a defense could be based, it is not a defense and the trial court properly rejected this offered testimony.

An examination of the record fails to disclose any error on the part of the trial court. The decree appealed from was properly entered and the same is hereby

AFFIRMED.

OSCAR D. DICKINSON, APPELLEE, V. FRED J. H. LAWSON, APPELLANT.

FILED DECEMBER 13, 1933. No. 28649.

1. **Pleading**: DEMURRER ORE TENUS. 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 the allegations thereof.
2. ———. Questions relating to the sufficiency of the petition should be determined before the cause comes on for trial to a jury.
3. ———: 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.
4. **Appeal**: IMMATERIAL ERRORS. 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.
5. **New Trial**. Affidavits in support of a motion for new trial examined, and *held* insufficient, and in the light of the entire record no error was committed by the district court in overruling such motion.

6. Trial: ABSENCE OF WITNESSES. "A litigant whose witnesses are absent when his case is called for trial, and who makes no objection then to the trial proceeding on that account, cannot be heard to complain in his motion for a new trial that he was prejudiced by the trial taking place when his witnesses were absent." *Kreamer v. Irwin*, 46 Neb. 827.
7. Sales. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price, which may be made payable in any personal property.
8. ———. Evidence examined and transaction in suit *held* to be a "sale" within the purview of the Nebraska uniform sales act.
9. ———: FRAUD. If a party conceals a fact pertaining to an existing charge or incumbrance upon personal property, in the sale of which he is then engaged, and which is material to the transaction, and peculiarly within his own knowledge, knowing that the other party acts on the presumption that no such fact exists, it is as much of a fraud as if the existence of such fact were expressly denied, or the reverse thereof expressly stated.
10. Torts. Every person legally responsible is liable for a tort committed by him which is the proximate cause of an injury to another.
11. ———. The degree of participation in the commission of an actionable tort does not affect the extent of liability, and all persons who instigate, promote, encourage, advise, countenance, cooperate in, aid, or abet the commission of an actionable wrong by another are liable as principals to the party injured to the same extent and in the same manner as if they had performed the wrongful act themselves.
12. Evidence examined, and *held* to sustain the judgment for damages as awarded by the district court.

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

Davis & Vogeltanz and *Fred J. H. Lawson*, for appellant.

Lanigan & Lanigan and *A. L. Bishop, contra.*

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

EBERLY, J.

This is an action in tort. The amended petition, on which the case was tried, alleges in substance that on November 24, 1929, in the place of business of plaintiff at Spalding, Nebraska, an exchange was made by and between the plaintiff and defendant of a new Ford truck, then owned by the plaintiff, and "estimated to be of the value of $715," for a new Whippet car, then owned and offered for trade by the defendant "at an agreed valuation of $688" and the additional sum of $25 in cash paid by the defendant; that the exchange was completed by the delivery of the property and payment of the money involved; that at the time of the exchange the Whippet car was mortgaged, a fact which defendant knowingly, wilfully and fraudulently concealed; that plaintiff by reason thereof was subsequently compelled to and did pay the sum of $271.81 to secure the release of this mortgage, which sum constitutes the damage suffered by him occasioned by the wrongful concealment mentioned.

Defendant in his answer denies generally the allegations of the petition, but in substance admits that the plaintiff is engaged in the automobile and garage business at Spalding, Nebraska, and was so engaged on November 24, 1929; that on the day mentioned defendant accompanied one Charles E. Anderson to plaintiff's place of business; that an exchange of the Ford truck for the Whippet car was then and there made; defendant admits giving the check of $25 to plaintiff, but alleges that the same was a loan to Charles E. Anderson and at the latter's request was drawn payable to plaintiff, and was not paid to plaintiff by defendant as the difference in value in a trade between plaintiff and defendant; that the trade or exchange was in truth and in fact then and there made solely between said Charles E. Anderson and plaintiff, in which defendant had no part; and defendant expressly denies that he was then and there the owner of the Whippet car. These allegations were put in issue by reply. The cause was tried to a jury and at the conclusion of the evidence each

party moved for an instructed verdict. The district court thereupon withdrew the cause from the jury and entered judgment for plaintiff as prayed. Defendant thereupon presented his motion for a new trial, and, from the order of the trial court overruling the same, appeals.

In his original brief on appeal the appellant, who is herein referred to as defendant, assigns nine errors as "Relied on for Reversal." Three of these are predicated on the alleged insufficiency of the amended petition; four, in effect, challenge the sufficiency of the evidence to sustain the judgment; one charges that the trial court erred in not sustaining defendant's motion for a new trial; and the last error assigned is based on the refusal of the trial court on motion to make the amended petition more definite and certain by requiring the plaintiff to allege whether the defendant represented to the plaintiff that he was the owner of the Whippet car which the plaintiff traded for.

The defendant first contends that the amended petition upon which the case was tried is defective for want of necessary allegations relative to fraud, and that the district court erred in overruling his oral objection to the introduction of evidence on the ground that "the petition does not state facts sufficient to constitute a cause of action against the defendant." This objection was first tendered after the jury had been duly impaneled and after a witness had been sworn and the reception of testimony commenced.

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 such pleading. *Curtis & Co. v. Cutler,* 7 Neb. 315; *Ball v. LaClair,* 17 Neb. 39.

In the instant case the record discloses that no demurrer provided for by our Civil Code was tendered by the defendant, and the challenge to the sufficiency of the petition, upon which the defendant now relies, was first made as above set forth.

But the conclusion is quite obvious that "questions relating to the sufficiency of the petition should be determined before the cause comes on for trial before a jury." *Marvin v. Weider*, 31 Neb. 774.

This court is committed to the rule: "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 must be liberally construed, and, if possible, sustained." *Johnson v. Spencer*, 51 Neb. 198. See, also, *Peterson v. Hopewell*, 55 Neb. 670; *Fire Ass'n of Philadelphia v. Ruby*, 60 Neb. 216; *First Nat. Bank of Cobleskill v. Pennington*, 57 Neb. 404; *Parkins v. Missouri P. R. Co.*, 76 Neb. 242; *Welch v. Adams*, 87 Neb. 681; *Donovan v. Chitwood*, 116 Neb. 683; *Harnett v. Holdrege*, 5 Neb. (Unof.) 114.

In the application of the rule above quoted the petition or pleading so assailed will be construed liberally in the light of the entire record. *National Fire Ins. Co. v. Eastern Building & Loan Ass'n*, 63 Neb. 698; *Punteney-Mitchell Mfg. Co. v. Northwall Co.*, 66 Neb. 5.

And we have also said on this subject: "If the essential elements of plaintiff's case may be implied from its terms (the terms of the pleading assailed) by reasonable intendment, they will be regarded as alleged sufficiently." *Sorensen v. Sorensen*, 68 Neb. 483. See, also, *Dailey v. Burlington & M. R. R. Co.*, 58 Neb. 396; *Parker v. Omaha Packing Co.*, 85 Neb. 515, 517.

And even then the determinative test may finally be found in the application of the statutory rule that "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." Comp. St. 1929, sec. 20-853. See, also, *Waldron v. McBride*, 79 Neb. 429; *Welch v. Adams*, 87 Neb. 681; *Fitzpatrick v. Hines*, 105 Neb. 134; *Bryan v. Manchester*, 111 Neb. 748.

A careful consideration of defendant's contention as to the sufficiency of the amended petition attacked, in the

light of the foregoing authorities, confirms the conclusion that the trial court committed no error in overruling the objection urged, and that we are required to now treat this pleading as ample and sufficient in all respects.

Preliminary to the discussion of the sufficiency of the evidence, the legal force and effect of five affidavits presented by the defendant in support of his motion for a new trial must be determined. The defendant apparently relies on these affidavits in his discussion of the sufficiency of the evidence to support the judgment entered. These affidavits are relevant, if at all, to a single ground of the motion for a new trial, viz.: "That the court should grant a new trial because of newly discovered evidence by the defendant, material to the defense of the defendant, which he could not, with reasonable diligence, have discovered and produced at the trial of said cause," etc.

These affidavits are: First, the affidavit of Charles E. Anderson, who was present with defendant when the exchange of the Ford truck for the Whippet car was made, and with whom, the record discloses, the defendant Lawson had a conversation in September, 1931, prior to the trial below, in reference to the present litigation, and said Anderson had been notified that his deposition was desired in the trial; second, the affidavit of Frank W. Blaha with whom the defendant Lawson had orally arranged for him to appear and testify in the district court at the expected trial, and that upon this case being reached for trial Lawson had the sheriff of Wheeler county endeavor to notify Blaha to appear and testify, as he had orally promised, but owing to the absence of Blaha from his place of business the sheriff was unable to communicate with him until after the termination of the suit; third, the affidavit of the county treasurer of Wheeler county as to the transfer of the Ford truck by plaintiff to Charles E. Anderson (a matter of public record); fourth, the affidavit of J. H. Jarvis as to the sale of one Whippet coach, model 96A, numbered 361179, by the Brandies Motor Company to the Pletcher Motor Company

on April 16, 1929; and, fifth, the affidavit of the defendant as to his failure to produce the evidence of Charles E. Anderson and Frank W. Blaha at the trial.

On the face of the showing it does not appear that the evidence of the two persons last referred to was in fact "newly discovered." On the contrary it fairly appears that the defendant knew the purport of this testimony prior to the trial date, had arranged for the presence of witness Blaha at that time and place and expected him to appear and testify. The same is true as to witness Anderson, except that defendant had planned to take his deposition. As to all absent witnesses the defendant has presented no sufficient showing of due diligence in securing their attendance at the trial. *Heady v. Fishburn,* 3 Neb. 263; *Todd v. City of Crete,* 79 Neb. 677.

Moreover, it appears to be the rule in this jurisdiction that if at the trial a needed witness is not present, or the evidence is not ready, one should ask for a postponement or continuance, because the absence of a subpœnaed witness is not in itself sufficient ground for a new trial where no delay or continuance is asked, since by voluntarily taking the hazard of a trial in the absence of witness or evidence the question of a new trial with respect to that particular matter is waived. The record before us does not show any application for a continuance on the ground of absent witness made by the defendant at or prior to the trial. *Kreamer v. Irwin,* 46 Neb. 827; *Van Etten v. Butt,* 32 Neb. 285; *City of Lincoln v. Staley,* 32 Neb. 63.

It follows that, in so far as based on the ground now being considered, the action of the trial court in overruling the motion for a new trial was correct, and is approved. It is also true that the statements contained in these affidavits are not competent save in connection with this one ground set forth in the motion for a new trial, heretofore quoted, and may not be considered in connection with the question of the sufficiency of the evidence to support the judgment.

The controlling question presented by this appeal is the sufficiency of the evidence to sustain the judgment of the trial court. In this case, a law action, in view of the manner of its submission, the determination of the trial judge on questions of disputed fact must be given the force and effect of a jury's verdict.

From the evidence adduced at the trial the following is, or may be, reasonably inferred: The plaintiff on November 24, 1929, was engaged in the automobile and garage business at Spalding, Nebraska. He was also engaged in selling Ford trucks, and then had one on display in his garage. On that day the defendant and one Charles E. Anderson appeared at plaintiff's place of business. There was brought with them a new Whippet automobile. On the arrival of the two men with the Whippet automobile, negotiations for a trade of this new Whippet automobile were commenced, which resulted in an exchange being effected on the basis of the "regular" selling price of the Ford truck ($713) and the like price of the Whippet automobile ($688) plus a $25 check drawn by defendant Lawson payable to the order of plaintiff and delivered to the latter on completion of this deal. There was also an immediate delivery of the Ford truck and the Whippet automobile by and to the respective parties as required by the terms of the agreement. It may be said in passing that this transaction between these parties, though for convenience to be referred to as an exchange, in truth and in fact constituted a "sale" within the terms of our uniform sales act enacted in 1921. As by it defined, "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price" (Comp. St. 1929, sec. 69-401) which "may be made payable in any personal property" (Comp. St. 1929, sec. 69-409). See Mariash, Sales, 217, sec. 87; 23 C. J. 185; *Bronner v. Van Cortlandt Vehicle Corporation,* 198 N. Y. Supp. 525; *Herring Motor Co. v. Aetna Trust & Savings Co.,* 87 Ind. App. 83; *Grace v. McDowell,* 60 Or. 577; *Selznick v. Holmes Pittsburgh*

Automobile Co., 275 Pa. St. 1. And in a transaction completed prior to the enactment of our uniform sales act, involving essentially identical elements as appear in the one now under consideration, this court held the transaction to be "a sale, as distinguished from an exchange." *Gill v. Eagleton*, 108 Neb. 179.

It appears without contradiction that on the previous 5th day of September, 1929, in the actual presence of the defendant Lawson, an instalment note aggregating $465.36 and a chattel mortgage to secure the payment of this obligation covering the Whippet car involved in this deal had been executed by Charles E. Anderson to the Pletcher Motor Company. At the time of the execution of this chattel mortgage and note an assignment in writing transferring both instruments to the American Credit Corporation of Omaha was indorsed on the back of the chattel mortgage and, together with the instruments assigned, was delivered to the defendant Lawson, who appears to have in turn transmitted them to the assignee named. At least the chattel mortgage thus assigned was filed in the proper public office of Wheeler county on September 11, 1929. The evidence properly in the record supports the conclusion that the plaintiff was wholly ignorant of this incumbrance at the time the exchange of the motor vehicles was made on November 24, 1929. It also appears that Lawson said nothing about any existing chattel mortgage on the Whippet car while actively making this deal for the Ford truck. In turning over the Ford truck plaintiff admittedly gave full value for the Whippet car without deduction for or consideration of the chattel mortgage. Lawson, knowing the existence of this chattel mortgage on the Whippet car, actually made the deal on the basis of the full value of unincumbered property on both sides without disclosure of the actual situation. Some days later the plaintiff in the usual course of business sold this Whippet car to a customer. Still later the owner of the chattel mortgage lien made due demand, and the plaintiff's uncontradicted evidence is that he was compelled

to pay the sum of $271.81, the balance then due, to the American Credit Corporation of Omaha, the assignee named in the written assignment indorsed on the back of the chattel mortgage.

We are not required, under the facts in this record, to go into the subject of where the actual title to the Whippet car was vested when the exchange was made. From a careful reading of all the evidence before the trial court we are inclined to the view that Lawson was the real or equitable owner of the Whippet car, who exercised full control and dominion thereover in the transaction appearing in this record. At least, it cannot be denied that the exchange was made and accomplished through negotiations carried on by Lawson, either in his own behalf or in behalf of Anderson, which, due to the fact that he concealed the existence of an incumbrance which was then known to him, resulted in a loss to the plaintiff. Under these circumstances it can make no difference whether the ownership of the Whippet car was vested in Anderson or in defendant. In his then situation good conscience and fair dealing required Lawson to reveal what he failed to disclose. In addition, the uniform sales act in legal effect converts his guilty silence into his positive though implied affirmation that the Whippet car was then and there free from any charge or incumbrance in favor of any third person, not known to the plaintiff before or at the time the transaction was completed. Comp. St. 1929, sec. 69-413. The defendant as a party to this concealment must be responsible for the damages it caused. Indeed the peculiar circumstances of this transaction invoke the due application of the rule: If a party conceals a fact pertaining to an existing charge or incumbrance upon personal property, in the sale of which he is then engaged, and which is material to the transaction, and peculiarly within his own knowledge, knowing that the other party acts on the presumption that no such fact exists, it is as much of a fraud as if the existence of such fact were expressly denied, or the reverse thereof

expressly stated. *Thomas v. Murphy,* 87 Minn. 358; *Becker v. Bundy,* 177 Minn. 415; *Salmonson v. Horswill,* 39 S. Dak. 402; *Bullock v. Crutcher,* 180 S. W. (Tex. Civ. App.) 940; *King v. International Lumber Co.,* 156 Minn. 494; *The Kalfarli,* 277 Fed. 391, 400.

"Every person legally responsible is liable for a tort committed by him which is the proximate cause of an injury to another. One who contributes to a damage cannot escape liability because his proportional contribution to the result may not be accurately measured." 62 C. J. 1128.

As a general rule, one who counsels, advises, abets, or assists in the commission by another of an actionable wrong is responsible to the injured party for the entire loss or damage. While the mere presence of a person at the commission of a trespass or other wrongful act by another will not render him liable as a participant, yet proof that a person is present at the commission of a wrongful act, without disproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for a jury to infer that he aided and abetted the same. 62 C. J. 1129. See, also, *Brown v. Perkins,* 1 Allen (Mass.) 89; *Hilmes v. Stroebel,* 59 Wis. 74.

Indeed, if the trial court had concluded that Charles E. Anderson was the real owner of the Whippet car at the time of the exchange and the principal beneficiary of that transaction, the judgment appealed from would still find ample support in the evidence; for Anderson and Lawson were both present during the negotiations that led to the exchange. Both knew of the existing incumbrance on the Whippet car, and that the exchange was being negotiated by Lawson on the basis of unincumbered property, and both equally maintained silence. Anderson, when the exchange was consummated, knew what had preceded the deal, and must be deemed to have adopted the conduct of Lawson as the conduct of an agent. Both thereby became jointly and severally liable for the tres-

pass, the wrong perpetrated. Anderson is liable because "A principal who retains benefits derived from the fraudulent conduct of his agent is chargeable with the instrumentalities employed by the latter in carrying out the fraudulent purpose." *Dresher v. Becker*, 88 Neb. 619. See, also, *Tylee v. Illinois C. R. Co.*, 97 Neb. 646; *Jacobson v. Skinner Packing Co.*, 118 Neb. 711. Lawson is liable because of his active participation in accomplishing the deceit both Anderson and he intended. Comp. St. 1929, sec. 69-473.

It will be remembered that, in determining the liability for torts committed, "The degree of participation, however, does not affect the extent of liability, and all persons who command, instigate, promote, encourage, advise, countenance, cooperate in, aid, or abet the commission of a trespass by another are cotrespassers with the person committing the trespass, and are each liable as principals to the same extent and in the same manner as if they had performed the wrongful act themselves." 26 R. C. L. 766, sec. 15.

We are unable to agree with the contention of the defendant that plaintiff at the trial failed to establish by competent evidence the lawful payment to the legal owner of the note secured by the chattel mortgage of September 5, 1929, of the then unpaid balance. The evidence in the record, fairly construed, is to the contrary. But even if we are mistaken as to the force and effect of this testimony as to the payment made, defendant's proposition may not be entertained, for he nowhere challenges the fact that at the time the exchange in controversy was consummated there was an existing incumbrance on the Whippet car to the extent of at least $271.81. This, as a fact, is not questioned.

Under the special circumstances surrounding this transaction, in view of the terms of our uniform sales act, if this contract of exchange entered into is to be deemed a "double sales contract" wherein price of each article involved is "made payable in any personal property"

(Comp. St. 1929, sec. 69-409; 24 R. C. L. 182, sec. 454), and even if the defendant Lawson and his companion Anderson, or either of them, be deemed to have entered into an implied warranty to plaintiff, as a part of the transaction in suit, that the Whippet car was "free" at the time of the "trade" from any charge or incumbrance in favor of any third person not declared or known to plaintiff at the time the contract was made and consummated (Comp. St. 1929, sec. 69-413) still defendant's conclusion as to the necessity of payment of the incumbrance as a prerequisite to maintaining this particular action remains a *non sequitur*.

While ordinarily a suit on a warranty against incumbrances must be preceded by satisfaction of the incumbrance forming the basis of such proceeding, such payment may not be deemed a prerequisite here. The instant suit is not for a breach of warranty, either express or implied.

"Plaintiff's action is founded in deceit. The question is not whether a financial loss has arisen out of the transaction by reason of a difference in the value of the things exchanged, but whether plaintiff received all that defendants' representations led him to believe he would receive. 12 R. C. L. 452, sec. 198; *Chapman v. Bible*, 171 Mich. 663; *Woolman v. Wirtsbaugh*, 22 Neb. 490." *Wallace & Co. v. First Nat. Bank*, 102 Neb. 358.

The fact "that defendant, in order to induce a purchase made express warranties, does not compel the purchaser to sue on his contract of warranty instead of bringing action for damages for the fraud." 10 Standard Ency. of Procedure, 38. See, also, Comp. St. 1929, sec. 69-473.

In this jurisdiction we have approved the view that "An action of deceit is an action separate and distinct in its nature from an action for a breach of warranty and it will lie in cases where there is a warranty as well as where there is none." *Hitchcock v. Gothenburg Water Power & Irrigation Co.*, 4 Neb. (Unof.) 620.

The law as to the necessity of prior payment of an incumbrance as prerequisite to the maintenance of an

action for the damages occasioned thereby appears to be as follows:

"To impose liability on a grantor on his covenant of warranty or against incumbrances, it is as a general rule essential, in case a moneyed incumbrance exists, that the grantee pay off the incumbrance to entitle him to recover its amount. It is held otherwise, however, where the grantor is sought to be held liable on account of his fraudulent representation that there were no incumbrances on the land. In such a case, the purchaser may recover the amount of the incumbrance, without having suffered a foreclosure, ouster, or having paid it off, because he is to be considered presently damaged in the sum which the fraud of the vendor has made it inevitable he must pay to protect his property." 27 R. C. L. 385, sec. 87.

This constitutes the rule as to personal property transactions as well as those relating to real estate.

It follows that, in view of the facts in the instant case, the payment of the incumbrance on the Whippet car was not a prerequisite for the recovery of the unpaid amount thereon from the defendant.

The judgment entered by the district court is therefore correct, and is

AFFIRMED.

LENA DUERING, APPELLEE, V. VILLAGE OF UPLAND ET AL., APPELLANTS.

FILED DECEMBER 13, 1933. No. 28828.

1. Master and Servant: AWARD OF COMPENSATION: APPEAL. Award of compensation commissioner shall be binding upon each party and an appeal to district court will not lie unless notice of intention to appeal is filed with the compensation commissioner within seven days following date of rendition of the award.
2. Jurisdiction: OBJECTIONS. Objections to jurisdiction which do not arise upon the summons, the indorsement, or service there-

of, or upon the face of the petition, may be raised for the first time by answer in connection with other defenses.

3. **Master and Servant:** AWARD OF COMPENSATION: APPEAL. The notice required to appeal from an award of the compensation commissioner to the district court must be filed within seven days of the award (Comp. St. 1929, sec. 48-157) and the petition on appeal in the district court must be filed within fourteen days (Comp. St. 1929, sec. 48-137).

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

Crossman, Munger & Barton, for appellants.

Clarence A. Davis and *Wilber S. Aten, contra.*

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

DAY, J.

This is a compensation case. The employer, against whom an award was made by the compensation commissioner, attempted to appeal to the district court. The employer brings the case to this court to review the judgment of the district court dismissing the appeal from the award for that notice of intention to appeal was not filed with the compensation commissioner within seven days after the award, as provided by subdivision g, sec. 48-157, Comp. St. 1929.

The award of the compensation commissioner was made July 5, 1932, and the notice of intention to appeal was not filed in the compensation commissioner's office until July 16, 1932. Subdivision g, sec. 48-157, Comp. St. 1929, provides: "Every order and award of the compensation commissioner shall be binding upon each party at interest unless notice of intention to appeal to the district court has been filed with the compensation commissioner within seven days following the date of rendition of the order or award." This provision of the statute is unambiguous. It is the general rule that where the language is unambiguous the clearly expressed intent must be given effect and there is no reason for construction. *State v. Marsh,*

108 Neb. 267; *White v. Sovereign Camp, W. O. W.*, 108 Neb. 203; *Gibson v. Peterson*, 118 Neb. 218; *State v. Marsh*, 119 Neb. 197. Award of compensation commissioner shall be binding upon each party and an appeal to district court will not lie unless notice of intention to appeal is filed with the compensation commissioner within seven days following date of rendition of the award.

"The notice required to be filed with the compensation commissioner within seven days after an award is intended to give information of the appeal to the opposing party, and may be waived by him, where the petition for review is filed in the district court within the time required by law." *Mucha v. Morris & Co.*, 105 Neb. 180. This would seem to support the view heretofore expressed that the notice of intention to appeal is necessary unless waived. Has the notice been waived in this case?

The appellee (employee) has not waived the filing of notice of appeal unless she did so by pleading the lack of jurisdiction of the district court in her answer which also denied liability. Thus the question of jurisdiction was raised in an answer which also pleaded a substantive defense. The petition or appeal to the district court did not allege when or how the notice of the intention to appeal was filed with the compensation commissioner. It was not required to be pleaded by the statutes. The rule has been well established by this court that objections to jurisdiction which do not arise upon the summons, the indorsement, or service thereof, or upon the face of the petition, may be raised for the first time by answer in connection with other defenses. *Hurlburt v. Palmer*, 39 Neb. 158; *Herbert v. Wortendyke*, 49 Neb. 182. "If instead of answering he files a motion attacking the petition, he thereby waives the question of jurisdiction over his person." *Williamson v. Williamson*, 120 Neb. 40. In *Davis v. O'Hara*, 266 U. S. 314, 69 L. Ed. 303, the supreme court of the United States reviewed the Nebraska decisions and reached the conclusion that "Where, as in this case, the defects do not appear on the face of

the petition, objection to jurisdiction over the person of the defendant and over the subject-matter of the action may be taken by answer setting up defenses on the merits, without or after prior objection by special appearance and motion." Citing *Hurlburt v. Palmer, supra; Kyd v. Exchange Bank of Cortland,* 56 Neb. 557; *Baker v. Union Stock Yards Nat. Bank,* 63 Neb. 801; *Templin v. Kimsey,* 74 Neb. 614. Under the authorities cited, there was no waiver in this case.

The appellant (employer) insists that subdivision g, sec. 48-157, Comp. St. 1929, is repugnant and inconsistent with section 48-137, Comp. St. 1929. For convenient comparison, we again quote subdivision g, sec. 48-157, Comp. St. 1929: "Every order and award of the compensation commissioner shall be binding upon each party at interest unless notice of intention to appeal to the district court has been filed with the compensation commissioner within seven days following the date of rendition of the order or award." Section 48-137, Comp. St. 1929, has this proviso: "Provided, however, if either party appeals from the award of the compensation commissioner notice of the appeal shall be given to the commissioner and the petition on appeal filed in the district court within fourteen days from the date of the award." The latter section was amended, as to the number of days in which notice must be given and an appeal filed, in 1929. Laws 1929, ch. 81, sec. 1. This section as amended was enacted subsequent to the enactment of subdivision g, sec. 48-157, Comp. St. 1929, in its present form.

Section 48-157, Comp. St. 1929, was passed by the legislature in 1917 (Laws 1917, ch. 85, sec. 29) and has never been changed or amended. Section 48-137, Comp. St. 1929, was originally enacted by the legislature in 1913 (Laws 1913, ch. 198, sec. 37), when it provided for an appeal to the district court and that the award of the compensation commissioner was final unless an appeal was taken which reversed and modified it. It was amended (Laws 1917, ch. 85, sec. 13) to provide for appeals

without any provision as to time. Again, it was amended (Laws 1919, ch. 91, sec. 5) in its present form except that the notice of appeal and the petition should be filed within seven days. It was again amended (Laws 1929, ch. 81, sec. 1) which changed the time from seven days to fourteen days.

Appeals from the compensation commissioner to the district court and the procedure are provided by sections 48-137, 48-139, and 48-157, Comp. St. 1929, and these sections must be construed together. Section 48-157, Comp. St. 1929, provides for procedure before the compensation commissioner and provides that an award shall be binding unless notice of intention to appeal be filed within seven days. Section 48-137, Comp. St. 1929, provides where the appeal shall be taken and when and how: (1) That notice shall be given to the compensation commissioner; and (2) that the petition on appeal shall be filed in the district court within fourteen days of the date of award. The provision in section 48-157, Comp. St. 1929, is a specific provision relating to requirement that notice be filed with the compensation commissioner. Following the familiar rule that statutes should be so construed that every part shall stand and reconcile the provisions if possible so as to make them consistent and harmonious (*State v. Coupe,* 91 Neb. 463; *West Nebraska Land Co. v. Eslick,* 102 Neb. 761; *Rohde v. Wayne Circuit Judge,* 168 Mich. 683) it is held that the provision of section 48-157, Comp. St. 1929, is not in conflict with section 48-137, Comp. St. 1929. The notice required to appeal from an award of the compensation commissioner to the district court must be filed within seven days of the award (Comp. St. 1929, sec. 48-157) and the petition on appeal in the district court must be filed within fourteen days (Comp. St. 1929, sec. 48-137).

The trial court was not in error in dismissing the appeal from the award of the compensation commissioner for that notice of intention to appeal was not filed within seven days.

AFFIRMED.

FLOYD SWANSON, APPELLANT, V. VILLAGE OF SHICKLEY ET AL., APPELLEES.

FILED DECEMBER 13, 1933. No. 28888.

Appeal: NOTICE. Where statute requires notice of intention to appeal to be filed within certain time, posting within time insufficient.

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

Sloans, Keenan & Corbitt, for appellant.

Crossman, Munger & Barton, contra.

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

DAY, J.

This is a compensation case which was argued at the same session as *Duering v. Village of Upland, ante,* p. 659. The notice in that case was not given within seven days from the order of the compensation commissioner. The defendant (employer) filed a special appearance challenging the jurisdiction of the court, because the notice of intention to appeal had not been filed with the compensation commissioner within seven days as provided by subdivision g, sec. 48-157, Comp. St. 1929. The intention of the legislature as gleaned from the entire compensation act is that cases arising under it may be speedily determined. To accomplish this purpose, the legislature has the power to limit the time within which an appeal may be taken. 3 C. J. 1040. Since the power resides in the legislature, the language used is unequivocal and unambiguous: "Every order and award * * * shall be binding * * * unless notice of intention to appeal * * * has been filed with the compensation commissioner within seven days."

Much is said in the brief about the required notice being posted within the seven days. Posting is not filing within the meaning of the statute. *State v. Marsh,* 120

Neb. 287; *State v. Marsh,* 120 Neb. 296; *Larson v. Wegner,* 120 Neb. 449.

Other questions raised here are identical with those disposed of in *Duering v. Village of Upland, supra,* and, in conformity to that opinion, it follows that the trial court was right in sustaining the special appearance.

AFFIRMED.

JOSEPH W. MONTEITH, APPELLANT AND CROSS-APPELLEE, V. ALPHA HIGH SCHOOL DISTRICT OF CHASE COUNTY ET AL., APPELLEES AND CROSS-APPELLANTS.

FILED DECEMBER 13, 1933. No. 28698.

1. **Taxation:** RURAL HIGH SCHOOLS. A rural high school district annual tax levy based upon an estimate adopted by school electors at a meeting held on the second Monday instead of the first Monday of June as required by section 79-805, Comp. St. 1929, is absolutely void. *Howard v. Jensen,* 117 Neb. 102, followed.
2. ———: SUIT TO RECOVER TAXES: PARTIES. A suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated, to recover back taxes alleged to have been illegally assessed, on the ground that the taxes were involuntarily paid by each. In such case, each must bring the action on his own behalf.
3. ———: ———. In the absence of statute, taxes voluntarily paid cannot be recovered back. When a tax imposed is illegal and unauthorized for any purpose, an original action may be brought to recover the tax only by virtue of statutory or constitutional authority.
4. **Limitation of Actions:** TAXES. As between a taxpayer and a school district or county, from which a recovery is sought, the statute of limitations begins to run from the time of the payment of the tax, and it is not postponed until the illegality of the tax has been judicially decided.
5. **Taxation:** SUIT TO RECOVER TAXES. One who seeks to avail himself of the statutory right to recover from a county or school district a tax voluntarily paid must show a substantial compliance with the statute.

APPEAL from the district court for Chase county: CHARLES E. ELDRED, JUDGE. *Affirmed in part, and reversed in part, and action dismissed.*

Scott & Scott, for appellant.

Hastings & Hastings, contra.

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

CARTER, District Judge.

In this case, the plaintiff commenced an action in the district court for Chase county for himself and on behalf of all other taxpayers similarly situated against the Alpha High School District of Chase county, together with the chairman, clerk and treasurer of said district and the county treasurer of Chase county, alleging that on June 14, 1926, the voters of said district attempted to vote a two mill levy for a "building fund;" that said purported levy was certified to the county clerk with a request that the levy be made; that said levy was subsequently made and that the sum of $15.10 was assessed against plaintiff's property in the year 1926, and which he paid in 1927, and for which he prays judgment in his first cause of action; that the sum of $15.15 was assessed against plaintiff's property in the year 1927, and which he paid in 1928, and for which he prays for judgment on his second cause of action; that the sum of $15.20 was assessed against plaintiff's land in the year 1928, and which he paid in 1929, and for which he prays judgment on his third cause of action. Plaintiff further alleges that there are more than 200 persons owning lands in the Alpha High School District and more than 200 tracts on which the void taxes were levied in each of the years 1926, 1927, and 1928; that on June 24, 1932, plaintiff made demands for the return of his taxes from the treasurer of the Alpha High School District and the county treasurer of Chase county, which were refused. Plaintiff alleges that $1,000 of the moneys collected as a "building fund" have been paid to

the treasurer of the school district by the county treasurer and that there is on hand in the county treasurer's office $3,590.30 of said funds. All of the above facts were stipulated as true by the parties to the suit. It appears, also, that no levy for 1929 and the years following was made, for the reason that the levy was successfully enjoined as being void. The prayer of the petition on each cause of action was the same, except for the change of date and amount of tax sought to be recovered, and as to the first cause was as follows:

"Plaintiff therefore prays that an accounting be had and taken of the matters complained of in plaintiff's first cause of action; that the amount of building fund taxes so paid by plaintiff on account of the pretended levy of 1926 be determined; that the amount of building fund taxes so paid by each and every taxpayer of said Alpha High School District on account of the pretended levy of 1926 be determined; that the amount of commission allowed by law to the county treasurer of Chase county, Nebraska, for collecting said taxes be determined; that the amount of said building fund taxes levied, assessed and collected on the alleged levy of 1926 that has lawfully been expended, and the amount thereof that lawfully remains in the hands of the county treasurer of Chase county, Nebraska, accredited to said Alpha High School District, and the amount now lawfully in the hands of the treasurer of said district be determined; that the said county treasurer and the said school district treasurer be required to account for all such funds by them collected, less commissions allowed by law, and less sums lawfully expended by them, and that it be adjudged and decreed that the balance of said alleged building fund be repaid and refunded to the persons and taxpayers who paid in the same in proportion, as the amount so paid in bears to the amount now remaining in the hands of said county and district treasurer, and for such other and further relief as equity may require."

The trial court sustained demurrers to the first two

causes of action on the theory that they were barred by the statute of limitations, and entered a judgment for plaintiff on the third cause in the sum of $15.20 with interest at 7 per cent. per annum, each party to pay his own costs. Plaintiff having elected to stand on his petition as to the first two causes of action, each was dismissed by the trial court. All parties filed motions for a new trial, from the overruling of which each gave notice of appeal.

It is admitted that the Alpha High School District was organized under the provisions of article 8, ch. 79, Comp. St. 1929, which provides that the annual school meeting of such rural high school district shall be held on the first Monday of June of each year. In the year the levy was made, the annual meeting was held on the second Monday in June. That the levy made on the second Monday of June was void, there can be no question. *Howard v. Jensen,* 117 Neb. 102.

The question first raised is whether a taxpayer may maintain a suit to recover back void taxes for himself and others similarly situated. Granting, for the sake of argument only, that a taxpayer could maintain the suit in his own behalf, yet we are of the opinion that it could not be maintained for the benefit of others. "A suit to recover back is quite different in the grounds upon which a recovery can be had, from a suit to enjoin a tax. In the latter case, each is not only interested in the question involved, but a judgment may be rendered in favor of all as a class, upon substantially the same case, and terminate the litigation. Not so in an action to recover back money paid under duress. In such case the judgment must not only be for each according to the amount due him, but must depend upon whether each as an individual paid voluntarily or involuntarily." *Trustees v. Thoman,* 51 Ohio St. 285.

It is further contended by the plaintiff that he can maintain the suit for others similarly situated to avoid a multiplicity of suits. We do not think that this rule has

any application to the case at bar. "The rights of the plaintiffs, as against the defendants, are purely legal, and wholly separate and distinct. * * * Each plaintiff is demanding a separate judgment against the defendants for the amount of his individual claim, the granting or refusal of which does not depend upon the rights of his coplaintiffs, any further than it grows out of the same transaction, and perhaps involves the same questions of law and similar facts." *Van Auken v. Dammeier*, 27 Or. 150. In the case last above cited, the court in its opinion says further: "Where the rights of the several plaintiffs are purely legal, and in themselves perfectly distinct, so that each party's case depends upon its own peculiar circumstances, and the relief demanded is a separate money judgment in favor of each plaintiff and against the defendant, there is no 'practical necessity' for the interposition of a court of equity, and we can find no authority for holding that it will assume jurisdiction simply because the parties are numerous." We believe this statement of the law to be sound and therefore conclude that the trial court was right in adjudging that none of the causes of action of the petition states facts sufficient to justify any recovery by the plaintiff on behalf of other taxpayers similarly situated.

There is no evidence in the record to the effect that any of the taxes were paid involuntarily. They were paid by the persons assessed more than three years prior to the date that demands were made for their return. The law is settled in this state that where a person assessed, voluntarily and without compulsion, pays taxes, they cannot be recovered back in an action at law unless there is some constitutional or statutory provision expressly or impliedly giving the taxpayer such right. The only statute applicable to this case is section 77-1923, Comp. St. 1929, but it provides as a condition precedent to the maintaining of the action that a demand in writing must be made within 30 days after the payment of the taxes. Demand in this case was not made for more than three

years after the taxes were voluntarily paid. This clearly was not a substantial compliance with the statute. The statute of limitations commences to run upon the payment of the taxes. The fact that the assessment was void and was not discovered for three years cannot change the rule. In the case of *Welton v. Merrick County*, 16 Neb. 83, Judge Maxwell speaking for the court says: "Even if a cause of action had existed in favor of the plaintiff upon the payment of the taxes in controversy, it was barred by the statute of limitations. If a party with ordinary care and attention could have detected even fraud, he will be charged with actual knowledge of it; that is, the mere fact that a party is not aware of the existence of certain matters, where there is no concealment, will not prevent the running of the statute of limitations." We are obliged to hold, therefore, that when plaintiff failed to demand repayment within 30 days from the date of payment of the taxes claimed to be void, in accordance with section 77-1923, Comp. St. 1929, he was forever barred.

The appellant relies on the case of *Haarmann Vinegar & Pickle Co. v. Douglas County*, 122 Neb. 643, to sustain his case. It was held in that case: "If a tax has been levied that is absolutely void and has been paid, though voluntarily, the amount thereof may be recovered in an action for that purpose." The writer of that opinion cites the case of *Wilson v. Butler County*, 26 Neb. 676, to support that proposition. That case holds that the purchaser of a tax sale certificate will be permitted to recover where the taxes were held to be void because the lands were not subject to taxation. This is not the rule to be applied where the person assessed pays a void tax voluntarily and fails to follow the statute that makes provision for its recovery. In examining the case of *Wilson v. Butler County*, above cited, we find the following statement of the law in the opinion, which in our judgment is the correct rule: "The case is entirely different from that of a taxpayer who voluntarily pays a questionable tax without objection. In such case there

can be no recovery because the party waives the objection by deliberately paying the amount claimed. He may have an object in this. The questionable tax may be of general benefit to the taxpayers of the county by reason of some great work of a public nature, the effect of constructing which would be to enhance the value of all the property within the county and add largely to its revenues. Or it may be that the tax in itself is just, although subject to attack from a legal standpoint. In either case the taxpayer who voluntarily pays the amount charged against his property thereby in effect admits its validity, and ordinarily cannot recover it back. The law for the protection of tax purchasers, however, is designed as an inducement to those who may purchase real estate upon which taxes are delinquent, by guaranteeing to them at least a repayment of the purchase price and interest, in case the title to the property and lien of the tax thereon fail from any cause." It is clear therefore that the above quoted case is not authority for the general rule quoted from the case of *Haarmann Vinegar & Pickle Co. v. Douglas County,* above cited, except in so far as it would apply to suits brought by the owners of tax certificates where the lien of the tax has failed from any cause. The rule quoted herein from *Haarmann Vinegar & Pickle Co. v. Douglas County* is not the true rule adopted by this court in so far as it conflicts with the rule that where a tax has been levied that is absolutely void, and has been paid voluntarily by the person assessed, the amount thereof may not be recovered back in the absence of a statute permitting it.

The suggestion was made that if the Alpha High School District was not entitled to the money it cannot complain of the judgment entered by the trial court. It is, however, a fundamental principle in the law of recovery that a defendant's possession of a thing cannot be disturbed by one who fails to show a better right.

We therefore hold that plaintiff's petition failed to state a cause of action on any of the causes therein set out.

The trial court was right in sustaining the demurrers to and dismissing the first and second causes of action, but was in error in not sustaining the demurrer to the third cause of action and dismissing it. The judgment entered by the trial court on the third cause of action is reversed and said third cause of action is hereby dismissed at plaintiff's costs.

AFFIRMED IN PART, AND REVERSED IN PART, AND ACTION DISMISSED.

WILLIAM PITTENGER, APPELLEE, V. SALISBURY & ALMQUIST, APPELLANT.

FILED DECEMBER 13, 1933. No. 28709.

1. **Trial**: INSTRUCTIONS. Instructions of trial court examined and found to be free from prejudicial error.
2. ———: ———. Plaintiff entered into a contract with defendant whereby plaintiff was to deliver a quantity of corn at defendant's elevator and receive therefor the market price at a date to be selected by plaintiff within a reasonable time. *Held*, when the case is tried on the theory that no date was selected and the market price not fixed, it is not prejudicial error to not instruct on what constitutes "a reasonable time," when such an instruction is not requested.
3. **Estoppel**. "When a party gives a reason for his decision and conduct touching anything involved in a controversy, he is estopped after litigation has begun from changing his ground and putting his conduct on another and different consideration." *Ballou v. Sherwood*, 32 Neb. 666, followed.
4. **Appeal**. Rulings of trial court on admissibility of evidence found to be free from prejudicial error.
5. ———. Remarks of trial court made in the presence of the jury, and alleged to constitute error, will not be considered on appeal, where no objection was made at the trial or no mention thereof made in the motion for a new trial.
6. **New Trial**: NEWLY DISCOVERED EVIDENCE. The overruling of a motion for a new trial on the ground of newly discovered evidence is not ordinarily error, where the record discloses that the new evidence is of impeaching character, and which could have been discovered by the exercise of reasonable diligence.

7. **Evidence** examined and *held* to be sufficient to support the verdict of the jury.

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

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

Ted R. Frogge, contra.

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

CARTER, District Judge.

The defendant, Salisbury & Almquist, appellant herein, during all the times herein mentioned, was engaged in the grain and elevator business at Elwood, Nebraska. On or about October 1, 1929, the plaintiff entered into an oral agreement with the defendant whereby the plaintiff delivered to the defendant 3,284.96 bushels of corn, for which he was to receive the highest market price paid in Elwood or any neighboring town on any date selected by the plaintiff within a reasonable time after the delivery of the corn. The plaintiff claims that on August 23, 1930, he notified defendant that he desired to sell on that date at the highest market price paid in Elwood, to wit, 80 cents a bushel, and demanded settlement on that basis, which was refused. The defendant admits the making of the contract substantially as set out by the plaintiff but denies that plaintiff ever notified defendant of any intention to sell, except by the filing of this action on April 29, 1932, at which time the corn was worth 21 cents a bushel. The reply of the plaintiff was a general denial. Upon these issues the jury returned a verdict for plaintiff for $2,627.97 and interest in the sum of $395.90. Defendant's motion for a new trial was overruled on October 18, 1932, and judgment entered on the verdict. On October 20, 1932, defendant's amended and supplemental motion for a new trial was overruled. From the overruling of these motions, the defendant prosecutes this appeal.

The defendant contends that the court erred in giving certain instructions to the jury and in the refusal to give others that were tendered. An examination of the instructions shows that they correctly state the law of the case according to the pleadings and the evidence.

The defendant contends that the failure of the trial court to define the term "market price" in his instructions to the jury constitutes error, even though no request therefor was made. While it is the duty of a trial court to instruct as to the issues between the parties whether requested or not, the complaint here made cannot be well taken. The court correctly submitted the issues to the jury, and if either party desired a further definition of the terms used therein, it became his duty to request them. This the defendant failed to do and therefore no error was committed.

The instructions tendered by the defendant and refused by the court were covered by those given by the court on his own motion. We find no error in the action of the trial court in refusing defendant's offered instructions.

The plaintiff alleged in his petition that, under the terms of the contract, he was to select a date of settlement "within a reasonable time," and which date he selected, as he alleges, the 23d day of August, 1930. Defendant claims that the allegation as to reasonable time was not supported by the evidence. The contract pleaded by the plaintiff was admitted by the answer of defendant. If there was a breach of this condition of the contract, it was the duty of defendant to plead it and substantiate it by evidence. The defendant did plead it as a defense but failed to produce evidence to support it. The jury found that the sale was completed on August 23, 1930, and that the market price of said corn was 80 cents a bushel. The evidence shows that the contention of the defendant at that time was not that plaintiff had failed to select his sale date "within a reasonable time," but that the market price was not agreed upon or a date designated, and that the sale was therefore never con-

summated. The question of whether the date of August 23, 1930, was within the "reasonable time" clause of the contract not being questioned by the defendant at any time during all the negotiations between the parties prior to the commencement of suit, and there being therefore no evidence thereon, and both parties having treated said date as being within the contract, it is not an issue of which the defendant can now avail itself. An objection to the submission of this matter as an issue for the jury on the part of the plaintiff undoubtedly would have been good under the rule set forth in *Ballou v. Sherwood,* 32 Neb. 666, as follows: "Where a party gives a reason for his decision and conduct touching anything involved in a controversy, he is estopped after litigation has begun from changing his ground and putting his conduct on another and different consideration." True, there was testimony that defendant needed the room taken by the corn and a request for plaintiff to dispose of it, but there was nothing that could be treated as an intention to rescind the contract because of unreasonableness of the time taken by plaintiff in selecting the date of sale. The evidence raised no issue on this subject that should have been submitted to the jury. If said date was not within the time specified by the contract, the defendant has waived its right to object by not raising it at the time the controversy took place.

The defendant complains of the testimony of the witness August Jorges as to the market price of corn on August 23, 1930. The witness testified that he was in the grain business on said date and that he was paying 80 cents a bushel for white corn on that day. The contract was that plaintiff was to receive the "market price" or "the highest market price" on that date, the exact language being in dispute. The plaintiff also testified that the agreement was that "he said he would give me as much as I could get in any other elevator, or in Eustis, or Smithfield, or in any other town around here." We find no error in admitting in evidence the testimony of

the witness August Jorges under the circumstances in this case. Complaint is made that he had not seen the corn. It is not necessary that he should have seen it in order to testify as to what he was paying for corn or as to the market value of corn. If the corn was inferior because of being a lesser grade or quality than as represented, it was a matter of defense. The pleadings raise no issue on that point.

Defendant also claims that the trial court erred in making certain remarks in the presence of the jury that were prejudicial to the rights of the defendant. The record fails to show that objection was made at the time or that any request was made that the jury be instructed to disregard the alleged prejudicial remarks. Neither is the objection raised in the motion for a new trial. The error, if any, has been waived by the defendant's failure to object thereto at the trial.

The defendant also complains of the trial court's action in overruling its amended and supplemental motion for a new trial on the ground of newly discovered evidence. The newly discovered evidence consisted of a discovery subsequent to the trial that one of plaintiff's witnesses, Ernest Pittenger, son of the plaintiff, had testified that the landlord's one-third share of the corn raised on his place was included in the corn delivered by his father to the defendant and that the remaining two-thirds had been sold by him directly to the defendant, Salisbury & Almquist, as white corn, when in truth and in fact the records of the defendant show that the corn sold to it by the witness Ernest Pittenger was mixed corn and not white corn and was purchased for 65 cents a bushel. It is very evident that defendant could have, by the use of ordinary diligence, discovered this fact at the time of the trial. The defendant had the books in its possession and could have checked them in a very short time to determine the truth of the matter. This court has held: "An applicant for a new trial on the ground of newly discovered evidence must show that he could not by the exercise of reasonable

diligence have discovered and produced such evidence at the trial." *Dresher v. Becker,* 88 Neb. 619. The newly discovered evidence is clearly impeaching in character and ordinarily such evidence is not sufficient to warrant the granting of a new trial. The trial court did not err in overruling the motions for a new trial.

An examination of the evidence discloses that the testimony was conflicting as to the material facts involved in the controversy. The evidence is sufficient to sustain the verdict of the jury. They having made a determination of the facts upon evidence which, if believed, would support it, it will not be disturbed. The judgment of the district court is

AFFIRMED.

FRANK B. KIMBALL ET AL., APPELLANTS, V. LINCOLN THEATRE CORPORATION ET AL., APPELLEES.

FILED DECEMBER 13, 1933. No. 28712.

1. **Landlord and Tenant:** EVICTION. The levy of a landlord's attachment on chattel property contained within the building on the leased premises and subject to a lien for rent, accompanied by a taking of possession of the leased premises by the officer for the purpose of holding the attached property only, does not, as a matter of law, constitute an eviction of the tenant.
2. ———: SURRENDER OF POSSESSION: ACCEPTANCE. A tenant's voluntary surrender of the key to the leased premises to a deputy sheriff attaching his personal property which was subject to a lien for rent cannot, of itself, be construed as a surrender of the premises, nor could the deputy sheriff's acceptance of the key be, of itself, construed as an acceptance of a surrender by the landlord.
3. ———: EVICTION. Whether the acts of the landlord constitute a constructive eviction of the tenant, or whether the landlord intended said acts as an eviction, must be determined from all the facts and circumstances surrounding the particular case.
4. ———: ———. Evidence examined and *held* not to sustain the finding of the trial court that the defendants had been constructively evicted as a matter of law.

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

Chambers & Holland, for appellants.

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

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

CARTER, District Judge.

In this case, the appellants, as plaintiffs below, brought this action to recover for rents due under a lease on the property known as the Rialto Theatre in Lincoln, Nebraska, which said lease had been made with the Princess Amusement Company and subsequently assigned to the Lincoln Theatre Corporation, defendant and appellee herein. The plaintiffs alleged in their petition that they evicted the lessee on the 15th day June, 1932, the lessee being in default since March 1, 1932. The Lincoln Theatre Corporation claims in its answer that they were evicted on March 4, 1932, instead of June 15, 1932, as alleged in the petition.

The record discloses that on March 4, 1932, the plaintiffs commenced an action in the district court for Lancaster county, Nebraska, to recover the sum of $800, the amount due under the lease as rent in advance for the month of March, 1932, and subsequently on the same day caused an attachment to be issued and certain chattel property in the Rialto Theatre to be attached. The property thus attached consisted of 1,600 seats, one silver picture screen, one asbestos stage drop, 300 square yards of carpet (attached to floor), 8 electric ceiling fans, one ticket receiving box, 18 wall bracket lamps, 4 large ceiling lights and 3 dome lamps, all of which were pledged under the terms of the lease for the payment of the rent. After making the attachment the deputy sheriff demanded a receipt for the property, which was refused, but notwithstanding such refusal the property was left in the building. Two days later the deputy sheriff at the request of defendants' attorney went to said attorney's office and

received a key to the outer door of the theatre building. The record also discloses that the defendants retained keys to the inside office and to the projection room of the theatre, and, in addition thereto, there is the testimony of at least one witness that they also retained a key to the outer door of the theatre until June 23, 1932. On the trial of the cause in which the attachment was issued, it was dismissed by the court on the ground that it was prematurely brought, the plaintiffs having failed to demand the rent in writing 24 hours prior to starting suit as provided in the lease. The undisputed evidence is that the theatre was closed and not being operated at the time the attachment was levied. The defendants claim that these facts show a constructive eviction on the part of the plaintiffs and contend that they are thereby absolved from paying the rentals due under the lease after that date. After the evidence of all parties was submitted, the trial court directed the jury to return a verdict for the defendants and entered a judgment against the plaintiffs for the costs of the action. From the overruling of the motion for a new trial, the plaintiffs appeal.

The main question for this court to determine is whether the evidence, as a matter of law, shows a constructive eviction of the lessee Lincoln Theatre Corporation. This court has held that the acts relied upon to constitute a constructive eviction must amount to a disturbance of possession or prohibition of enjoyment. *Herpolsheimer v. Funke,* 1 Neb. (Unof.) 471. The established rule now is that any disturbance of the tenant's possession by the landlord or by some one under his authority, whereby the premises are rendered unfit for occupancy for the purposes for which they were demised or the tenant is deprived of the beneficial enjoyment of the premises, amounts to a constructive eviction, if the tenant abandons the premises within a reasonable time. In this case the landlord sued for a month's rent four days after it was due and caused the attachment to be levied on the chattel property hereinbefore described. The property was left in the theatre building without molesta-

tion so far as the record shows. The deputy sheriff demanded a receipt for the property, but when it was not forthcoming he did not remove the property. The theatre was not operating when the attachment was levied, so that no interference which damaged the defendants has been shown by the record. The defendants contend that they surrendered the key to the building to the sheriff two days after the levy of the attachment, in support of their allegation that they were dispossessed of the entire building. The evidence shows that the attorney for the defendants called the deputy sheriff to his office and gave him one key to the outer door of the theatre building. This evidence is admissible to show the intention of the defendants to treat the acts of the plaintiffs as an eviction. When the deputy sheriff accepted the key from defendants' attorney, he could in no way bind the plaintiffs by so doing. One of the plaintiffs, Frank B. Kimball, testifies that on June 23, 1932, Charles Shire, local manager of the Lincoln Theatre Corporation, returned certain keys to him, among which was one key to the outer door of the theatre. Even if the possession of the keys were controlling, the evidence as to who had their possession is disputed. It appears that the south door, generally termed the front door, was the only entrance to the theatre that could be locked, all other entrances being barred from the inside. The defendants contend that on the delivery of the key by them to the deputy sheriff the eviction was complete. To this we cannot agree. In the case of *Webster Co. v. Grossman,* 33 S. Dak. 383, the court in discussing the matter of the surrender of keys in a case of this character say: "The delivery of keys of leased premises to a janitor, by lessees, upon their removal from the premises, and acceptance of keys by janitor, who was not shown to have had authority to terminate leases, or otherwise to bind lessors by his acts in the premises, does not establish a surrender of possession and acceptance thereof by lessors." In the case at bar, the delivery of the keys to the deputy sheriff cannot be considered as a surrender of possession, in the

absence of evidence to the effect that the deputy sheriff was the agent of the plaintffs and authorized to terminate leases for them. In the case of *In re Bradley,* 225 Fed. 307, it was held: "The tenant's surrender of the key of the premises on demand of a sheriff attaching his personal property could not be construed as a surrender of the premises, nor could the sheriff's acceptance of the key in the presence of the landlord's agent be construed as an acceptance of a surrender." It is clear therefore that the acceptance of the front door key by the deputy sheriff in this case cannot, as a matter of law at least, be construed as a surrender and acceptance.

The question then arises whether the act of levying the attachment as hereinbefore detailed could, as a matter of law, constitute a constructive eviction. In the case of *Wolf v. Ranck,* 161 Ia. 1, it was held: "The main question in the case is whether there was an eviction of the tenant by his landlord, and, following that, whether, if there was an eviction, it was waived by the parties in their subsequent relations to each other and to the property. The levy of a landlord's attachment upon property subject to the lien for rent, even when accompanied by taking possession of the leased premises by the officer acting under the writ, for the purpose of holding the attached property in his custody, does not constitute eviction." Again, quoting from the case of *In re Bradley,* hereinbefore cited, we find the following in the opinion: "In this case, all of the personal property on the premises was levied upon, so that the premises could not have been longer used by the bankrupt for the conduct of his business, since his entire stock was in the possession of the sheriff. If the sheriff had placed a bailee in possession of the personal property, as he had the undoubted right to do, the result would have been exactly the same to the tenant. In this case, the tenant was foreclosed from continuing business, even before the levy, by the filing of the petition in bankruptcy. There is no evidence of any declaration of the landlord or her agent, from which it could be inferred that the purpose of the attachment

was other than the collection of the rent. Indeed, it seems quite clear that there was no other purpose on her part than to secure her rent in response to the invitation of the tenant to do so. Nor did the sheriff, while the agent was present, do anything inconsistent with a purpose merely to take possession of the personal property on the premises against which the levy was directed. At most, it can only be said he selected a method of retaining custody of the property levied upon that was irregular, but which evinced no intent either upon his part or that of the agent to close up the premises for any other purpose than to keep safely the goods levied upon. Nothing was done by the sheriff that is not reasonably referable to a custody of the goods levied upon, and for this reason no inference can be drawn that there was an intent by what was done to oust the tenant. His acts might constitute a trespass, but could not amount to an eviction."

In the case at bar, the chattels were left in the theatre with the defendants as bailee. There is no evidence of any declaration on the part of plaintiffs of any intent other than to enforce the collection of the rent due. Nor did the deputy sheriff do anything in levying the attachment inconsistent with the taking of possession under the directions contained in the writ. It is true that plaintiffs did, after a refusal of defendants to so do, go upon the premises to drain the heating plant boiler and radiators so that they would not be damaged by freezing. This they had a right to do under the circumstances to prevent damage to their property. Can it be said that one who is pursuing a legal right, voluntarily granted in a lease of property, to enforce the collection of rent due thereunder, against a lessee who has failed to pay, thereby places himself in such a position that he absolves the lessee from paying what he contracted to pay? We think not. Under the evidence in the record and the law herein cited, we are obliged to hold that the levy of the attachment, as a matter of law, did not of itself constitute a constructive eviction of the defendants and that the trial court erred

in sustaining the motion of the Lincoln Theatre Corporation for a directed verdict.

Objection is also made as to certain rulings of the trial court on offered testimony. There are clearly some acts of interference by the landlord with the tenant's enjoyment of the premises which do not amount to an eviction, but which may be either mere acts of trespass or eviction, according to the intention with which they are done. While a landlord must be presumed to intend the natural consequences of his conduct, all the circumstances must be taken into account in determining whether there has been an actual expulsion of the tenant with the intent and effect of depriving him of the enjoyment of the demised premises or a substantial part thereof. The intention of the landlord to evict or deprive the tenant of the enjoyment of the premises may be presumed from the character of the act, if the necessary result of it is to deprive the tenant of the beneficial enjoyment of the premises. And where the landlord actively interferes with the tenant's beneficial enjoyment of the demised premises, it is not for him to determine whether his act was intended as an eviction, but the effect of his act shall govern. Thus it would seem that all the facts and circumstances should be admitted in evidence that would have a bearing upon the intent of the parties. In this case the plaintiffs offered evidence to show that the theatre had been closed for a period of time prior to the levy of the attachment. The plaintiffs should have been permitted to show this.

Plaintiffs complain of the action of the trial court in directing a verdict in favor of the Paramount Publix Corporation. The evidence shows that officers of the Lincoln Theatre Corporation used letter-heads of the Paramount Publix Corporation in replying to letters addressed to them. The evidence also discloses that the Lincoln Theatre Corporation by one of its officers answered a telegram addressed to the Paramount Publix Corporation in New York. This evidence is insufficient to hold the Paramount Publix Corporation as an undisclosed principal.

The trial court was right in directing a verdict in its favor.

The judgment of the trial court directing a verdict in favor of the Lincoln Theatre Corporation is hereby reversed and the cause is remanded.

REVERSED.

JAMES F. MCLAUGHLIN, APPELLANT, V. F. W. WOOLWORTH COMPANY, APPELLEE.

FILED DECEMBER 13, 1933. No. 28685.

1. **Libel.** A letter written by a party to one from whom a tradesman has been purchasing articles, which states that the tradesman from whom the writer has been purchasing such articles does not have as large and complete an assortment as it should be to select from owing to the fact that such tradesman is not financially able to put in this assortment, or, in other words, he is not able to keep the writer's stores supplied with the newer views that are in demand, is not defamatory of the tradesman or his business and is not actionable *per se*.
2. ———. The letter written by appellee, and set out in the opinion, is not libelous *per se*.

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

J. J. Friedman and *Harry B. Fleharty*, for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

RAPER, District Judge.

Action for libel brought by appellant (plaintiff below) in the first cause of action in his amended petition alleges that for more than 20 years he has been engaged in business as a news dealer, publisher and distributer of picture post cards of Omaha and vicinity, and has built up a remunerative patronage in the sale and distribution

of picture post card views to various stores, and in the course of such business established favorable trade relations with the firm of Curt-Teich Company, of Chicago, during a period of 25 years, said firm being in the business of printing and lithographing, and said firm was plaintiff's sole source of supply for said post card views; that Curt-Teich Company allowed considerable credit and continued during all said time to supply plaintiff's needs and such as his customers required. Plaintiff further alleges that on or about October 14, 1930, the defendant F. W. Woolworth Company, acting through its managing agent at Minneapolis, Minnesota, wrote to the Curt-Teich Company a letter, as follows:

"The superintendent of the Omaha stores, also manager of Store No. 29, Omaha, Nebraska, advises that they have been buying their view cards from a local concern, and that the assortment is not as large and complete as it should be, owing to the fact that the man from whom they are buying them is not financially able to put in this assortment. In other words, he is not able to keep the stores supplied with the newer views that are in demand. The Omaha stores are also unable to buy folders, and we believe that it is best that our stores buy direct. We would appreciate it very much if you would send a representative to Omaha in the very near future to interview the managers of our stores No. 29 and No. 1441, so they may select views, which they feel will be in demand. In this way, they can place orders for their 1931 requirements. Yours very truly,

"F. W. Woolworth Co.,
"By A. C. Swedlund."

Plaintiff avers that by the letter the defendant company was referring to plaintiff as the "local concern" mentioned; that said Curtis-Teich Company had in its possession all of the plates made by plaintiff, said plates being views of various business houses, places and parks in Omaha and vicinity, and was supplying plaintiff with his

requirements of such post cards; that from the time said letter was received by the Curt-Teich Company, its attitude towards plaintiff changed, and it began to make insistent demands for the balance of plaintiff's account, which it had not before been demanding, and shortly thereafter said company discontinued supplying the post card views to plaintiff, and placed the business that plaintiff formerly handled with another concern, or directly with defendant, to plaintiff's great loss of profit.

In the second cause of action plaintiff alleges that the defendant knew that it would take from one to one and a half years to take new views and develop a new and complete line of such post card views, and that plaintiff would be unable to supply his local trade; that the defendant by the writing of said letter wrongfully and maliciously interfered with plaintiff's established business relations with the Curt-Teich Company, and the defendant company being a large and influential chain store with many stores all over the United States sought to and did use its purchasing power to ruin the business of plaintiff, and that the Curt-Teich Company discontinued its business with plaintiff after the receipt of said letter, and by reason of the contents of said letter the plaintiff lost a great portion of his business and trade in picture post card views, to his damage. No special damage is pleaded.

To this petition the defendant interposed a general demurrer, which the court sustained, and dismissed plaintiff's petition. Plaintiff appeals.

The petition does not allege that plaintiff had an exclusive contract for his dealings in the post card views with either the Curt-Teich Company or the defendant. Each company could buy from or sell to whomsoever it desired. Nor does he plead that he was able to supply defendant with the newer post card views and folders which defendant might desire to purchase, but this may be of not much moment. The appellant asserts that this letter is libelous *per se*, which he bases largely upon the phrase "that the man from whom they are buying them is not financially able to put in this assortment." This

is modified to some extent by the next sentence in the letter, which reads: "In other words, he is not able to keep the stores supplied with the newer views that are in demand."

It is stated in appellee's brief, but is not contained in the record, that the trial judge, in a written memorandum sustaining the demurrer, said: "I am of the opinion that the language of that part of the letter quoted in the petition is not libelous. It casts no reflection, as I view it, upon the solvency or integrity of the plaintiff, nor does it imply inability to meet his financial obligations. It merely states that the assortment carried in stock by him is not as complete as defendant would wish it to be for the purpose of making its selections, owing to the fact that the one from whom they have been making their purchases is not financially able to carry such an assortment."

We have no statutory definition of libel in this state. As applied to libel of one in his business or occupation, it is elementary in the law of libel and slander that defamatory words falsely spoken (or written) of a party which prejudice such party in his occupation or trade are actionable *per se*. *Pollard v. Lyon*, 91 U. S. 225, 23 L. Ed. 308. Newell on Slander and Libel (4th ed.) secs. 150, 152, states these rules as to what may constitute libel *per se*. The law guards most carefully the credit of all merchants and traders. Any imputation on their solvency, any suggestion that they are in pecuniary difficulties, is therefore actionable; also where any language is used of merchants and tradesmen which imputes a want of credit or responsibility or insolvency, or of common honesty. To the same effect is the text in 36 C. J. 1190, 1191.

Tested by the rules above announced, it is clear that the letter contains nothing of a defamatory, prejudicial nature against the plaintiff or his business. It cast no reflection or imputation upon plaintiff's solvency, nor suggested that he was in any pecuniary difficulties, nor that his credit was poor, nor that he had been guilty

of fraud, nor that he was unable to meet his financial obligations, nor any statement that he had a want of integrity or common honesty. There is no statement in the letter that can be construed in any way to cause the Curt-Teich Company to become doubtful of plaintiff's financial condition or business ability or honesty. Without some such defamatory statement concerning a tradesman or his business, a writing is not libelous *per se*.

Plaintiff cites several cases to support his theory, but an examination discloses that, in each case, one or more of the defamatory statements or elements announced above are contained in the alleged libel, and it will serve no purpose in reviewing these cases.

The action of the trial judge in sustaining the demurrer is right, and the judgment is

AFFIRMED.

JOHN ERNESTI ET AL., APPELLEES, V. CITY OF GRAND ISLAND ET AL., APPELLANTS.

FILED DECEMBER 22, 1933. No. 28611.

1. **Municipal Corporations**: POWERS. A city ordinance may reasonably classify persons and occupations to be governed by its rules.
2. ———: SPECIAL LEGISLATION. A city ordinance, affecting barber shops and barbers, but expressly exempting from the provision beauty shops and operators therein, though doing similar work, is arbitrary and discriminatory; the classification not resting upon any reason of public policy or upon any substantial difference of situation or circumstances, the ordinance is unconstitutional and void.

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

A. G. Abbott and *Paul C. Holmberg*, for appellants.

B. J. Cunningham, contra.

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

GOSS, C. J.

This is an appeal from a judgment enjoining the city of Grand Island from enforcing the provisions of an ordinance fixing hours when barber shops may open and close. The district court found that the hours of closing section was unreasonable and that the exemption of beauty parlors was discriminatory in that it was not uniform as to classes doing the same work.

The first section of the ordinance defined barbering as constituting the doing upon the upper part of the human body, for cosmetic purposes and not for the treatment of disease or physical or mental ailments, the following, when done for pay:

"Shaving or trimming the beard or cutting the hair; giving facial and scalp massage or treatment with oils, creams, lotions or other preparations either by hand or mechanical appliances; singeing, shampooing or dyeing the hair, or applying hair tonics; applying cosmetic preparations, antiseptics, powders, oils, clay or lotions to scalp, face, neck or upper part of the body.

"Persons engaged in operating or employed in beauty shops or hair-dressing parlors patronized by women and children shall be exempt from the provisions of this ordinance."

Succeeding sections provided for inspection and enforcement by the board of health, including the issuance of permits and collection of an annual fee from each shop and person doing barbering, prescribed in detail sanitary and sterilized tools, instruments and objects contacted with the customer, prohibited employment of any one afflicted with a communicable disease, and fixed opening hours at not earlier than 7:30 a m., with closing hours not later than 7:00 p. m., except on the days preceding the major five holidays, when the closing hour might be extended to 10:00 p. m. It provided for all day closing on Sundays and the five holidays named.

The definition of barbering in the ordinance is the same as that in the statutes. Comp. St. 1929, sec. 71-2002.

The regulations in the ordinance are devised largely from the chapter in the statutes (sections 71-2001 to 71-2027) authorized to be cited as "The Barber Act." The point of difference particularly involved is that the ordinance fixes a closing hour. This controversy springs from that point.

Appellants seek justification of the ordinance as a health measure authorized to be enacted by the city council under the police power. Indeed, the committee of the council, having the proposed ordinance under consideration, recommended "that the so-called barber closing ordinance be passed as a health measure." Appellees claim the ordinance is discriminatory as to the closing hour because its terms do not apply to, but expressly except, the so-called beauty parlors from its operations, though they perform in many respects the same service as barber shops. This charge of unlawful discrimination is based upon the Fourteenth Amendment of the Constitution of the United States, which provides: "Nor shall any state 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." The Nebraska Constitution reiterated the due process clause of the federal Constitution. Const. art. 1, sec. 3.

Without quoting the testimony, we derive from it that operators in beauty shops cut hair of women and children and shave the hair from the necks of such as need or desire it; that approximately an equal number of these have such work done in barber shops and in beauty shops. The latter solicit hair-cutting business in newspaper advertisements. It is notable that the ordinance especially exempted these shops from the operation of the ordinance.

The end sought by the city council, as indicated by the evidence, was that of better inspection of barber shops while in operation under the closing hours fixed; it being the theory that these hours would usually be in daylight. This evidently does not take cognizance of the fact that some apparently very clean and sanitary shops are con-

ducted in basements and elsewhere where artificial light is always needed. This is true also of beauty shops. The city claims to find it inconvenient to inspect barber shops after 7:00 p. m., and assumes that danger to health would lurk in barber shops in the hour or two later they might operate, if not so limited by ordinance. We do not think the evidence or the situation justifies the fear, if proper daytime inspection is given by officials. If germs develop overnight, by reason of origin later than 7 o'clock in the evening, they may be more readily detected the next day. The state, with about the same regulations to prevent the communication of disease from barbers and barber shops to customers, contents itself with only a few examinations of shops each year. Delay, overnight, on the part of the city to perform this function is not likely to be disastrous.

The acts performed on customers of barber shops and on customers of beauty shops seem very similar in their nature. In their relation to health and disease about the only real difference is that arising from the difference in the sexes treated.

Within the jurisdiction of each there is no constitutional difference between a discriminatory statute and a discriminatory ordinance. Under the Constitution, persons in the same class, or who should be considered as included within the relations and circumstances provided for, must be governed by the same rules; otherwise the legislation is unconstitutional.

A law requiring railroads, canals and certain other corporations to maintain crossings and bridges where they cross highways, but exempting irrigation companies from the rule, is void. *State v. Farmers & Merchants Irrigation Co.*, 59 Neb. 1. In the course of that opinion Sullivan, J., said:

"It has been said, frequently, in the opinions of this court, that where a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, it is not objectionable as wanting uniformity of operation, or as being in the nature of special

legislation. See *State v. Graham*, 16 Neb. 74; *State v. Berka*, 20 Neb. 375; *County of Lancaster v. Trimble*, 33 Neb. 121; *State v. Robinson*, 35 Neb. 401; *Van Horn v. State*, 46 Neb. 62. 'To this general statement,' it is said in *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200, 205, 'it is perhaps necessary to add a qualification. The legislature may not arbitrarily and without any possible reason create a class to be affected by legislation where the result would be an infringement upon the constitutional prohibition.'

"The rule established by the authorities is that while it is competent for the legislature to classify, 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. See Cooley, Constitutional Limitations (5th ed.) 481."

Without covering the vast field opened up by the arguments and briefs of the parties, it is sufficient to say that the classification by the ordinance of barbers as within the rules and the express exemption therefrom of beauty shop operators is discriminatory in that it is not uniform as to classes doing similar work, is arbitrary under the evidence, and is unconstitutional. No reason of public policy and no substantial difference of circumstances authorize the exemption. The judgment of the district court is right. It is

AFFIRMED.

HAROLD O. WOODS, COUNTY TREASURER, APPELLANT, V. BROWN COUNTY, APPELLEE.*

FILED DECEMBER 22, 1933. No. 28575.

1. **Counties and County Officers: COUNTY TREASURER.** A county treasurer is without authority to loan public funds to indi-

*Rehearing of case reported, *ante*, p. 256.

viduals, or use such funds to purchase valid claims against the county and, in his official capacity, take assignments of such claims.

2. ———: ———. A county treasurer, having loaned or invested public funds without authority, may, in his official capacity, maintain any proper action for the recovery of such funds.
3. ———: CLAIMS: ASSIGNMENT. Claims for earned official salaries against a county may be assigned, and each assignment is binding on the county when the county board is advised of such assignment.
4. Parties. An assignee of a thing in action may maintain an action thereon in his own name.
5. Pleading. It is the duty of the trial court to render judgment in favor of party where, from the pleadings, such party is entitled to judgment.
6. ———. In an action against a county by an assignee of salary claims against such county, where the county admits that the salaries have been earned, are fixed by law and have not been paid, and pleads no defense to such claims, the trial court should enter judgment in favor of plaintiff, assignee, for the amount of such claims.

APPEAL from the district court for Brown county: ROBERT R. DICKSON, JUDGE. *Former judgment of affirmance vacated, and judgment of district court reversed, with directions.*

William M. Ely, for appellant.

Ben H. Burritt, contra.

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

GOOD, J.

This cause is before us on rehearing. The former opinion is reported, *ante,* p. 256, reference to which is made for a complete statement of the facts.

This appeal involves 216 salary claims against Brown county. It appears that when these claims were filed the general fund from which they were payable was either greatly depleted or entirely exhausted. By an arrangement between the claimants, the county board, and the county treasurer, the latter was directed by the county

board to use other funds, in his control and possession as county treasurer, to purchase the claims and take assignments thereof to himself in his official capacity. This course was pursued until the amount of the claims thus acquired aggregated $22,016.76, after which the practice was discontinued. Subsequently the county board rejected and disallowed all of the claims, and the county treasurer appealed to the district court. There he set up the facts fully in his petition. The county answered, admitting all the allegations of plaintiff's petition; admitted that the services for which the claims were filed had been rendered; that the salaries had been fixed by law; that the claims were just and unpaid; and failed to plead any defense to the claims. A jury was waived and the cause submitted to the court upon the pleadings and a stipulation of facts. The district court entered a judgment, finding that all of the claims were fully paid and discharged, and that the plaintiff had no valid claim against the county, or against the assignors of the several claims. From that judgment the county treasurer has appealed.

Defendant has not filed a brief and has not presented oral argument in this court. At every step, except in the one act of the county board rejecting and disallowing the claims, the county has admitted, and now concedes, that the claims are just and have not been paid from any proper funds of the county.

It must be conceded that the treasurer had no authority to use the trust funds, in his possession as treasurer, to purchase the claims in question; nor did the county board have authority to direct him so to do. It is also true that, with the trust funds in his possession, the county treasurer purchased and took an assignment of these claims. He is the proper custodian of the funds that were used. He is, in his official capacity, the holder of the claims thus assigned to him as security for public funds. He is entitled to enforce their payment, if they are valid and just, to reimburse the funds so wrongfully used. By his acts, the plaintiff, in effect, made a loan of public funds.

Section 77-2601, Comp. St. 1929, is applicable to the situation here and authorizes suit by the treasurer. That section in part provides: "In all cases in which public moneys, or other funds belonging to the state or to any county, school district, city or municipality thereof, have been deposited or loaned to any person or persons, * * * it shall be lawful for the officer or officers making such deposit or loan, or his or their successors in office, to maintain an action or actions for the recovery of such moneys deposited or loaned, and all contracts for the security or payment of any such moneys or public funds made shall be held to be good and lawful contracts binding on all parties thereto."

From the record, it is unquestioned that the plaintiff and all the county officers acted in the utmost good faith, without any thought of wrong-doing. The plaintiff has not trafficked in the claims against the county, seeking a profit to himself. By his purchase of the claims against the county with trust funds, the claims were not thereby extinguished. They remain just claims, and plaintiff, as assignee, is entitled to enforce their payment to the same extent as would the assignors.

A claim for earned official salary against the county may be assigned, and such assignment is binding on the county when the county board is advised of such assignment. 15 C. J. 663. Section 20-302, Comp. St. 1929, empowers an assignee of a thing in action to maintain an action thereon in his own name.

It is a rule of universal application that it is the duty of the court to render judgment in favor of a party, where, from the pleadings, such party is entitled thereto. *Arendt v. North American Life Ins. Co.*, 107 Neb. 716; *Meyer Bros. Drug Co. v. Hirsching-Morse Co.*, 94 Neb. 309; *Kime v. Jesse*, 52 Neb. 606; *Scofield v. Clark*, 48 Neb. 711.

While the trial court held that the claims were paid and discharged, such ruling finds no support in the record. Payment is a defense that must be pleaded. The county

failed to plead payment, or any other defense. The judgment of the district court is not supported by the pleadings and is contrary to the law and the facts.

In reversing a judgment in a law action, ordinarily the cause is remanded to the court generally for further proceedings, but, since the pleadings disclose beyond any cavil that the claims are just and unpaid, plaintiff, in his official capacity, is entitled to judgment. There is no occasion for a new trial in the district court.

The former opinion in this case is vacated. The judgment of the district court is reversed, and the cause remanded, with directions to enter judgment for plaintiff in the sum of $22,016.76.

REVERSED.

MATTHEW THIMGAN, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

FILED DECEMBER 22, 1933. No. 29002.

1. **Patents:** INFRINGEMENT. The manufacture, sale or use of an invention, protected by letters patent, within the area and time described therein, by a person not duly authorized so to do, constitutes an infringement.
2. ———: ACTION. An action for infringement of a patent, granted by the United States, is one arising under the patent laws.
3. **Courts.** State courts have no jurisdiction of cases arising under the patent laws of the United States.

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

Sterling F. Mutz and *Edward C. Fisher,* for appellant.

Paul F. Good, Attorney General, Paul P. Chaney and *Allen & Requartte, contra.*

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

GOOD, J.

Plaintiff brought this action in the district court for Lancaster county against the state of Nebraska, to recover $50,000 alleged value of his private property taken and appropriated for a public use by defendant. The trial court entered judgment of dismissal, and plaintiff has appealed.

In his petition plaintiff alleged that he is the owner and sole proprietor of a certain patent, issued to him by the United States government October 25, 1927, which granted to him the sole and exclusive right to make, use and sell one certain ornamental design for a road marker; that thereafter the defendant appropriated the plaintiff's said property to its own use, using the patented design upon thousands of road markers along every state road and highway in the state of Nebraska, and that defendant at all times failed and refused to pay plaintiff any compensation for his property, and has failed and refused to discontinue the unlawful use thereof; that plaintiff at all times protested against the taking of his property, and repeatedly demanded its return, or just compensation therefor; that in the 1929 session of the legislature two bills were introduced for the relief of plaintiff, one of which had for its purpose the appropriation of state funds for the payment to plaintiff of royalties which he had demanded for the use of the patented design, and the other of which had for its purpose the granting to plaintiff of the right and authority to sue the defendant state in the proper court for infringement of his patent, or to restrain said state and its department from using the same; but that the legislature refused to pass either of said bills; that, because of such refusal, plaintiff has been deprived of his property without due process of law, and he bases his right to recover upon section 3, art. I of the Constitution, which provides: "No person shall be deprived of life, liberty, or property, without due process of law," and on section 21, art. I of the Constitution, which provides: "The property of

no person shall be taken or damaged for public use without just compensation therefor." Plaintiff alleged that his property, so appropriated by the state, was of the reasonable value of $50,000, and prayed for judgment in that amount.

Defendant answered, admitting its corporate and sovereign capacity, and for defenses alleged that the court was without jurisdiction to adjudicate defendant's liability to plaintiff, because no claim had been filed with the auditor of public accounts; that the court was without jurisdiction because the petition stated a cause of action for patent infringement, which is within the exclusive jurisdiction of the federal courts; and that the court was without jurisdiction because defendant had not precedently given consent to be sued; and further alleged that the design for the road marker was not an original invention by the plaintiff; that the design for the road marker, for which plaintiff claims a patent, was in general, common and rightful use long prior to the time the patent was issued to plaintiff, and that the patent was void because procured by fraud. Defendant also pleaded specifically the statute of limitations.

Plaintiff frankly admits that, if his action shall be deemed an action for the infringement of a patent right, then jurisdiction is vested solely in the federal court, and the state court is without power to hear and determine it; but contends that the action is not one for patent infringement, but is based upon the constitutional provision, and insists that the gravamen of his action is conversion without furnishing compensation for the property taken, or a remedy for its adjudication, and that plaintiff's cause of action arose because of the refusal of the legislature to grant him the right to sue the state for infringement of his patent right.

We are unable to adopt the view contended for by plaintiff. In his petition he alleged that a bill was introduced in the legislature to authorize plaintiff to sue for infringement of patent right, and, had the legislature so con-

sented, plaintiff might have then sued in the federal court for infringement, but that, since the legislature had not seen fit to waive the immunity of the state and permit suit to be brought for infringement of patent, therefore the action is not for patent infringement but for conversion of property for a public use. In other words, if the state had granted permission to bring suit, the action would have been for patent infringement, but, because of the refusal of the state to grant permission to sue the state, the action is not one for patent infringement. This reasoning does not appeal to us as being sound.

The term infringement in patent law means the act of trespassing upon the incorporeal right secured by patent. Any person who, without legal permission, shall make, use or sell the thing, which is the subject-matter of any existing patent, is guilty of infringement, for which damages may be recovered at law by an action on the case, or which may be remedied by a bill in equity for an injunction and an account. The manufacture, sale or use of an invention protected by letters patent, within the area and time described therein, by a person not duly authorized so to do, constitutes an infringement. Bouvier's Law Dictionary, and cases therein cited.

"The owner of a valid patent secures, by virtue thereof, three substantive rights: The right to make, the right to sell, and the right to use the patented article. He who invades any one of these rights is an infringer." *Tuttle v. Matthews,* 28 Fed. 98; *Birdsell v. Shaliol,* 112 U. S. 485, 28 L. Ed. 768.

Plaintiff in his petition alleges that he is the patentee and proprietor of the patent; that the state is making and using his invention. Clearly, his petition states a cause of action for infringement of a patent right.

Plaintiff has cited and relies upon a number of cases where state courts are held to have jurisdiction to determine questions arising under the patent law, such as an action for royalties or on a contract to convey or assign a patent. State courts may have jurisdiction of

cases where questions of patents are involved, but not of a case arising under the patent laws. The distinction is clearly stated in *Pratt v. Paris Gas Light & Coke Co.*, 168 U. S. 255, 42 L. Ed. 458. In that case it was said (p. 259): "Section 711 does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of *'cases'* arising under those laws. There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction."

In *Hartell v. Tilghman*, 99 U. S. 547, 25 L. Ed. 357, it was held: "A suit between citizens of the same state cannot be sustained in the circuit court as arising under the patent laws of the United States, where the defendant admits the validity and his use of the plaintiff's letters-patent, and a subsisting contract is shown governing the rights of the parties in the use of the invention.

"Relief in such a suit is founded on the contract, and not on those laws."

Littlefield v. Perry, 88 U. S. 205, 22 L. Ed. 577, was a suit by an assignee against a patentee, who had made a conveyance to the plaintiff of his patent, with all improvements thereon, within certain states, for which plaintiff had agreed to pay a royalty upon all articles sold, with a clause of forfeiture in case of nonpayment or neglect, after due notice, to make and sell the patented articles to the extent of a reasonable demand therefor. In the opinion it was said (p. 222): "They (the plaintiffs) certainly had the exclusive right to the use of the patent for certain purposes within their territory. They thus held a right under the patent. The claim is that this right has been infringed. To determine the suit, therefore, it is necessary to inquire whether there has been an infringement, and that involves a construction of the patents. * * * Such a suit may involve the con-

struction of a contract as well as the patent, but that will not oust the court of its jurisdiction. If the patent is involved it carries with it the whole case."

In *Atherton Machine Co. v. Atwood-Morrison Co.*, 102 Fed. 949, it was held that a suit, in which the relief sought is an injunction and recovery of damages for infringement of a patent, is one arising under the patent laws of the United States, although it incidentally involves a determination of the question of ownership of the patent, which was claimed by both plaintiff and defendant under separate assignments from the patentee. The jurisdiction of the federal court was sustained.

Plaintiff's ground for recovery is that he has a patent; that, without his consent, defendant is making and using the patented article. It is a case arising under the patent laws and is within the exclusive jurisdiction of the federal courts.

State courts are without jurisdiction of the case presented. The action is therefore

DISMISSED.

MILDRED I. MERRILL, APPELLANT, V. FRANK A. PARDUN, EXECUTOR, ET AL., APPELLEES.

FILED DECEMBER 22, 1933. No. 28647.

1. Wills: CONSTRUCTION: COUNTY COURTS. A county court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will, but has no jurisdiction to construe wills to determine rights of devisees or legatees as between themselves, and where under the terms of the will an executor can assign the property without a construction of the will and does not request such construction, the court has no authority to bind the heirs or legatees by any construction.
2. ———: ———. Where a will in one clause makes an apparently absolute bequest of property, but in a subsequent clause makes a further bequest of the remainder, after the death of legatee taking under the first clause, the two clauses are to be construed together to ascertain the true character of the estate

in fact granted by the first clause, and the second clause is effective and operative to define and limit the estate granted by the first as a life estate with power of disposition, and the second is effective and operative to grant an estate in remainder in the unused, unexpended or undisposed property granted for life by the first clause.

3. ———: ———. The use of the word "request" in a disposition by will limiting an apparently absolute bequest to a widow does not imply that it is optional, discretionary, or recommendatory, particularly when the context of the will does not demonstrate an alternative choice or option in the pursuit of a recommendation or an exercise of discretion, but if it is definite as to a person and quantum of estate, if there was no clear discretion or choice, if the person benefited is a natural object of the testator's bounty, and if the person affected by the limitation is in close or fiduciary relation to the testator as a widow, the use of the word "request" imports, although in courteous and polite form, a command or direction, imperative and dispositive in legal effect.

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

Kennedy, Holland & De Lacy and *Ralph E. Svoboda,* for appellant.

Charles T. Dickinson, contra.

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

BEGLEY, District Judge.

This is an action in equity to declare and enforce a trust upon personal property passing by the will of Charles E. Brown, deceased, and to enforce an accounting with respect thereto. The plaintiff is the only child of Charles E. Brown, deceased, and the issue of his first marriage. The first wife of Charles E. Brown died in Marshalltown, Iowa, when the plaintiff was 12 years old. About 5 years later Charles E. Brown remarried. Of the second union there was no issue. The defendants are the residuary legatees and devisees and sisters and children of deceased sisters of the second wife, Margaret L.

Brown. Charles E. Brown died testate on the 10th day of August, 1921, a resident of Douglas county, Nebraska, leaving surviving him a second wife, Margaret L. Brown, then 67 years old, and the plaintiff, Mildred I. Merrill, then 58 years old. His last will and testament was admitted to probate in the county court of Douglas county, Nebraska, on September 10, 1921, and his widow, Margaret L. Brown, was appointed and qualified as executrix. The second paragraph of his will which is in dispute here is as follows:

"I give and bequeath to my wife, Maggie Brown, all the rest, residue and remainder of my property of whatever kind and wherever situated to be hers absolutely. It is my request, however, that any of said property remaining on the death of my said wife, shall go to my daughter, Mildred I. Merrill, to be hers absolutely and in case of her prior death then to her children, share and share alike."

On petition of the executrix, the estate was closed in county court on April 15, 1922, and the personal estate, amounting to $8,086.98, was turned over to Margaret L. Brown; the court finding that by the terms of said will "all of the property he (the testator) owned at the time of his death goes to his widow, Margaret L. Brown as sole devisee." Margaret L. Brown in turn died testate on the 4th day of February, 1929, leaving a last will and testament which was duly probated in Douglas county, Nebraska, by the terms of which she gave and bequeathed to her step-daughter, the appellant herein, Mildred I. Merrill, the sum of $1,000, and gave the remainder of her estate to other heirs and devisees therein named. The estate of Margaret L. Brown, at the time of her death, was of the estimated value of $19,249.65. The appellant brought this action in the lower court against the executor of the will of Margaret L. Brown, deceased, and the residuary legatees and devisees named in said will, comprising three living sisters and the children of two deceased sisters of Margaret L. Brown, deceased, alleging

that pursuant to administration of the estate of Charles E. Brown, deceased, Margaret L. Brown, took unto herself the entire estate, and that under the terms of the will she took the proceeds of said estate only as a life tenant, with power to dispose of and use the principal thereof, as far as might be necessary and reasonable for her support, comfort and enjoyment; that the widow in turn by her will disposed of the proceeds of the estate derived from her husband's estate, contrary to the provisions of the will of Charles E. Brown, deceased, excepting to the extent of bequeathing $1,000 to the plaintiff; that by reason of the wrongful and fraudulent disposition of said property by said Margaret L. Brown, in violation of her fiduciary relation toward the plaintiff and in contravention to the right of the plaintiff in the property, the several defendants hold the property in trust for the plaintiff. The prayer is for a declaration of a constructive trust by the court in plaintiff's favor, an accounting and a decree setting over to the plaintiff such of the property left by the will of Charles E. Brown, deceased, and the increase and proceeds thereof, as remained unexpended and undisposed of by said widow, Margaret L. Brown, deceased, for her support, comfort and enjoyment, at her death.

The answer of the defendants and appellees challenges the right of the plaintiff to claim as a remainderman, after a life tenancy, and alleges full title in Margaret L. Brown in the property under the terms of the will of Charles E. Brown, deceased, and that the decree of settlement of final account entered, setting off to the widow, Margaret L. Brown, all of the property in the estate, cannot be attacked in a collateral proceeding.

A demurrer was interposed by plaintiff to this part of the defendants' answer, which was overruled, and later a trial was had on agreed statement of facts, and a decree was entered dismissing the plaintiff's petition. From this decree the plaintiff has appealed.

The decree specifically finds: (1) That the court had

no jurisdiction by reason of the decree or settlement of final account in the administration proceedings in the matter of the estate of Charles E. Brown, deceased, by the county court of Douglas county, Nebraska; (2) that by the will of Charles E. Brown, deceased, Margaret L. Brown acquired and became entitled to the entire estate of Charles E. Brown, deceased, as her sole and absolute property; (3) that the plaintiff acquired no interest whatever by the will of Charles E. Brown, deceased; (4) that it was not necessary to pass upon the question of the accounting presented by the pleadings.

The first error complained of by the appellant is the finding that the court had no jurisdiction by reason of the decree and settlement of final account in the estate of Charles E. Brown, deceased. It is settled in Nebraska that a district court has jurisdiction of a suit in equity for relief, based upon a breach of a constructive trust, even though the granting of such relief involves the interpretation of a will which has been admitted to probate. *Abbott v. Wagner,* 108 Neb. 359.

The county court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will, but has no jurisdiction to construe wills to determine rights of devisees or legatees as between themselves, and where under the terms of the will an executor can assign the property without a construction of the will and does not request a construction, the court has no authority to bind the heirs or legatees by any construction. *Youngson v. Bond,* 69 Neb. 356.

In this case the executrix asked no construction of the will in her final petition; no notice of same was given, and the court made this order without notice to the parties. Therefore the district court was not bound or estopped by any such order of the county court.

The next error complained of by the appellant is the finding of the lower court that Margaret L. Brown acquired and became entitled to the entire estate of Charles E. Brown, deceased, as her sole and separate property.

This involves a construction of the second paragraph of the will. The first sentence of the paragraph, standing alone, gives the property to Margaret L. Brown absolutely, while the second clause contains a request that any property remaining at her death shall go to his daughter, Mildred I. Merrill, to be hers absolutely, and, in case of her prior death, then to her children. The general rule under the common law is that, where an estate in fee simple is given in one clause of a will, subsequent clauses attempting to cut down said estate would be void; but in Nebraska, on account of the peculiar provisions of our statute regarding the intentions of the testator, in construing a will it is held that, where a will in one clause makes an apparently absolute bequest of property, but in a subsequent clause makes a further bequest of the remainder after the death of the legatee taking under the first clause, the two clauses are to be construed and considered together to ascertain the true character of the estate in fact granted by the first clause; and in such case, contrary to the ancient rule at common law, the second clause is effective and operative to define and limit the estate granted by the first to and as a life estate with power of disposition, and the second is effective and operative to grant an estate in remainder in the unused, unexpended or undisposed property granted for life by the first. *In re Estate of Darr,* 114 Neb. 116; *Krause v. Krause,* 113 Neb. 22; *Heyer v. Heyer,* 110 Neb. 784; *Grant v. Hover,* 103 Neb. 730.

The appellee, however, contends that the word "request" in the second sentence of the foregoing clause is merely a word of recommendation which was complied with to the extent of bequeathing $1,000 to the plaintiff, Mildred I. Merrill. The question as to when a trust may be implied where precatory expressions are employed is one which has caused considerable difficulty in the courts and is the subject of an extended annotation in 49 A. L. R. 10. In the case of *In re Hochbrunn's Estate,* 138 Wash. 415, 49 A. L. R. 7, the court said: "Where a person

makes a special request of another who is independent of him, it may be altogether ignored; but if in making a bequest to him capable of being fulfilled, and, in the same instance, specially requests that a portion of it be paid to another at a time sufficiently definite, the courteous language used makes it no less imperative than if he had commanded or ordered it to be paid. There is no technical meaning of the words 'special request,' or even the simple word 'request,' inconsistent with its being a common word that any one, whether layman or lawyer, may use in his will to express his intention of imposing an obligation."

In determining what the testator meant by the word "request," we have to take into consideration the situation of the parties at the time. The testator in this case was married a second time. He had no children of the second marriage, but he had one daughter by a former marriage. He desired to provide for his wife during her lifetime, and the necessary inference would be taken that he then desired that his property go to his blood relations. His daughter being his nearest of kin, he therefore made this bequest to his wife, and then requested that so much thereof as remained at her death should be given to his daughter. The use of the word "request" in a disposition by will limiting an apparently absolute bequest to a widow does not imply that it is optional, discretionary or recommendatory, particularly when the context of the will does not demonstrate an alternative choice or option in the pursuit of a recommendation or an exercise of discretion, but if it is definite as to a person and quantum of estate, if there was no clear discretion or choice, if the person benefited is a natural object of the testator's bounty, and if the person affected by the limitation is in close or fiduciary relation to the testator as a widow, the use of the word "request" imports, although in courteous and polite form, a command or direction, imperative and dispositive in legal effect. It therefore is a bequest to his daughter, Mildred I. Merrill, of all property

remaining on the death of his said wife, to be hers absolutely. *Smullin v. Wharton,* 73 Neb. 667, 690; *In re Estate of Combs,* 117 Neb. 257; Thompson, Construction of Wills, sec. 559.

We therefore find that under the terms of the will of Charles E. Brown, deceased, Margaret L. Brown, his widow, was entitled to a life estate only in his property, with power to dispose of and use the principal so far as same might be necessary and reasonable for her support, comfort and enjoyment, and that so much of said property remaining at the death of said Margaret L. Brown should go to the appellant, Mildred I. Merrill, his daughter, to be hers absolutely, and a trust will be enforced in said remainder in favor of appellant.

The decree of the district court is therefore reversed and the case remanded to the district court, with directions for an accounting between the parties hereto.

REVERSED.

HELEN M. OLESON, APPELLANT, V. MARIE ALICE PUMPHREY ET AL., APPELLEES.

FILED DECEMBER 22, 1933. No. 28694.

Attachment: LIEN: PRIORITY. An attachment lien upon the proceeds of the sale of crops from leased premises, procured by an attaching creditor in an action against the lessee, is prior to any right or lien of the lessor arising under and by virtue of a provision of a lease which requires the lessee to give, upon demand, a chattel mortgage upon the crops to secure the rental, the lease being neither filed nor recorded and the lessor not having had possession of the crops, whether such creditor had actual notice of the agreement to give a mortgage or not.

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

A. R. Oleson, for appellant.

Zacek & Nicholson, contra.

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

CHAPPELL, District Judge.

Plaintiff, appellant herein, sought by this action to have certain money, due from the defendant Harry Pumphrey to defendant Albert Meyer, subjected to an equitable lien claimed by her. The suit resolved itself into a controversy between the plaintiff and the interveners, Carl Voght and Adolph Zicht, appellees herein, the question being whether plaintiff, by virtue of a lease with defendant Albert Meyer, had a lien on the proceeds of certain corn prior to the attachment lien of the interveners.

By its decree the trial court directed defendant Harry Pumphrey to pay the fund, held by him, into court, and found that the attachment lien of the interveners was prior to any lien of the plaintiff, and, after satisfaction of the interveners' lien, ordered any balance of the fund paid to the plaintiff. Plaintiff appeals, contending that under the evidence she was entitled to a decree directing Harry Pumphrey to pay to this appellant all the fund in controversy.

The undisputed evidence discloses that plaintiff was the owner of certain land in Cuming county, Nebraska, which she leased to defendant Albert Meyer on October 15, 1930, for a term commencing March 1, 1931, and ending March 1, 1932, which lease contained an agreement by the tenant to give, upon demand, a chattel mortgage upon the crops to secure the cash rental. The lease was never filed or recorded, and tenant was in possession of the land for the full term. On December 30, 1931, the tenant held a public auction at which some of the corn grown on the premises was sold to Harry Pumphrey. Before the corn was removed, it stayed on the farm for about a month, and Harry Pumphrey and the other defendants were notified by plaintiff that she claimed a lien, and they were told to not remove the corn from the place without arranging to pay her, but they did not agree to do this, and

Harry Pumphrey removed it. Others also claimed the fund and he did not make settlement. On March 5, 1932, in an action brought by interveners Carl Voght and Adolph Zicht against the tenant, the funds in the hands of Pumphrey were attached by garnishment proceedings. On that date at a conference between Harry Pumphrey, Albert Meyer, and his sister, L. A. Meyer, who had made a claim that she had a bill of sale for all the corn and was entitled to the proceeds thereof, it was agreed that they would all release to plaintiff any right or claim they might have to the corn or the proceeds, and the plaintiff was paid $884.40, but the sum of $100 was retained by Harry Pumphrey pending the outcome of the garnishment proceedings. This fund remaining in his hands is the amount in controversy.

The plaintiff contends that under the evidence she was a mortgagee in possession and was entitled to this fund under the lien created by her lease. The evidence shows that the tenant was in possession of the leased premises at all times until March 1, 1932, and that the corn purchased by defendant Pumphrey at the public auction on December 30, 1931, was removed from these same premises by him about a month later. It does not show that plaintiff, as mortgagee, was ever in possession of the corn.

Section 36-301, Comp. St. 1929, provides: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditor of the mortgagor * * * unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagor executing the same resides * * *; provided, that the filing of a lease containing an agreement for the execution of a chattel mortgage, or, therein constituting a chattel mortgage, on unplanted crops shall constitute notice of such an obligation and lien and protect the lessor against

chattel mortgages given to other creditors by the lessee." This court has said, in construing this section of the statute: "Creditor in this connection means judgment, execution, or attachment creditor." *Reiss v. Argubright,* 3 Neb. (Unof.) 756. See, also, *Earle v. Burch,* 21 Neb. 702; *Farmers & Merchants Bank of York v. Anthony,* 39 Neb. 343.

In many well-reasoned cases this court has said that where the possession of mortgaged chattels remains in the mortgagor and the mortgage or a copy thereof is not filed, as required by this section, the mortgage is invalid as to execution creditors of the mortgagor whether they have actual notice of the mortgage or not. The statute concerning chattel mortgages makes an important distinction between creditors and subsequent purchasers or mortgagees. Purchasers or mortgagees, to avail themselves of a default on the part of a prior mortgagee, must take without notice of his rights, but a creditor is not affected by such notice. *Farmers & Merchants Bank of York v. Anthony, supra; Spaulding v. Johnson,* 48 Neb. 830; *Forrester v. Kearney Nat. Bank,* 49 Neb. 655; *Meyer v. Miller,* 51 Neb. 620; *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.,* 68 Neb. 222; *Rothchild & Co. v. Van Alstine,* 90 Neb. 441; *Nethaway v. Clark,* 113 Neb. 206; *Wilcox & Co. v. Deines,* 119 Neb. 692; *Johnson v. Spaulding,* 1 Neb. (Unof.) 699; *Johns v. Kamarad,* 2 Neb. (Unof.) 157; *Reiss v. Argubright, supra.*

Logically, it follows that an attachment lien upon the proceeds of the sale of crops from leased premises, procured by an attaching creditor in an action against the lessee, is prior to any right or lien of the lessor arising under and by virtue of a provision of a lease which requires the lessee to give, upon demand, a chattel mortgage upon the crops to secure the rental, the lease being neither filed nor recorded and the lessor not having had possession of the crops, whether such creditor had actual notice of the agreement to give a mortgage or not.

Plaintiff contends that the tenant, Albert Meyer, having

transferred the corn to his sister, L. A. Meyer, by a bill of sale, it not being pleaded nor proved that this was in fraud of creditors, the interveners acquired no rights when they attached the funds in the hands of Pumphrey. The sister was a party to this suit, but defaulted, and is not claiming any rights to the corn or the proceeds of the sale in the hands of Pumphrey, and the plaintiff cannot assert such a claim for her. Plaintiff, by praying that she be awarded a lien upon the corn or its proceeds, placed herself in opposition to the sister, and she cannot claim anything because of a supposed right in a third person who, by defaulting, admits that she had no rights. An examination of the pleadings and a study of the evidence, which is all undisputed or agreed upon by the parties, show conclusively that this was not an issue in the trial of this case. Having been neither pleaded nor proved, no such issue of law or fact was presented for decision.

It follows that the district court, in its determination of the case, was right, and the judgment is

AFFIRMED.

AUGUST MEYER, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 22, 1933. No. 28686.

1. Trial: DIRECTION OF VERDICT. A trial court is right in overruling defendant's motion for a directed verdict at the close of the evidence, when there is competent evidence from which the truth of the material facts alleged in plaintiff's petition may be reasonably inferred.
2. Jury: DISQUALIFICATION. A juror who, during the trial of a cause and after a witness has testified to a state of facts material to the issues, boards a street car similar to the one involved in the accident concerning which the witness testified, and makes observations and experiments for the express purpose of reaching a conclusion, and who does reach a conclusion, as to the truth of such testimony, thereby disqualifies himself as such juror.

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

E. J. Shoemaker and *Kennedy, Holland & De Lacy,* for appellant.

O'Sullivan & Southard and *Robert H. McCaw, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

HORTH, District Judge.

On May 14, 1931, the plaintiff, August Meyer, purposing to become a passenger upon an approaching westbound street car of the defendant, Omaha & Council Bluffs Street Railway Company, entered the safety zone at Farnam and Fifteenth streets in the city of Omaha. As the front of the street car reached the point opposite where plaintiff was standing, they contacted and plaintiff was severely injured. Charging that the negligence of the motorman operating the street car, in suddenly opening the north front doors of said street car and causing said doors to extend northward from the body of said street car and come in contact with plaintiff's right side and shoulder, was the proximate cause of plaintiff's injuries, plaintiff sued the defendant to recover damages therefor. There was a trial in the district court resulting in a verdict and judgment for $3,000 in favor of plaintiff. Defendant's motion for a new trial was overruled, and it prosecutes this appeal, presenting only two questions to be determined by this court, the first of which is:

1. Did the trial court err in overruling defendant's motion for a directed verdict at the close of the evidence?

The plaintiff, describing the manner in which he received his injuries, testified, in substance, that as he entered the safety zone, the street car upon which he purposed to take passage was approaching about a block distant. Awaiting its arrival, plaintiff took a position facing south near the center of the safety zone, and that standing in this position there would be a clearance of about one

foot between his body and the street car as it passed him; that as the front of the car arrived at a point about opposite plaintiff, plaintiff took his eyes off the street car, turned eastward and started to take a step forward, east, when the door came out towards him like it was shot out of a gun, he ducked, and that is the last he remembered until he was loaded into an ambulance; that during the noon recess of the trial in the district court plaintiff saw his attorney, Mr. O'Sullivan, make measurements upon a street car of the type which came in contact with plaintiff when he received his injuries; that this measurement showed that when the front doors of the street car were opened they extended eleven or twelve inches beyond the body of the street car. Upon cross-examination plaintiff testified that he did not know just what part of the car struck him. On behalf of the defendant, the motorman of the street car involved in the accident testified, in substance, that as the street car approached the intersection of Farnam and Fifteenth streets the plaintiff was standing in the safety zone clear of the car and looking at it; denied that he opened the front doors of the street car until the car had come to a complete stop, and in this denial he is corroborated by the testimony of the witness Mr. Lighthall called on behalf of defendant. Mr. Finley, chief engineer of the defendant, was called by the defendant as a witness and testified that the rear half of the front door of the street car, when opened, extended five and one-half inches beyond the body of the car, and that the front half of the front door, when opened, extended a less distance. The witness Lighthall, called on behalf of the defendant, testified, in substance, that as the street car was half way in the safety zone the plaintiff was standing very close to the car with his back to the car facing the curb; that the motorman sounded his bell to attract plaintiff's attention and went on by him; that as the car passed him plaintiff turned or started to turn and went out of witness' view for a second, and when witness next saw him plaintiff was going down. The

motorman denies that he rang the bell and denies that the street car struck the defendant.

The testimony is very conflicting, but there is sufficient evidence supporting plaintiff's theory of the case to entitle him to a submission of the facts for determination by the jury.

2. Did the trial court err in overruling defendant's motion for a new trial based on misconduct of the jury?

Mr. Wright E. Moon was one of the jurors impaneled to try the cause. After the witness Lighthall had testified in the case and before the case had been submitted to the jury, the juryman, Mr. Moon, for the express purpose of satisfying himself as to whether or not the witness Lighthall could see all that he testified to seeing, boarded one of the defendant's street cars, of a type similar to the one involved in the accident in this case, and rode the same for several blocks, sitting in the same position the witness Lighthall testified he was sitting at the time of the accident; that after so doing the juror, Mr. Moon, came to the conclusion that Mr. Lighthall could not see what he testified he did see, and after the jury had retired for deliberation, Mr. Moon stated to his fellow jurors what he had done and the conclusion he had drawn concerning Mr. Lighthall's testimony. In *Kelley v. Adams County,* 113 Neb. 377, it is held:

"Where a juror, during the trial, unofficially visits the *locus in quo,* and reaches a conclusion therefrom in reference to material facts in the case, he thereby disqualifies himself as such juror."

It is the facts thus gained by the juror and the conclusion reached therefrom that disqualify him, and it is immaterial whether the place visited was the *locus in quo,* or some other place. As is said in *Kelley v. Adams County, supra:* "The test is, are the facts thus gained of such weight as to enable a reviewing court to say that they had no part in the juror reaching the verdict rendered?" It is manifest from juror Moon's affidavit that the facts gained by him upon his unofficial visit and the conclusion

he reached therefrom influenced him in reaching the verdict. The conduct of the juror was prejudicial to the rights of the defendant, and defendant's motion for a new trial should have been granted.

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

REVERSED.

FRONTIER COUNTY ET AL., APPELLANTS, V. ALBERT C. PALMER, APPELLEE.

FILED DECEMBER 22, 1933. No. 28746.

1. Infants. The mothers' pension act is not an amendment of the poor laws of the state, but is independent and complete in itself. *Rumsey v. Saline County*, 102 Neb. 302.
2. ———. The mothers' pension act and the pauper statutes were enacted with entirely different objects in view and to remedy conditions altogether dissimilar. Their respective subject-matters are entirely distinct.

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

F. J. Schroeder, for appellants.

Butler & James, contra.

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

MESSMORE, District Judge.

This is an appeal from an order of the district court for Frontier county sustaining a general demurrer to the second amended petition of appellants, plaintiffs below. Said petition sought to state a cause of action against appellee, defendant below, to recover money expended by the county of Frontier allowed to one Lelah Ward, daughter of appellee, by virtue of a mother's pension. The amount so paid was $1,675 and was paid over the period of time alleged in the petition.

Appellants contend that the court erred in sustaining the demurrer for the reason that appellee, the father of the said Lelah Ward, is liable for the support of his child and the children of that child, who because of an unavoidable casualty is unable to earn a livelihood for herself and children, and predicate their cause of action upon sections 43-407 and 68-101, Comp. St. 1929, which may be termed for the purposes of this opinion "Relief for the Poor" or "Pauper Statutes."

Appellee contends that the demurrer was properly sustained for the reason that the mothers' pension act has been declared to be a separate and distinct statutory act and so held by this court in case of *Rumsey v. Saline County,* 102 Neb. 302, in which case it was held: "Chapter 187, Laws 1915, providing pensions for mothers and guardians, is not invalid as being in conflict with section 11, art. III, or section 5, art. IX of the Constitution. It is not an amendment of the poor laws of the state, but is independent and complete in itself."

The mothers' pension act, being in and of itself an independent statutory provision and granting pensions in stipulated amounts to mothers who come within the provisions of such act, upon proper showing in a court having jurisdiction of such matters, goes to the proposition of the welfare of the children involved in such action, under 16 years of age, for the purpose of contributing to their relief, and in order that they may obtain educational advantages such as other children have, and that they may have the home environment necessary and incident to the well-being of children generally. It must be borne in mind that the money utilized in this respect is for the benefit of such children. No provision is made for the recovery of this money on behalf of any governmental body.

The mothers' pension act and the act under which the county seeks to recover herein were enacted with entirely different objects in view and were passed to remedy conditions altogether dissimilar. Their subject-matters are

entirely distinct, and for a further analysis it may be said that when a statute gives a right and creates a liability which did not exist at common law, and at the same time points out a specific method by which the right can be asserted and the liability ascertained, that method must be strictly pursued.

Appellants had every opportunity in the county court to present any opposition they may have had to the recovery by Lelah Ward under the provisions of the mothers' pension act, and there the question could have been very properly raised as to the ability of the grandfather to support the minor children of his daughter. While no formal answer is necessary in behalf of the county in such a proceeding and while the hearing is informal, yet all questions as to why the award should not be paid may be raised by the county attorney who represents the taxpayers of the county and the county board, and in the absence of such showing on the part of the county no other specific recovery can be had.

Therefore, we are of the opinion that the demurrer was properly sustained by the lower court.

AFFIRMED.

SMITH BAKING COMPANY, APPELLANT, V. ROY BEHRENS, APPELLEE.

FILED DECEMBER 22, 1933. No. 28642.

1. Injunction. Injunction should not be granted to enforce a negative agreement in a contract of employment, unless the court is satisfied that the enforcement will be just and equitable and will not work undue hardship or oppression.
2. ———. Ordinarily, a negative covenant of a contract of employment will not be enforced by injunction at the suit of one who has first materially breached the contract.
3. Contracts: MODIFICATION. Parties to a written contract of employment may by mutual consent orally modify it, and, generally, in cases where the employer reduces the wages of the employee who thereafter continues in the service at the reduced

wages, such continuance in the employment implies consent of the employee to the reduction, yet circumstances may be shown to controvert the implication of consent.

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

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

Max Kier, contra.

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

RAPER, District Judge.

The appellant Smith Baking Company, a corporation, brings this action against appellee, Roy Behrens, for the purpose of enjoining him from operating a competitive business in violation of an agreement in a contract of employment.

The petition alleges that plaintiff is engaged in the manufacture and sale of bread and baked products, and that on July 23, 1931, plaintiff and defendant Roy Behrens entered into a written contract by the terms of which the plaintiff agreed to purchase a delivery truck from defendant and the right to sell bread and baked products over a certain bread route extended through certain towns (naming them) and that defendant was to sell the merchandise of plaintiff in those towns, and that, in case he severed his connection with plaintiff, he would not for a period of five years from the date of said contract sell, offer for sale or solicit sales for baked merchandise over said aforementioned route, and that plaintiff and defendant fully performed the conditions of said contract until about April 19, 1932, when defendant without just cause severed his connection with plaintiff, and immediately thereafter commenced and has continued to sell, offer for sale and solicit sales for bread and baked merchandise of another party over the route as had been agreed upon, and that a judgment against defendant could not be collected. Plaintiff alleges that it has suffered and, unless

defendant is restrained from continuing to sell such products for another party, plaintiff will suffer irreparable damage.

The defendant in his answer denies the allegations of the petition, and alleges that said contract was without consideration, is void, and is against public policy. Defendant denies that plaintiff performed the conditions of said contract, and alleges that in January, 1932, plaintiff reduced the wages of defendant from $20 a week to $18 a week without consent of defendant, and that said breach was of the essence of the contract, and because of such breach plaintiff is not entitled to relief prayed for.

The reply alleges that on January 16, 1932, plaintiff and defendant orally agreed that said written contract should be modified so that defendant's weekly wages be $18 a week instead of $20, and that defendant operated under such modification from January 16, 1932, to April 19, 1932, and states that if the court finds, as a fact, that the written contract was not modified and that plaintiff is obligated to pay $20 instead of $18 a week, then plaintiff agrees to pay the defendant $20 a week from January 16, 1932, to April 19, 1932, and recoup such sums out of an amount that plaintiff alleges defendant had collected for plaintiff but had failed to account therefor, and plaintiff denies the other allegations of the answer.

The contract recites conditions substantially as alleged in the petition. It fixes defendant's compensation as 6½ per cent. on gross sales made by him, and in any event guarantees to him an earning of $20 a week.

The trial court found generally in favor of defendant, and that the written contract had been entered into, and that plaintiff reduced defendant's wages without defendant's consent, which constituted a material breach of the contract, and dismissed plaintiff's action.

The testimony discloses that $300 was paid defendant for the truck and his bread route, and defendant operated the bread route from the date of the contract until April 19, 1932, and defendant was paid the guaranty of $20 a

week until January 16, 1932. At this last date plaintiff claims the wage guaranty was by mutual agreement reduced to $18 a week. Defendant denies that the change was by mutual consent. Both parties agree that defendant received only $18 a week after January 16, 1932. The commissions of 6½ per cent. did not equal the guaranteed amount. The defendant's testimony, which the court's finding seems to adopt, is to the effect that plaintiff's managing officer told defendant, on or about January 16, that his guaranty would be $18 a week, that defendant protested that he could not live on that wage, but if it had to be done he (defendant) supposed he would have to. Some time later, and not long before defendant quit, the manager of plaintiff stated in such terms that defendant understood that all the employees on the bread routes would be placed on the commission basis solely. The defendant then notified plaintiff that he would no longer remain in its employ. Plaintiff insists that, because defendant remained in the employment for the three months at the reduced guaranty, he impliedly consented to the modification, if he did not expressly do so. It may be conceded that the parties had a right to modify the contract orally, and further it may be conceded that in certain cases where the employee continues to work after such modification he will be held to have assented thereto, even though express consent is not given. The situation of the parties in this case cannot fairly be construed to bind the defendant by such implied consent.

The contract does not bind the plaintiff to keep defendant in its employ for a single day, so to some extent the contract is lacking in mutuality, not sufficient to render it void, but that fact should be taken into consideration, and is important. The defendant was faced with this condition, that he had no definite terms of employment and might be discharged at any time; he was a married man, and at that time it was difficult to obtain employment; that he was obliged to accept the reduced guaranty or risk the hazard of obtaining other employment; that the

plaintiff probably would soon abrogate the guaranteed wage entirely. Under those circumstances it would indeed be harsh and unjustifiable to hold that the continuation of the three months' apparent acquiescence of the reduction will entitle the plaintiff to enjoin defendant from seeking other employment, even though such employment is in part over plaintiff's bread route. One who is dependent upon his labor to support himself and family, particularly at a period of much unemployment, may feel compelled to raise no objection to a reduction of wages, rather than suffer a discharge. The urgent necessity of retaining some wages upon which to live should be taken into account. We hold that by merely continuing in the employment for the three months under these conditions, over his protest, defendant did not consent to the reduction so as to prevent him from claiming otherwise at the later date. Plaintiff contends that the reduction of $2 a week was so small and insignificant that it does not bar plaintiff from its right to the injunction. The trial court found otherwise and we see no reason for a different holding.

The plaintiff in its reply and at the trial offered to pay defendant at the $20 a week rate. This was offered after the defendant had for good cause, as shown above, terminated his employment and had procured another position. This offer comes too late. *Rice v. D'Arville,* 162 Mass. 559. And, besides, such offer may be construed as an admission that a breach of the contract occurred on plaintiff's part.

Under the evidence, the granting of the injunction would be a grave injustice to the defendant. The district court rightly refused to enjoin the defendant, and its judgment dismissing plaintiff's action is

AFFIRMED.

ORCHARD & WILHELM COMPANY, APPELLEE, V. GRENVILLE P. NORTH, APPELLEE: UNITED STATES NATIONAL BANK OF OMAHA, GARNISHEE, APPELLANT.

FILED DECEMBER 29, 1933. No. 28702.

1. **Garnishment.** In garnishment proceedings in aid of execution (Comp. St. 1929, secs. 20-1056 to 20-1061) the answer or evidence of the garnishee only may be taken by the court.
2. **Execution: PROCEEDINGS IN AID OF.** Where discovery of property of a judgment debtor is sought through evidence from others than a garnishee, the remedy is provided in sections 20-1565 to 20-1582, Comp. St. 1929.
3. **Evidence.** Courts take judicial notice of the uses made of safe deposit boxes.
4. **Garnishment.** A leased safe deposit box, access to which is had by one key held by the lessor and by another key held by the lessee, is in the possession and under the control of the lessor when considered in a garnishment proceedings in aid of execution.
5. ———. In such a situation the court may require the safe deposit box to be opened, by force if necessary, and the execution may be levied against any property of the judgment debtor contained therein and subject to levy.

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

Morsman & Maxwell and *John R. Fike,* for appellant.

Howard Saxton and *John E. Eidam, contra.*

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

GOSS, C. J.

By this appeal United States National Bank of Omaha challenges the right of the district court to require the bank as garnishee to open a safe deposit box leased to defendant.

Plaintiff obtained judgment against Grenville P. North for $1,460.65 and costs, no part of which was paid. Two executions were issued and returned unsatisfied, the second being issued and returned on July 29, 1932. On that

date a third execution was delivered to the sheriff; also a garnishment summons, requiring the bank to appear and answer as to any property of defendant in its possession or under its control. The record shows that defendant had been examined July 14, 1932, before Judge Wright, in aid of execution, and had disclosed that he had a safe deposit box in the United States National Bank, containing insurance policies and other papers. No order was made thereon by Judge Wright and the execution had been returned unsatisfied.

In this garnishment proceeding in aid of execution, the bank as garnishee duly filed a written answer. The answer first pleaded that the bank had in its possession or control no goods, chattels, rights, properties, money or credits of defendant; then stated that on or about December 20, 1929, defendant leased from the bank a certain described box in the bank's safety vaults, a copy of the lease agreement being attached to the answer, but alleged that it is specifically provided in the lease that the bank has no possession, custody or control over, access to, or knowledge of, the contents of the box; that the bank does not have a key which will open the box and there is no way whereby it alone can open the box; and that the only method of opening the box without injury is under the arrangement whereby both the key in the possession of the lessee and the key retained by the bank are necessary.

So far as the lease is concerned its provisions bear out the statements of fact in the answer. No oral answer or other evidence was taken on this garnishment answer, the hearing on which was before Judge Thomsen; but the order made by Judge Thomsen, dated September 24, 1932, recites that "the matter was submitted on the answer of the United States National Bank, garnishee, and upon the testimony given at the hearing in aid of execution (meaning the hearing in aid of execution at which defendant North was examined before Judge Wright) and the record." The clerk of

the district court certified that the record in that office "does not show that any order was made by the court on or in connection with said hearing in aid of execution" (meaning the hearing at which defendant North was examined), except as shown by the bill of exceptions filed herein November 2, 1932. This must be understood and considered, however, in connection with the final order here appealed from, in which Judge Thomsen recited that the matter was "submitted on the answer of the * * * garnishee, and upon the testimony given (by defendant) at the hearing in aid of execution." The bill of exceptions tendered by appellant, consisting of this testimony only, was returned by appellee with no amendments and was thus duly settled by the court.

The district court found that the United States National Bank, "garnishee, has in its possession or under its control a safe deposit box" leased by defendant, ordered the bank to open the box within ten days and to disclose its contents to plaintiff and to the sheriff for levy of execution; directing the garnishee, first, to notify defendant of its desire to proceed under the order and to request of him the use of his key to open the box without injury, and second, in the event of defendant's refusal, that the garnishee shall drill or force the lock so as to make its contents available for inspection and execution. The expense of such drilling or forcing, not to exceed $2.50, was ordered paid by plaintiff, to be taxed as costs.

Section 20-1060, Comp. St. 1929, provides: "In cases where the garnishee, in answering such interrogatories, shall disclose that he has property in his possession or under his control belonging to the defendant or defendants in execution, the court shall order the same to be taken and sold by the officers upon execution, as in other cases."

The order is bottomed upon the theory that the garnishee had property of defendant in its possession under its control. Appellant therefore concludes that the district court regarded defendant as bailor and the bank as bailee

of the property contained in the safe deposit box; and devotes much of its argument to a discussion of the elements required in a bailment and to an analysis and criticism of opinions favorable to appellee in which the courts have (sometimes perhaps improperly) referred to a lessor of a safe deposit box as a bailee and to the lessee as a bailor, or to the result as a bailment.

By the terms of the lease it was beyond the power of defendant to open the box without the aid of the bank, using its key. So the bank had the physical possession of the box and the control of the means by which it could be opened. Under the admissions of the bank's answer, it is entirely proper to say that the safe deposit box of defendant was under the control of the garnishee. Knowing modern life, we may take judicial notice and assume defendant leased the box for use. "The court takes judicial notice of the uses made of safety deposit boxes." *West Cache Sugar Co. v. Hendrickson*, 11 A. L. R. 216 (56 Utah, 327). If he had any property subject to execution therein, it too was as much under the control of the law as the box itself, so far as access is concerned. The order of the court safeguarded from any levy such contents of the box as upon inspection might not be subject to execution. Indeed the law itself would protect property contained in the box but owned by others, or not subject to execution, and wrongfully converted or levied upon.

Garnishee attacks the final order of the court in which it is shown that, as a basis for the order, the court considered not only the answer of the garnishee but also the testimony of defendant North given in another proceeding before another judge. We are of the opinion that this testimony was incompetent to be considered in the garnishment proceedings and therefore ought not to be considered by us in review. Of course the garnishee was required to make up the bill of exceptions, consisting only of this testimony, because the court had based the order, in part at least, upon it. Our reasons for this conclusion

are founded upon a consideration of our statutes relating to garnishment in aid of execution, which is the provisional remedy under which this controversy arose. The procedure is found in sections 20-1056 to 20-1061, Comp. St. 1929, being the subdivision of the chapter of the Code relating to garnishment in aid of execution. Nowhere in that procedure is any power granted the court to require answers from, or to take testimony of, any one other than the garnishee. Our legislature has never seen fit to provide, in respect of garnishments, that other evidence may be taken than that of the garnishee. We cannot quote the statutes. A perusal will verify our conclusion.

It is true that the statutes do provide through another subdivision in this same chapter, but in the subdivision relating generally to proceedings in aid of execution, for an inquiry or disclosure of property owned by the garnishment debtor either by proceedings in equity, or as provided in the sections immediately following. Comp. St. 1929, secs. 20-1565 to 20-1582. Section 20-1572 expressly provides that witnesses may be required to appear and testify in the same manner as upon the trial of an issue. That the judgment debtor may be included among the witnesses referred to is shown by section 20-1573. In the instance where the judgment debtor was examined before Judge Wright this form of provisional remedy was used but no order was made. In the instant case Judge Thomsen was acting under the garnishment form of provisional remedy and erred in seeking to tack to the answer of the garnishee the testimony given in an entirely different proceeding by another witness. Quite likely the total evidence would be the same, if the bank and judgment debtor were examined in proceedings in aid of execution, as it evidently was when taken in these two entirely separate proceedings. In adopting that procedure the court would be able to direct and control the acts of the witnesses in all lawful ways until they were excused from attendance. If the safe deposit box should be ordered opened but, upon inspection, contained no leviable prop-

erty of defendant, that would end necessity for further action in that phase of that proceeding. But we have no legislative powers and cannot read into the statutes relating to garnishment that which is not there, namely, the right to take other evidence than that of the garnishee, which was done in this case.

We have perhaps unnecessarily explained our views at the foregoing length in order that we may make it clear that in garnishment proceedings in aid of execution only the answer or testimony of the garnishee may be considered, under the present wording of our statutes; if the judgment creditor desires to get the facts in part from other witnesses he must proceed in other ways in aid of his execution. So we eliminate from the bill of exceptions the testimony of the judgment debtor. It was erroneously considered but no party has been prejudiced thereby.

With the answer of the debtor eliminated, we proceed to consider whether the answer of the garnishee alone did not justify the order made by the trial court. We have already recited the contents of this answer.

One of the earliest (1900) and oft-cited cases of like nature is *Trowbridge v. Spinning*, 23 Wash. 48, 54 L. R. A. 204. This was a garnishment after judgment. The statute required the garnishee to answer as to personal property of defendant in possession of garnishee or under his control; and authorized a judgment requiring the garnishee to deliver up to the sheriff such property. The answer disclosed a safe deposit box rented by defendant. "No evidence was introduced as to the contents of the box; it was simply as to the manner of control." There, as here, defendant and garnishee each had a key. Both were indispensable in opening the box without forcing it. It was held that the trial court erred in discharging the garnishee.

In *West Cache Sugar Co. v. Hendrickson*, 56 Utah, 327, reported in 11 A. L. R. 216, with annotation, 225, it was held that the court takes judicial notice that, in a gar-

nishment proceeding after judgment, the contents of a safe deposit box are subject to garnishment, and when defendant has a key without which the box cannot be opened, the court may require the box to be opened by drilling the tumblers of the lock. The opinion in that case was aided by a general statute of Utah to the effect that where, by statute, jurisdiction is given to a court or official, all the means necessary to carry it into effect are also given; and if, in the exercise of the jurisdiction, the course of the proceeding be not specifically pointed out by statute, any suitable mode of proceeding may be adopted which may appear most conformable to the spirit of the statute or Codes of Procedure. While we do not have so specific a statute, we have a general Code provision which performs the same office. Section 20-2219, Comp. St. 1929, says: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions and all proceedings under it shall be liberally construed, with a view to promote its object and assist the parties in obtaining justice." How could an execution in pursuance of garnishment be better aided "with a view to promote its object and assist the parties in obtaining justice" than in such a construction of a garnishment statute as will allow the evidence of a garnishee to be followed to its logical end by requiring a safe deposit box belonging to a judgment creditor, in garnishee's possession and control, to be opened and examined for property subject to execution? Such action is in effect a logical continuation and part of the testimony or answer of the garnishee. To deny it on the ground that it is not contemplated in this subdivision of the Code would subject the statute to a strict construction rather than to that liberal construction otherwise authorized in the Code.

In the annotation to *West Cache Sugar Co. v. Hendrickson, supra,* in 11 A. L. R. 225, it is said: "The majority of the cases which have passed upon the question whether or not the contents of a safety deposit box are subject

to levy, attachment, or garnishment, have held in accordance with the rule laid down in the reported case (*West Cache Sugar Co. v. Hendrickson, ante,* 216) that the contents of such boxes may be reached." The annotation cites *Washington Loan & Trust Co. v. Susquehanna Coal Co.,* 26 App. D. C. 149; *Tillinghast v. Johnson,* 34 R. I. 136; *Trowbridge v. Spinning,* 23 Wash. 48.

Apropos the argument of appellant that the trial court must have considered the case as one of bailment with defendant as the bailor and the bank as bailee, it is interesting to note the discussion of that subject by the New York Court of Appeals in *Carples v. Cumberland Coal & Iron Co.,* 240 N. Y. 187. In that case it was held that it was the duty of the court to aid the sheriff by an order permitting him to open a safe deposit box and to take any property of defendant subject to levy. As to the bailment argument the opinion said: "The status of a safe deposit company is in some aspects that of a bailee but the customer's control and possession of a box is like that of a tenant having property in an office rented from the owner of a building. * * * If the property in the box is to be regarded as in the possession of the customer the order granted was right. If, on the other hand, the safe deposit company should be regarded as in some respects a bailee and having possession of the box it was still proper for the court to make such order which, with the levy of the sheriff thereunder, will be ample protection to the company as against the box holder."

Aside from the wish of all good citizens that the law should be justly and correctly administered, the garnishee's desire is for protection from liability to holders of its safe deposit boxes. Defendant did not appeal. Presumably he was satisfied with the order or was of the opinion appeal would be of no avail. The order itself gives him an opportunity to aid in opening the box by furnishing his key. The order and its affirmance here protect the garnishee from liability.

The judgment of the district court is

AFFIRMED.

MARGIE GILBERT, ADMINISTRATRIX, APPELLANT, V. JESSE C. BRYANT, APPELLEE.

FILED DECEMBER 29, 1933. No. 28655.

1. **Automobiles: LIABILITY TO GUEST: GROSS NEGLIGENCE.** In the law providing that an unintoxicated motorist shall not be liable in damages to a guest except for "gross negligence," that term indicates a degree of negligence greater than want of ordinary care or slight negligence but not necessarily extending to wanton or wilful or intentional disregard for the guest's safety.
2. ———: ———. By enacting the guest law, the legislature did not intend to destroy entirely the civil remedy of a guest for an actionable wrong or to incumber the remedy with restrictions that would prevent a recovery for damages in a proper case.
3. ———: ———: GROSS NEGLIGENCE. In the law providing that an unintoxicated motorist shall not be liable in damages to a guest except for "gross negligence," that term means negligence in a very high degree, or the absence of even slight care in the performance of a duty. Comp. St. Supp. 1931, sec. 39-1129; *Morris v. Erskine*, 124 Neb. 754.
4. **Gross Negligence: PROOF.** "The existence of gross negligence must be determined from the facts and circumstances in each case." *Morris v. Erskine*, 124 Neb. 754.
5. **Automobiles: INJURY TO GUEST: GROSS NEGLIGENCE: PLEADING.** In an action against a motorist for injuring a guest, the petition may plead gross negligence by charging in detail that defendant was grossly careless, reckless and negligent in driving at the rate of 50 or 60 miles an hour; in losing control by high speed; in running off the pavement; in refusing to comply with guest's request for lower speed; in guiding the automobile into the railing of a bridge; in thus causing plaintiff's injuries.
6. **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.
7. **Automobiles: INJURY TO GUEST: GROSS NEGLIGENCE: QUESTION FOR JURY.** In an action against a motorist for injuring a guest, the issue of gross negligence should be submitted to the jury, where the pleadings and proof are sufficient to support a verdict in favor of plaintiff.

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

Baker, Lower & Sheehan and *Schiefelbein & Donato*, for appellant.

Baylor & Tou Velle, George Healey and *H. A. Bryant, contra.*

Heard before GOSS, C. J., ROSE and PAINE, JJ., and BEGLEY and HORTH, District Judges.

ROSE, J.

This is an action against Jesse C. Bryant, defendant, to recover $15,000 in damages for alleged negligence resulting in the death of William Delmont Gilbert, a guest of defendant in the latter's automobile. While defendant was driving westward about 7 o'clock in the evening, September 7, 1931, on the paved highway between Gretna and Ashland, his automobile struck the railing on the north side of a bridge approximately five miles east of Ashland. As a result of the collision Gilbert was fatally injured. Margie Gilbert, widow, administratrix of decedent's estate, is plaintiff.

It was admitted in the answer that the automobile collided with the railing of the bridge and that Gilbert, now deceased, was then riding in defendant's car, but actionable negligence was denied.

The cause was tried to a jury. At the close of the evidence on both sides, the district court directed a verdict in favor of defendant, which the jury rendered. From a judgment of dismissal, plaintiff appealed.

On appeal plaintiff contends that by her petition and evidence she made a case for the consideration of the jury and that therefore the peremptory instruction in favor of defendant was prejudicially erroneous.

On the contrary, the position of defendant is that, in his automobile at the time and place of the collision, Gilbert was riding as a gratuitous guest and that plaintiff did not plead and prove "gross negligence," as the cause

of decedent's injuries and death, within the meaning of those words as used in the recent guest law which provides:

"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." Comp. St. Supp. 1931, sec. 39-1129.

The determination of the controversy over the directed verdict depends on the meaning of the statutory term "gross negligence" in connection with the petition and the evidence.

Defendant argues that, in the light of judicial precedents, the following definition of "gross negligence" should be adopted as indicating the sense in which the legislature used that term:

"An unintoxicated driver should be liable to a passenger, not for hire, only when his negligence is such as would amount to an abandoned, monstrous and approximately wanton disregard of safety, and as would amount to a voluntary and intentional indifference to the danger liable to follow."

A definition of that character has not been unanimously accepted by the courts. A milder interpretation of "gross negligence," as used in guest laws, seems to be based on better reasons. In a recent opinion the supreme court of Vermont said:

"Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. Gross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or

the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is, in gross negligence, magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure." *Shaw v. Moore*, 104 Vt. 529, 86 A. L. R. 1139. See, also, annotations in 86 A. L. R. 1145.

When the Nebraska guest law of 1931 was enacted, a remedy for negligence resulting in personal injuries to a motorist's guest existed under the constitutional provision that "every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law." Const. art. I, sec. 13. The lawmakers did not intend to destroy entirely the civil remedy of a guest or to incumber the remedy with restrictions that would prevent a recovery for damages in a proper case. They did not define "gross negligence" or use in connection with those words any such terms as "abandoned, monstrous and approximately wanton disregard of safety" or "intentional indifference to the danger." They intended, of course, to increase, beyond want of ordinary care or slight negligence, the degree of negligence essential to the right of a motorist's guest to recover damages for personal injuries. The meaning of the words under consideration, as used in the Nebraska guest law, was explained in a recent opinion as follows:

"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." *Morris v. Erskine,* 124 Neb. 754.

Within the meaning of "gross negligence," as thus explained, did plaintiff by her petition and evidence present an issue of fact for the consideration of the jury? The pleas relating to negligence are challenged as insufficient. Plaintiff alleged in substance that, while Gilbert and two other guests were riding in the automobile operated by defendant, the latter drove it in a grossly careless, reckless and negligent manner, thus guiding it into the bridge railing. Other acts charged as grossly careless, reckless and negligent were: Operating the automobile at the speed of 50 or 60 miles an hour; guiding the automobile off the pavement; losing control because of the high rate of speed; refusing to comply with requests of guests to lower speed; causing the death of Gilbert by such negligence.

When the petition was drawn, the term "gross negligence," as used in the new guest law, had not been defined in *Morris v. Erskine,* 124 Neb. 754. There was no motion

in the case at bar to make general allegations of negligence more specific. The district court sustained the petition by overruling a demurrer to it. The trial proceeded on the theory that gross negligence had been charged. While the petition is far from a satisfactory model of pleading, it seems to be sufficient, when considered as a whole, to support a judgment in favor of plaintiff, if recoverable under the evidence.

It is a familiar rule of law that, 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. The admissions and evidence in the record tend to prove the following facts:

Defendant had driven onto the pavement about a mile east of the bridge and had turned westward toward Ashland. Two of the guests protested against the manner in which defendant had been driving. One of them said he would rather walk. Defendant was requested to stop his car and did so perhaps half a mile east of the bridge. Two of the guests got out and sat for a few minutes on the bank by the roadway. Defendant called to them to come back to the car. Complaint was made that the driving had been reckless and dangerous. Defendant swore when asked to let some one else drive and refused to do so. Gilbert asked defendant to cut down the speed, saying they were all liable to get killed. Defendant said, "All right, get in. We'll take it slower on in." Thus assured, the guests who had left the car reentered it and defendant started westward toward Ashland. The speed of the car rapidly increased. Ahead there was an unobstructed view of the bridge. The left wheels zigzagged across the center line of the cement pavement. The two right wheels left the pavement 50 feet or more east of the bridge and ran on the north shoulder of the highway until the car struck the north railing of the bridge at a speed of at least 50 miles an hour. An eyewitness testified that defendant's automobile, weaving back and forth, came down the pavement toward the bridge at a speed of 50 miles

an hour and looked more like an airplane leaving the ground than anything else. There was testimony of a speed of 60 miles an hour. The pavement on the roadbed was 20 feet wide and the bridge was 24 feet wide. The pavement was first open to travel on the day of the tragedy—Labor Day. Defendant had never before been over the pavement and consequently did not know the condition of the north shoulder on the highway and did not know whether he could safely turn the right wheels back on the pavement at a high rate of speed. When the collision occurred, defendant was facing traffic on Labor Day between sundown and dark.

The testimony tending to prove the facts outlined was evidence of gross negligence as the proximate cause of Gilbert's injuries and death—a question for the jury. For the error in directing a verdict in favor of defendant, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

IN RE ESTATE OF CHARLES D. MATHEWS. GLEN W. MATHEWS, APPELLANT, V. W. T. BARSTOW ET AL., APPELLEES.

FILED DECEMBER 29, 1933. NOS. 28714, 28972.

1. **Appeal: SUPERSEDEAS BOND.** When an appeal is taken by an executor, in furtherance of his individual interests, from a final order entered in the county court in the exercise of its probate jurisdiction, he must give bond like other suitors.
2. **Statutes.** A statute may adopt a part or all of another statute by a specific and descriptive reference thereto, and the effect is the same as if the statute or part thereof adopted had been written into the adopting statute.
3. **Appeal: SUPERSEDEAS BOND.** In determining the amount of the appeal bond to be required in an appeal in a case involving the exercise of probate jurisdiction by the county court, sections 30-1603, 30-1606, 20-1901, 21-1301 to 21-1305, 21-1311, 21-1313, and 27-540, Comp. St. 1929, are *in pari materia*, and may be taken together and construed as one law.

4. ———: ———. The statutory provisions referred to require the county court to exact the giving of an appeal bond in such sum as will reasonably assure the payment by the surety to the appellee of the whole amount of the debt, costs and damages recovered against appellant on appeal.
5. ———: ———: DISMISSAL. In a proceeding on appeal from a final order entered in the probate jurisdiction of the county court, when the surety in the undertaking shall be insufficient or such undertaking may be insufficient in form or amount, it is proper for the district court, on motion, to order the execution and giving of a proper bond, and on failure to comply with such order within a reasonable time, the appeal may be dismissed.
6. Dismissal. The dismissal of the appeal in case number 28714, under the facts in the record, *held* error without prejudice.
7. Constitutional Law: RIGHT OF APPEAL. "The constitutional provision which declares that 'the right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied,' does not prohibit the legislature from prescribing reasonable rules and regulations for the review of a cause by appeal, such as requiring a bond to be given." *School District v. Traver*, 43 Neb. 524.

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

Charles E. Matson, for appellant.

Stewart, Stewart & Whitworth, J. W. Kinsinger and *H. C. Henderson, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

EBERLY, J.

At the argument in this tribunal two cases were submitted together by agreement of the parties. The cases have identical titles; the first one bears number 28714, the second 28972, and by these numbers they will be referred to in this opinion.

The facts from which these controversies arise, as disclosed by the record in number 28714, may be epitomized as follows: Charles D. Mathews, a resident of Lancaster county, Nebraska, died in 1922 testate. His last will was admitted to probate in the county court of Lancaster

county on October 18, 1922, and letters testamentary were duly issued to Glen W. Mathews as executor named in the will on November 15, 1922, who thereupon qualified as provided by law. Without enumerating or considering the successive steps of the administration of this estate, it may be said that the "final report" and the "supplemental final report" of Glen W. Mathews, executor of the estate, together with objections thereto on the part of W. T. Barstow and the City National Bank, both creditors of the estate, were finally submitted to the county court of Lancaster county. On June 29, 1932, after a trial, these objections of creditors were in effect sustained and the account of Glen W. Mathews as executor was, by the order of the county court, "surcharged on account of devastavits and waste committed by him with respect to assets of the estate which have come into his possession as executor and with respect to the collection of assets and sums due the estate converted to his own use or transferred without consideration to others, or which he has failed and refused to account for." These aggregate the sum of $52,855.19, and are itemized in this order, which also contained the following: "Without affecting the finality in other respects of this decree and order, the court finds that determination should be reserved and made at a later date, or at the time the matter of distribution is before the court, of the following matters: (a) Whether the applicant, the City National Bank, has now a valid or enforceable claim against this estate or is entitled to receive dividends as a creditor. (b) Whether the executor should be charged in his accounts on account of the sale of the shares of the capital stock of the Continental Mortgage & Land Company owned by this estate. (c) Whether the executor should be further charged in his accounts because of the payment to Mrs. T. C. Sime on December 8, 1923, of $2,123.05. Wherefore, it is ordered, adjudged, and decreed that the executor's application for the approval of his report and for his discharge and the release of his surety should be and

hereby is denied. It is further ordered, adjudged, and decreed that the accounts of Glen W. Mathews as executor of the estate of Charles D. Mathews, deceased, should be and they hereby are charged and surcharged with the total sum of $52,855.19, which amount the court finds the executor is accountable for as the property of this estate."

The executor's motion for a new trial was overruled, and on July 11, 1932, Glen W. Mathews filed notice of appeal from the order of June 29, 1932. On July 28, 1932, the county court, by order duly entered, fixed the amount of the appeal bond at $300, to be in form as provided by statute, which was given and approved both as to form and sufficiency by the county court on July 28, 1932. On this same date a correct transcript of this proceeding was filed in the district court for Lancaster county, Nebraska. Thereafter in October, 1932, the district court sustained generally motions for dismissal, which had been duly filed in the cause in August, 1932, and which were each based on two grounds, viz.: (1) That the order appealed from was "not a final order but interlocutory and not appealable;" and (2) "no sufficient appeal bond has been given." From the orders of dismissal Glen W. Mathews, the executor, appeals to this court.

The record in case number 28972, so far as essential to the consideration of the present appeal, may be summarized as follows: On January 18, 1933, upon hearing on the matters reserved in the order of June 29, 1932, an order was entered in the county court of Lancaster county which surcharged the executor's account with an additional amount of $2,123.05, making the total surcharge, $54,978.24 with interest, which total sum this order or decree determined "is now due and owing from Glen W. Mathews as executor." This order also removed Glen W. Mathews as executor, and appointed Homer L. Kyle as administrator with the will annexed of this estate. Notice of appeal from this order of January 18, 1933, was duly

filed in the county court, and by that court an order was entered on February 10, 1933, whereby the amount of the appeal bond "is fixed at the sum of $200 to be in form as provided by statute." On the day last named the appeal bond in this amount was filed and approved by the county court. Transcript on appeal, containing the order of January 18, 1933, was filed in the district court for Lancaster county on February 16, 1933, and Mathews' petition on appeal was filed in the district court for Lancaster county on March 8, 1933. Thereafter the district court sustained motion of appellees to require the appellant, Glen W. Mathews, to furnish a $60,000 appeal bond by June 10, 1933. Appellant's motions for new trial were overruled, and appellant failing to comply with this order, on June 24, 1933, his appeal for this reason was dismissed.

The controlling question in the second case, number 28972, is the right of the district court to require the appellant, Glen W. Mathews, to furnish an additional appeal bond in the sum of $60,000, and, upon his failure to comply with this order, to dismiss his appeal. This, in substance, is also the controlling question presented by the record in the first case, number 28714. For, in this case last referred to, the order of dismissal entered in the district court was silent as to which of the two grounds set forth in the motion to dismiss that court's action was predicated upon. If it clearly appears that this dismissal now attacked on review was proper and may be sustained upon either of the grounds set forth in the motion, this tribunal will inquire no further.

The right to appeal to the district court from the final probate orders, judgments, or decrees of the county court is provided for by the statutes of this state. Comp. St. 1929, sec. 30-1601. The applicable provisions thereof must be substantially complied with. In the instant cases the appeals were not taken in the appellant's representative capacity as executor. They are taken solely in furtherance of his individual interests. Therefore he is

required to give bond as other suitors. *In re Williams,* 97 Neb. 726; *In re Langdon,* 102 Neb. 432; *In re Estate of Craig,* 101 Neb. 439; *In re Estate of Nelson,* 108 Neb. 296.

Among the statutory provisions regulating the exercise of this right of appeal is the requirement that "every party so appealing shall give bond in such sum as the court shall direct, with two or more good and sufficient sureties, to be approved by the court, conditioned that the appellant will prosecute such appeal to effect without unnecessary delay, and pay all debts, damages and costs that may be adjudged against him." Comp. St. 1929, sec. 30-1603.

Further, section 30-1606, Comp. St. 1929, provides, after the appeal is properly lodged in the district court, for the conduct of proceedings therein as follows: "That court * * * shall proceed to hear, try and determine the same, in like manner as upon appeals brought upon the judgments of the same court in civil actions."

The language just quoted in terms by reference and implication renders pertinent to the questions presented by the instant appeals the following sections of our statutes, viz., sections 20-1901, 21-1301 to 21-1305, 21-1311, 21-1313, 27-540, Comp. St. 1929. For, "a statute may adopt a part or all of another statute by a specific and descriptive reference thereto, and the effect is the same as if the statute or part thereof adopted had been written into the adopting statute." 59 C. J. 1059.

Being *in pari materia,* these sections, including the first two quoted from above, must be taken together and construed as if they were one law, and, if possible, effect be given to every provision. *State v. Omaha Elevator Co.,* 75 Neb. 637; *State v. Royse,* 71 Neb. 1; *Downey v. Coykendall,* 81 Neb. 648; *State v. Junkin,* 87 Neb. 801; *Sheridan County v. Hand,* 114 Neb. 813.

Therefore, the parties to this appeal, being authorized to proceed therein only "in the same manner as provided by law in cases tried and determined by justices of the

peace" (Comp. St. 1929, sec. 27-540) must submit to and comply with all the statutory regulations governing the latter proceedings, except where, and to the extent the same or any part thereof are, inconsistent with the provisions of the probate act. In other words, as determined by this court in *Rogers v. Russell,* 11 Neb. 361: "Appeals from the judgments of county courts are regulated by the law governing appeals from the judgments of justices of the peace."

On this basis appellant in each of the instant appeals was required by the express words of section 30-1603, Comp. St. 1929, to "give (an appeal) bond in such sum as the court shall direct, * * * to be approved by the court, conditioned that the appellant will prosecute such appeal to effect without unnecessary delay, and pay all debts, damages and costs that may be adjudged against him." The amount of the bond is, by the terms of the statute, to be fixed by the court in the exercise of its sound judicial discretion from a consideration of the several sections of the statutes pertinent to the subject, which, as we have already seen, include all of the sections above referred to and quoted from.

Section 21-1311, Comp. St. 1929, provides: "When any appeal shall be dismissed, or when judgment shall be entered in the district court against the appellant, the surety in the undertaking shall be liable to the appellee for the whole amount of the debt, costs and damages, recovered against the appellant." It will be noted that the term "the whole amount of the debt, costs and damages" employed in the paragraph last quoted is substantially identical with "all debts, damages and costs" as these words are used in section 30-1603, Comp. St. 1929. It is equally obvious from a consideration of these provisions that the trial court would fail to exact a proper appeal bond if it were fixed at such sum that the surety thereon could not be required to respond to the full scope of the statutory liability as imposed by section 21-1311, Comp. St. 1929. Indeed, this test determines the absolute

minimum of the appeal bond which may lawfully be required. It is manifest that the county court in the instant cases failed to comply with this requirement, and the bonds exacted were therefore wholly insufficient.

The remedy for this situation is found in section 21-1313, Comp. St. 1929, which fully justifies the action of the district court in its order exacting an additional bond of $60,000 in case number 28972, and the dismissal of the appeal therein because of failure to comply therewith. *Galligher v. Wolf,* 47 Neb. 589; *Gannon v. Phelan,* 64 Neb. 220.

We do not overlook the fact that in case number 28714 there was a peremptory dismissal and no opportunity was given to the appellant by the terms of this order to furnish a proper bond. But, as heretofore noted, these motions by the creditors named for a dismissal on the ground of insufficiency of the appeal bond were filed in the district court in the month of August, 1932, and the judgment of dismissal was not entered until after a hearing thereon in the month of October following. The record also fails to disclose any application on the part of appellant for leave to file a new bond. In view of these facts the principles approved by this court in *State Savings & Loan Ass'n v. Johnson,* 70 Neb. 753, are applicable and controlling, viz.:

"The sustaining of an objection to jurisdiction in the appellate court and dismissal of the appeal on that account is harmless error, where the objection was pending for at least twelve days, and appellants made no offer or application to be allowed to furnish a sufficient bond."

It would therefore follow that, in the view of the facts and law most favorable to appellant's contention, the dismissal of this appeal in case number 28714, in the absence of any application on his part to correct this bond, or file a new one, must be held to be error without prejudice. *State Savings & Loan Ass'n v. Johnson,* 70 Neb. 753, 755.

Appellant's contention that the statutory requirements

as to giving appeal bonds as a prerequisite to appeals from the county court are in contravention of section 24, art. I of the Constitution of Nebraska, we deem in principle to be fully answered in *School District v. Traver*, 43 Neb. 524, wherein we said:

"The constitutional provision which declares that 'the right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied,' does not prohibit the legislature from prescribing reasonable rules and regulations for the review of a cause by appeal, such as requiring a bond to be given."

See, also, *Hier v. Anheuser-Busch Brewing Ass'n*, 52 Neb. 144.

It follows that the action of the district court in dismissing case number 28714, and also number 28972, was substantially correct, and each of these judgments is

AFFIRMED.

RUTH SWENGIL, APPELLEE, V. SOL MARTIN, APPELLANT.

FILED DECEMBER 29, 1933. No. 28692.

1. **Automobiles**: LIABILITY TO GUEST: GROSS NEGLIGENCE. "Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1931, means negligence in a very high degree, or the absence of even slight care in the performance of a duty." *Morris v. Erskine*, 124 Neb. 754.
2. **Gross Negligence**: PROOF. "The existence of gross negligence must be determined from the facts and circumstances in each case." *Morris v. Erskine*, 124 Neb. 754.
3. ———: QUESTION FOR JURY. "The question of gross negligence is for the jury, where the evidence relating thereto is conflicting and from which reasonable minds might draw different conclusions." *Morris v. Erskine*, 124 Neb. 754.
4. **Trial**: INSTRUCTIONS. "A party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence." *Boice v. Palmer*, 55 Neb. 389; *Roh v. Opocensky, ante*, p. 551.

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

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

Shotwell, Monsky, Grodinsky & Vance and *Harry B. Cohen, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

CHAPPELL, District Judge.

The plaintiff, appellee herein, recovered a judgment against the defendant, appellant herein, for personal injuries sustained in an automobile accident while a guest of defendant in his car then driven by him. Defendant appeals, relying, for reversal, upon the propositions that the trial court erred in overruling defendant's motion for a directed verdict and in the giving of certain instructions upon its own motion and the refusal to give certain instructions requested by defendant.

The evidence, when considered most favorably for the plaintiff, discloses that on Monday, September 7, 1931, defendant invited plaintiff to go with him in his Ford sedan to a picnic at Meadows, Nebraska. A young man named Morris Kaplan and a young lady named Charney Soiref were also invited to go with him. Although plaintiff had known defendant for about a year, she had never ridden with him in an automobile before. About 3 o'clock in the afternoon on that day the four started to the picnic, Morris Kaplan then driving the car. They first went to Elkhorn, Nebraska, where they stayed about an hour. From Elkhorn, Nebraska, the defendant drove his car, and plaintiff rode in the front seat with him. At the time of the accident the car was approaching Millard, Nebraska, from the north along U. S. Highway No. 38, now U. S. Highway No. 6. Just east of Millard, Nebraska, the highway makes a sharp curve or turn from south to west. There is a railroad crossing quite a distance north of this curve. The defendant was driving fast between Elkhorn

and the railroad crossing, and on several occasions plaintiff told the defendant to slow down. He did slow down some for the railroad tracks and then speeded up again to from 50 to 55 miles an hour. Plaintiff then complained to defendant about his speed, and soon thereafter called his attention to the turn sign which is approximately 195 feet north of the center of the curve. Defendant, however, continued at that speed and made the turn at 55 miles an hour or faster, driving his car to the left of the highway and completely off the pavement into the dirt part of the road on the left of the curve, barely missing a telephone pole south of the pavement on the southwest end of the curve. He continued on the south side of the road toward the west at the same speed or faster. At the same time a Lincoln sedan, driven by B. F. White, was approaching the curve from the west on the south side of the highway at a speed of 25 miles an hour. A head-on collision seemed unavoidable, and the Lincoln sedan turned northeast to get on the north side of the pavement. Defendant also turned north to get on the north side of the pavement, his right side of the street, and at a point 50 or 60 feet west of the corner, that is, west of the pole, the two cars came together in a V-shaped position a little north of the center of the pavement. The driver of the Lincoln car first saw defendant's car about 40 feet north of a culvert which is at the beginning of the curve. His car was then 120 feet or more west of the curve. The defendant saw the Lincoln car when 75 or 100 feet away from it. Plaintiff was seriously and permanently injured, and the cars were badly damaged.

Plaintiff's right to recover in this action is limited by section 39-1129, Comp. St. Supp. 1931, which, in effect, provides that the 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 damages are caused by the gross negligence of the operator.

We will consider the propositions relied upon by the

defendant in what seems to us their logical sequence. The trial court, on its own motion, gave instruction No. 6 in which, after quoting section 39-1129, Comp. St. Supp. 1931, verbatim, it said: "It is not claimed that the defendant was intoxicated; the only ground of recovery alleged by plaintiff is that she suffered the injuries of which she complains because of gross negligence of the operator of the car in operating same at the time of the accident. With reference to this term 'gross negligence' in the statute, you are instructed that it was the evident intention of the legislature to exempt the driver of an auomobile from liability for injuries suffered by the guest because of ordinary negligence of the driver, and permit his recovery only when such injuries were the result of gross negligence (or intoxication). It is therefore necessary to distinguish between ordinary negligence and gross negligence in the determination of this case. 'Ordinary negligence' is the doing of some act under the circumstances of the accident that an ordinarily prudent person would not have done, or the failure to do some act or take some precaution which a person of ordinary prudence would have done or taken. 'Gross negligence' is a wanton or reckless disregard of the safety of others; it signifies the driving of an automobile carelessly or heedlessly in a reckless disregard of the rights of others or of the consequences, *but need not necessarily be wilful.* For mere negligence not amounting to 'gross negligence' defendant would not be liable; for 'gross negligence' he would be liable to plaintiff."

Instruction No. 2 requested by defendant, and which was refused by the court, reads: "You are instructed that gross negligence is that degree of negligence which amounts to a reckless disregard of one's own safety and the safety of others; *and a wilful indifference to the consequences liable to follow,* and in this connection you are further instructed that, in order to be guilty of *wilful indifference,* the person charged with gross negligence must have been aware of the apparent danger at the time

of the commission of the negligent act or acts upon which the charge of gross negligence is based."

Defendant complains of only that part of instruction No. 6, given by the court on its own motion, which reads: "But need not necessarily be wilful." The instruction given by the trial court was not erroneous. This court has defined gross negligence under this statute since the trial of this case. "Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1931, means negligence in a very high degree, or the absence of even slight care in the performance of a duty." *Morris v. Erskine,* 124 Neb. 754. A portion of this opinion gives full answer to defendant's contention that the element of wilfulness should have been included in the court's instruction. "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." *Morris v. Erskine, supra.* See, also, *Cole v. Morse,* 85 N. H. 214; *Dzura v. Phillips,* 275 Mass. 283; *Learned v. Hawthorne,* 269 Mass. 554; *Altman v. Aronson,* 231 Mass. 588, 4 A. L. R. 1185; *Meeney v. Doyle,* 276 Mass. 218; *Malone v. Clemow,* 111 Cal. App. 13; *Shaw v. Moore,* 104 Vt. 529, 86 A. L. R. 1139, and note, page 1145; *Storla v. Spokane, P. & S. Transportation Co.,* 136 Or. 315.

Defendant relies upon *Chicago, B. & Q. R. Co. v. Hyatt,*

48 Neb. 161, and *Jennings v. Biurvall,* 122 Neb. 551, for a definition of gross negligence. A careful study of the first case discloses that it is a definition of criminal negligence under that section of the statute which makes every railroad company the insurer of the passenger's safety, "except in cases where the injury done arises from the criminal negligence of the person injured," and is not a definition of gross negligence. They are not synonymous. Likewise, a careful reading of the second case discloses that it is a definition of reckless operation under an Iowa statute and not a definition of gross negligence. The instruction therein approved by this court did not contain the element of wilfulness.

The trial court did not err when it overruled defendant's motion for a directed verdict. The evidence adduced by plaintiff was such that it required submission to a jury for determination. *Morris v. Erskine, supra,* so fully answers defendant's contention that other language is inadequate. "The existence of gross negligence must be determined from the facts and circumstances in each case. The question of gross negligence is for the jury, where the evidence relating thereto is conflicting and from which reasonable minds might draw different conclusions. * * * 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." *Morris v. Erskine, supra.* See, also, *Graham v. Higgins,* 121 Neb. 211; *Jennings v. Biurvall, supra; Malone v. Clemow, supra;* Note, 74 A. L. R. 1200; *West v. Rosenberg,* 44 Ga. App. 211; *Dzura v. Phillips, supra; Pepper v. Morrill,* 24 Fed. (2d) 320; *Manning v. Simpson,* 261 Mass. 494; *Adair v. Newkirk,* 148 Wash. 165; *Meeney v. Doyle,*

supra; Smiddy v. O'Neil, 277 Mass. 36; *Parker v. Moody,* 274 Mass. 100; *Kirby v. Keating,* 271 Mass. 390; *Cole v. Morse, supra; Siesseger v. Puth,* 248 N. W. (Ia.) 352; *Sorrell v. White,* 103 Vt. 277; *Terlizzi v. Marsh,* 258 Mass. 156; *Zelinsky v. Howe,* 163 Wash. 277; *Altman v. Aronson, supra; Taylor v. Cockrell,* 116 Cal. App. 596; *McQuillen v. Meyers,* 213 Ia. 1366; *Doody v. Rogers,* 116 Conn. 713; *Schepp v. Trotter,* 115 Conn. 183; *O'Nellion v. Haynes,* 122 Cal. App. 329; Note, 86 A. L. R. 1145.

Defendant complains that the trial court in instruction No. 1, given upon its own motion, enumerated plaintiff's allegations of gross negligence in four paragraphs, and in instruction No. 4, given upon its own motion, charged the jury that they might find for the plaintiff if they found that plaintiff had established by a preponderance of the evidence that the collision between the car in which plaintiff was riding and the car with which it collided was caused proximately by the gross negligence of the defendant in the operation of his automobile in some one or more of the particulars set forth in plaintiff's petition. There is competent evidence supporting each and all of plaintiff's allegations of gross negligence pleaded in the petition and set forth in instruction No. 1 so given by the court. This court has said: "A party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence." *Boice v. Palmer,* 55 Neb. 389; *Roh v. Opocensky, ante,* p. 551. See, also, *Gilbert v. Merriam & Roberson Saddlery Co.,* 26 Neb. 194; *Hancock v. Stout,* 28 Neb. 301; *First Nat. Bank v. Carson,* 30 Neb. 104; *Cunningham v. Fuller,* 35 Neb. 58; *Hartwig v. Gordon,* 37 Neb. 657; *Chicago, R. I. & P. R. Co. v. Buckstaff,* 65 Neb. 334; *Western Mattress Co. v. Ostergaard,* 71 Neb. 575; *Link v. Campbell,* 72 Neb. 310; *Hauber v. Leibold,* 76 Neb. 706; *Hoover v. De Klotz,* 89 Neb. 146; *Beauchamp v. Leypoldt,* 108 Neb. 510. These instructions, construed together, correctly and properly presented the issues to the jury,

and the court did not commit error when it gave instruction No. 1 on its own motion.

Defendant contends that the court should have given instructions Nos. 1 and 6, which he proffered. The requested instruction No. 1 charges the jury to the effect that a guest accepts the risk that would necessarily follow from the known proficiency of the driver and his known usual and customary driving habits. The requested instruction No. 6 charges the jury to the effect that a driver of an automobile does not guarantee to his guests any accomplished degree of skill. It is evident that the requested instruction No. 6 follows from the rule of law contended for in the requested instruction No. 1, for if a guest, at the time of accepting the invitation, is aware of the proficiency and the usual and customary habits of the driver, then the driver does not guarantee an accomplished degree of skill to his guest.

Defendant alleged in his answer that the plaintiff was "familiar with the condition of the said car and the habits and manner of the defendant in driving the said car." The trial court did not submit this issue to the jury. The undisputed evidence shows that, although plaintiff had known defendant for about a year, she had never ridden with him in a car before, and that he did not drive his car upon this trip until after they left Elkhorn, Nebraska. There is no evidence that the plaintiff knew the condition of the car or was familiar with the proficiency of the driver or of his usual and customary habits of driving. There is no evidence as to the proficiency of the driver, nor of his usual and customary habits of driving, nor that such was the proximate cause of the accident. This matter, therefore, was not an issue in the case, and the trial court was right when it did not submit the issue to the jury. It was pleaded but not proved. While, as decided in *Boice v. Palmer*, 55 Neb. 389, and other cases cited hereinbefore, "A party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present

the theory as an issue and it is supported by competent evidence," logically, unless an issue is supported by competent evidence, he is not entitled to have the same submitted to the jury.

The trial court did not commit error in overruling defendant's motion for a directed verdict, or in the giving of instructions on its own motion, or in the refusal of instructions requested by the defendant.

The judgment of the trial court is

AFFIRMED.

CHARLES E. KEENAN, APPELLEE, V. NELLIE MCCLURE ET AL., APPELLEES: DAKOTA COUNTY ET AL., APPELLANTS.

FILED DECEMBER 29, 1933. No. 28700.

1. Taxation: PAYMENT. Although technically taxes can be paid only in lawful money of the United States, checks on banks are made to take the place of the actual cash, in that the check itself is a means of obtaining the money of the drawer from the bank for the holder.
2. Bills and Notes: CHECKS: PRESENTMENT. Checks are not designed for circulation as a medium of exchange, and should be presented for payment with dispatch and diligence consistent with the circumstances of the case and the transaction of other commercial business.
3. ———: ———: ———. Holder of a check must use due diligence in obtaining money, and must present it and demand payment within a reasonable time.
4. ———: ———: ———. In case holder of check and bank upon which it was drawn are in different places, the payee of the check is not guilty of such negligence as will shift loss to him on account of bank's insolvency, if he deposits it so it may be forwarded by mail for presentment on the next secular day after it is received.
5. ———: ———: ———. Drawer of check assumes risk of drawee bank's insolvency during reasonable period for presentment, so if drawee bank fails before holder has had a reasonable time to present check for payment, the loss must fall upon the drawer of the check.

6. **Taxation: PAYMENT BY CHECK: INSOLVENCY OF BANK.** Where bank, located in different place than where check was given for redemption from tax sale and in payment of taxes, failed on day following that on which check was given, county's lien for taxes was not satisfied by virtue thereof, regardless of fact that check was never actually deposited in county depository; the necessity for presentation and demand of check being obviated by the failure of drawee bank before reasonable period for presentment.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Reversed, with directions.*

Sidney T. Frum and *Malcolm R. Smith*, for appellants.

W. V. Steuteville and *Sherman W. McKinley, Jr., contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

LANDIS, District Judge.

This is a suit to foreclose a mortgage. In the decree the trial court ordered that the issue raised by the pleadings as to the validity of certain taxes and tax sales be continued for further hearing. A supplemental decree was entered declaring the mortgaged premises free and clear of taxes for the years 1927, 1928, and 1929. From this supplemental decree Dakota county and Harry Rockwell, county treasurer, appeal, being defendants below and appellants here. There is no objection to the original decree of foreclosure. Charles E. Keenan, mortgagee, plaintiff below, secured confirmation of the sale of the mortgaged premises in him, a cancelation of the taxes, and is appellee here.

It appears from the record that appellee was holder of a tax sale certificate and paid subsequent taxes for the year 1928. On December 5, 1930, Nellie McClure, mortgagor, appeared at the county treasurer's office about 3 o'clock p. m., and gave to Harry Rockwell, county treasurer, her check for $678.10 on the First National Bank of Sioux City, Iowa. This check was intended to pay for

the redemption from tax sale in the amount of $471.40, and taxes for the year 1929 in the sum of $206.70. Redemption certificate and tax receipt were thereupon issued by the county treasurer. Notice of redemption was received by appellee by mail, whereupon he promptly went to the office of the county treasurer, surrendered his certificate of sale and received county treasurer's check for the redemption money and at once cashed same. All of these matters occurred before any of the parties knew of the failure of the First National Bank of Sioux City, Iowa, which closed its doors December 6, 1930, at noon.

Appellee knew in the late afternoon of December 6 that the McClure check was on the failed bank as is evidenced by the conversation between him and the county treasurer.

When the county treasurer made his monthly settlement, about January 2, 1931, he used as a voucher the original tax sale certificate surrendered to him, upon which is indorsed "Paid & Canceled. John Sohn Board of Commissioners, Dakota county, Nebr."

When the First National Bank of Sioux City, Iowa, failed, Nellie McClure had on deposit therein $981.60. A check given by her on this account on the afternoon of December 5, 1930, which was deposited in and forwarded direct by the Nebraska State Bank of South Sioux City, Nebraska, was paid in due course. The same mail on the afternoon of December 5, 1930, after banking hours, carried direct remittances to the First National Bank of Sioux City, Iowa, from Nebraska State Bank, South Sioux City, Nebraska, and the Bank of Dakota City, Dakota City, Nebraska.

The Bank of Dakota City was the depository bank for Dakota county, located at Dakota City, Nebraska, the county seat, and where the county treasurer deposited the county funds. This bank, December 5, 1930, on the afternoon mail in question sent to the First National Bank of Sioux City, Iowa, its letter of remittance with checks and the same were not cleared, but returned. This letter of remittance contained items formerly deposited by the

county treasurer on the First National Bank of Sioux City, Iowa, and none of these were paid, but returned.

The McClure check was never actually deposited by the county treasurer in the depository bank at Dakota City, but on December 8, 1930, he was informed by the Bank of Dakota City that no items on the failed bank would be received. Later, on inquiry at Sioux City, Iowa, of the officials in charge of the failed First National Bank, he found he had no claim against the bank and that the check would not be honored.

On March 5, 1931, the county treasurer wrote the appellee advising him that he had canceled the redemption certificate and the receipt for the 1929 taxes which he had issued. Appellee's attorney advised the county attorney of Dakota county that, if an effort would be made by the county to collect the amount represented by the McClure check out of the dividends which were payable on her account in the failed bank, he would give them all the assistance possible and would stipulate that any effort which was made toward the collection of the check would not prejudice the rights of appellants in the further litigation, if further litigation were necessary.

First should be determined what was the reasonable time the county treasurer had under the circumstances of this case in which to present for payment the check received by him.

Technically taxes can only be paid in lawful money of the United States, but checks on banks are made to take the place of the actual cash, in that the check itself is the means of obtaining the money of the drawer from the bank for the holder.

Under our negotiable instruments law, chapter 62, Comp. St. 1929, it is provided that "a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank." Comp. St. 1929, sec. 62-1606. "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the

loss caused by the delay." Comp. St. 1929, sec. 62-1603. Where a check is deposited which is payable in another city, it is exercise of ordinary care upon the part of the bank to forward the item by mail not later than the business day next following its receipt direct to the bank upon which it is drawn. Comp. St. 1929, sec. 62-1805.

Checks are not designed for circulation as a medium of exchange, and should be presented for payment with dispatch and diligence consistent with the circumstances of the case and the transaction of other commercial business. The holder of a check is bound to use due diligence in obtaining the money, and must present it and demand payment within a reasonable time.

In the instant case there are no special circumstances reflected by the evidence except that the holder of the check and the bank upon which it was drawn were in different places. Under such a status it is the almost universal rule that the payee of the check is not guilty of such negligence as will shift the loss to him if he deposits it so it may be forwarded by mail for presentment on the next secular day after it is received. *Scroggin v. McClelland,* 37 Neb. 644; *Anderson v. Rodgers,* 53 Kan. 542; *Lewis, Hubbard & Co. v. Montgomery Supply Co.,* 59 W. Va. 75; *Gifford v. Hardell,* 88 Wis. 538; *Holmes v. Roe,* 62 Mich. 199; *First Nat. Bank v. Buchannon Bank,* 80 Md. 475; *Smith v. Janes,* 20 Wend. (N. Y.) 192; *Aebi v. Bank of Evansville,* 124 Wis. 73; *Manitoba Mortgage & Investment Co. v. Weiss,* 18 S. Dak. 459; 17 Am. St. Rep. 807, note; 13 L. R. A. 43, note; *Nuzum v. Sheppard,* 87 W. Va. 243; *Edmisten v. Herpolsheimer Co.,* 66 Neb. 94, 98; Comp. St. 1929, secs. 62-1603, 62-1805.

Second should be considered the effect of the failure of the drawee bank within the reasonable time allowed for presentment.

Every drawer of a check assumes the risk of the drawee's solvency during the period of time allowed as reasonable for presentment. *Anderson v. Gill,* 79 Md. 312. So, if the drawee bank fails before the holder has had

a reasonable time to present a check for payment, the loss must fall upon the drawer of the check because she should carry the risk of the drawee's solvency during that period of time. *Commercial Investment Trust v. Lundgren-Wittensten Co.*, 173 Minn. 83.

The record reflects no special or exceptional circumstances why the county treasurer should present through the county depository bank this check received in the afternoon of December 5 until and during the business day of December 6. But the drawee bank at Sioux City, Iowa, failed on December 6 at noon. In other words, during the shortest period within which, consistent with the ordinary employments and duties of commercial business, to make presentation, the necessity for presentation and demand of the check in question was obviated by the failure of the First National Bank of Sioux City, Iowa. Neither equity nor law requires the doing of useless things. In the instant case there was no necessity or requirement of the county treasurer to make presentation and demand of the McClure check.

Nothing occurred, after the receipt of what proved to be a worthless check in payment of taxes, to force the county to accept it in payment of the tax liens. There is nothing in the record which shows that Dakota county, or the county treasurer, owes the duty or is obligated by legal means to collect the McClure check.

The ultimate facts are the county's first lien for the 1929 taxes is not satisfied; there has been no redemption from the tax sale. Appellee under a mistake of fact has $471.15 of Dakota county's money. Appellee is not entitled to a confirmation of the mortgaged premises free and clear of taxes and tax sales for the years 1927, 1928, and 1929.

Hence, the supplemental decree is reversed, with directions to enter a decree reinstating Dakota county's first lien for the taxes of 1929, and the lien created by the tax sale, in accordance with this opinion.

REVERSED.

J. O. JOHNSON, APPELLANT, V. CALEDONIAN INSURANCE COMPANY, APPELLEE.

FILED DECEMBER 29, 1933. No. 28631.

Insurance: POLICY: BREACH. A provision in a fire and lightning insurance policy covering personal property, limiting the location of the insured chattels, but providing for a removal permit of such chattels, the insured having knowledge of his right in obtaining such permit and having exercised the right on one occasion, but subsequently, without obtaining such permit or notifying the company or its agent, moved a horse to a location not covered by the policy, and the horse was struck by lightning and killed, *held* that such unauthorized removal constituted a breach of the policy which existed at the time of the loss and contributed to the loss, as provided in section 44-322, Comp. St. 1929.

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

A. L. Bishop, for appellant.

F. J. H. Lawson and *Crofoot, Fraser, Connolly & Stryker, contra.*

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

MESSMORE, District Judge.

This is an appeal from the judgment of the district court for Wheeler county. The jury was waived and at the conclusion of the evidence the court found for defendant company, appellee herein.

The action was brought on an insurance policy. Plaintiff, appellant herein, was the owner of four horses covered by the policy in question and in full force and effect at the time one of the horses was struck by lightning and killed. Appellant prayed for a recovery of $80. Appellee answered, admitting that the policy was in full force and effect and valid while the live stock was located on certain real estate, to wit, the west half of section 31, township 22, range 11, Wheeler county, and that on March 30,

1928, appellee issued, at appellant's request, a removal permit continuing the insurance in force while appellant's live stock was located, contained and kept on the southeast quarter of section 12, township 21, range 10, in said county. The answer further alleges that when the horse was killed by lightning on July 7, 1928, it was not located, contained or kept on the real estate covered by the policy or the removal permit, but was on other and different real estate, to wit, section 4, township 21, range 10, in said county, and that therefore the loss was not covered by the policy. To this answer there was filed a denial.

The evidence discloses that the policy covered the live stock while located, contained and kept on the west half of said section 31; that a removal permit had been granted appellant by appellee on or about the time alleged in the answer, authorizing appellant to keep the live stock hereinbefore mentioned on the southeast quarter of section 12, aforesaid. It further discloses that the horse was in fact killed while in a pasture in section 4, aforesaid, and that no removal permit had been requested of or issued by the company for such location.

The errors relied on by appellant to reverse the judgment in this action may be summarized as follows: (1) That the judgment is not sustained by the evidence; (2) the judgment is contrary to law.

In support of the first contention appellant states that the removal of the property from the place designated in the policy does not invalidate the insurance contract, unless the breach of such contract contributed to the loss, citing section 44-322, Comp. St. 1929, the pertinent part of which statutory provision is as follows: "The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding."

Appellant further cites in support of his contention the

case of *Mayfield v. North River Ins. Co.*, 122 Neb. 63, and *Hannah v. American Live Stock Ins. Co.*, 111 Neb. 660.

In the case of *Mayfield v. North River Ins. Co., supra,* the agent of the company had actual knowledge of the transfer of the stock of goods of the hatchery to a new location, had inspected the premises and had discussed with the owners of the hatchery the proposition as to whether or not there might be additional insurance coverage, and defendant therefore was chargeable with the knowledge possessed by its agent with reference to the real situation of the risk prior to the fire which destroyed the property in question. This court is committed to the doctrine that notice to the local agent of an insurance company, who has authority to issue the policy, is notice to the company.

Likewise, in case of *Hannah v. American Live Stock Ins. Co., supra,* it was held that the temporary removal of the insured animal from the premises where by the provisions of the policy it should have been kept did not invalidate the policy in the absence of proof that the failure to keep the animal on the premises of the insured existed at the time of the loss and contributed to the loss. This case is not in point with the proposition contended for by appellant because it involved a temporary removal and the loss occurred on the premises covered by the policy. The temporary removal was merely for breeding purposes and a forfeiture could not be declared under such circumstances, where the actual loss occurred on the premises covered by the policy, while in the instant case the actual loss occurred off the premises covered by the policy and the removal permit later granted. In the case last cited the company, in response to notice by telephone that the insured animal was ailing, sent veterinarians to take charge of the animal, and they examined it, operated upon it and continued to visit and treat it until its death a month and a half later, and the company was held to have waived the right to declare a forfeiture under the policy on account of failure of in-

sured to notify it by telegram of the first appearance of sickness or disease, that being one of the requirements of the policy.

In case of *Security State Bank v. Aetna Ins. Co.*, 106 Neb. 126, the owner of the insured goods had given a bill of sale which was really a chattel mortgage. There was no change of ownership. This court held that there was no violation of the provisions of the policy in giving the mortgage and the policy was not invalidated, as it in no way contributed to the loss; in other words, the giving of the chattel mortgage in the form of a bill of sale did not contribute in any way to the occurrence of the fire.

The question of fact presented to the trial court in the instant case was whether or not the removal of the horse in question to a place other than that covered by the policy, where the horse was subsequently struck by lightning, contributed to the loss of the horse. The trial court answered in the affirmative.

Analyzing the facts in this case and the law as cited by appellant and bearing in mind the statutory provision cited, we must conclude that the appellee had the right to make any reasonable condition as to what risk it might assume in the contract. Appellant knew he had the right to request a removal permit and in fact had so requested and obtained one, but at the time the loss occurred he had taken the horse from the location where he had coverage to a place two and one-half miles distant, when the insurance company by the very terms of the contract had the right to know where the stock was being kept and under the terms thereof was privileged to discontinue the insurance if it was not satisfied with the risk and the continuance of the same in the new location. That was the purpose for which the removal permit was created by the terms of the contract.

It can be said with some degree of certainty that locations differ with respect to lightning hazards because of the nature of the land and soil conditions, the presence of high trees, wire fences, the improper grounding of such

fences and other numerous hazardous conditions. With this in mind it would be reasonable for the company to be entitled to know where the live stock is being kept so that it may determine whether or not to continue the insurance in force.

We believe that where the contract of insurance is reasonable in its terms and the insured is fully apprised of all his rights and in fact has exercised his right thereunder by obtaining a removal permit for his live stock, and subsequently, in the absence of such permit, loses one of his horses in a location different than that covered by the policy, and where the agent of the company or the company itself has no knowledge of the removal of such animal to a place not covered by the policy and no notice of such removal, and such animal is struck by lightning and killed, the unauthorized removal of such animal was a breach existing at the time of the loss and contributed to the loss.

The judgment of the trial court was right and is

AFFIRMED.

IN RE ESTATE OF ALBERT O. YETTER.
VAN T. WESCOTT, APPELLANT, V. EMMA S. YETTER, EXECUTRIX, APPELLEE.

FILED DECEMBER 29, 1933. No. 28690.

1. **Executors and Administrators: ADMINISTRATION OF ESTATES: PRESENTMENT OF CLAIMS.** Ordinarily, a person having a claim against an estate may not rely upon statements of a third party, not authorized to represent the executor or the estate, that no probate proceedings have been commenced.
2. ———: ———: ———. A claimant against the estate of a deceased person is not entitled to have time extended beyond that duly fixed by the county court so that he might present his claim, where such claimant has been guilty of inexcusable inattention, neglect, or lack of diligence.
3. ———: ———: ———. The promise by an executrix to a claimant before expiration of time for filing claims that she

will make a payment on a claim against her deceased husband at a date after the time fixed for filing claims is not such a statement as to excuse the claimant for not filing his claim in proper time.

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

G. A. Munro and *R. H. Mathew,* for appellant.

Warren Pratt and *Ira D. Beynon, contra.*

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

RAPER, District Judge.

This action, according to statements in appellee's brief, originated in the county court of Buffalo county, to obtain leave to file a claim against the estate of Albert O. Yetter, deceased, after the date fixed for presenting claims. It appears from statements in appellee's brief (which should have been in plaintiff's petition, and which seem necessary to an understanding of the issue) that the will of Albert O. Yetter was duly probated on March 30, 1932, and the county court then made an order directing that claims of creditors be filed prior to June 30, 1932, and for presentation, examination and allowance of same on July 6, 1932, and that notice thereof should be given by publication in the Kearney Tribune, which was all done in a legal and regular way, and that appellant, on July 14, 1932, filed in the county court an application for order extending time for filing his claim in which he designated his claim as contingent. A demurrer was interposed by the executrix, which that court sustained and an appeal was taken to the district court.

On August 23, 1932, appellant filed an application in the district court, which he designated as an "application for order extending time for filing claims and for allow-

ance of contingent claim." In that application Van T. Wescott, appellant, alleges that he is the owner and holder of a promissory note signed by testator, and J. G. McKee and Etta McKee, which note is secured by a chattel mortgage on certain property, and that there is due and owing appellant thereon $2,000 and interest; that on or about February 9, 1932, Albert O. Yetter died, leaving a last will under the terms of which Emma S. Yetter, his wife, was made executrix and sole legatee; that thereafter an order was made by the county court of said county requiring creditors of said estate to file claims on or before June 30, 1932, as the day for hearing on claims; that petitioner had no knowledge that the last will and testament of Albert O. Yetter, deceased, had been filed for probate or that an executrix had been appointed or that a time had been fixed by said county court for filing claims, or of the notice to creditors to present their claims against said estate, until July 12, 1932, after the time for filing claims had expired.

Petitioner further alleges that he has been diligent in attempting to protect his rights, and he has since the death of Albert O. Yetter had frequent interviews with J. G. McKee concerning said indebtedness; that said J. G. McKee, one of the makers of said note and chattel mortgage, is the son-in-law of decedent and Emma S. Yetter, and said J. G. McKee frequently requested petitioner not to talk to Emma S. Yetter or bother her about said indebtedness; that in May, 1932, said J. G. McKee stated to petitioner that no probate proceedings had been commenced on the estate of Albert O. Yetter, and that Emma S. Yetter was upset and they felt that there was no hurry about commencing such probate proceedings; that said statements were false and said McKee knew they were false and were made for the purpose of fraudulently preventing petitioner from discovering the pendency of the probate proceedings and filing his claim, and that petitioner relied on said false statements; that about

the middle of June, 1932, petitioner talked with Emma S. Yetter about said indebtedness and requested that some payment be made thereon, and that Emma S. Yetter then stated that she would be able to make a substantial payment thereon after the 6th of July, 1932, and that she anticipated a large business during the Veterans' convention and also to receive some rents from property in Lexington by said date and requested that petitioner wait until after said date, which said date was the day fixed by the county court for hearing claims, which she well knew, but was unknown to petitioner; that she made no payment after July 6, and that her said statements were made by her fraudulently and for the purpose of preventing petitioner from discovering the pendency of the probate proceeding and from filing his claim; that the security covered by the chattel mortgage is insufficient to satisfy the amount due on said notes, and unless petitioner be allowed to file his claim, he will be unable to collect the deficiency. He prays for an order extending the time for filing claims against said estate and for allowance of his claim.

A demurrer was interposed by the executrix, which was sustained by the district court, and petitioner Van T. Wescott appeals.

The appellee asserts that appellant's notes are not a contingent claim. The petition states that the deceased signed the notes. The fact that he also signed the chattel mortgage does not fix the status of the claim as contingent. *In re Estate of Golden,* 120 Neb. 233. The erroneous naming of the application as for a contingent claim is immaterial in the determination of the issue. The application does allege an absolute claim, and the right to file it must be determined under sections 30-603, 30-604, and 30-605, Comp. St. 1929, and not under the law relating to contingent claims.

Section 30-603 places upon county courts the duty to fix the time for presenting claims against an estate, which in the first instance shall not exceed eighteen months nor

less than three months. Section 30-604 provides the court may extend the time allowed creditors to present their claims, as the circumstances of the case may require, but not so the whole time shall exceed two years.

Section 30-605 reads: "On the application of a creditor who has failed to present his claim, if made within three months after the expiration of the time previously allowed, the court may for good cause shown allow further time * * * for the filing and determination of such claim." The sole issue is whether appellant's application states a good cause within the meaning of the statute.

Appellant knew of the death of Albert O. Yetter, but did not know that any probate proceedings had been begun to administer his estate. The lack of actual knowledge of those proceedings, together with what was said to him by J. G. McKee and Emma S. Yetter, the executrix, constitute the excuse for his default. We assume from the statements in the brief and appellant's petition that the probate of the will and the order fixing time for filing claims on or before June 30, 1932, and published notice to creditors were duly and legally made. The son-in-law, J. G. McKee, did not state that he was the agent or authorized to represent the estate or the executrix, and claimant's inquiry of McKee shows that he knew that he must present his claim to the county in order to recover from the estate. The fact that McKee told him no proceedings had been begun did not give claimant the right to rely on such statement. McKee's statement that the widow was upset and his request not to bother her about the matter, perhaps, might tend to induce the claimant, out of tender regard for the feelings of a bereaved and grieving widow, to hesitate about "bothering" her about it. But he does not allege that he did not refrain from speaking to her about the debt on that account, but by his own allegation he did not rely on McKee's statement, and did about the middle of June ask her about payment. What she said to him was not in any manner such as to give him the right to assume that she would pay his

claim without the allowance of the same by the county court, which action he knew must be taken before any payment could come from the estate. If he understood or felt that the executrix meant to pay it on her own account or out of her means, that would not bind the estate nor give reasonable grounds for an excuse to delay filing his claim.

In re Estate of Golden, 120 Neb. 226, is the latest case in this state upon the question here involved and is the most directly in point. In that case it was shown that the claimant had actual knowledge of the pendency of the administrative proceedings before the time for presenting claims had expired. In that opinion it is said that the claimants were chargeable with constructive notice authorized by statute and given. It further states that there was no evidence of fraud, accident, mistake, unavoidable misfortune, excusable neglect, or diligence.

In the case at bar it is claimed the statements of McKee and the executrix were fraud of such a character as to lull the claimant into a state of inactivity and to lead him to believe that there was no occasion for haste in filing his claim. But, as stated above, the acts and statements of those parties were not such as to reasonably give excuse for not presenting the claim in proper time. The *Golden* case very aptly states that claims against a solvent estate make a strong appeal to morality, justice, and equity, but the arbitrary bar of the nonclaim statute and the peremptory order of the county court pursuant thereto apply alike to just and unjust claims.

The order of the county court duly made and entered and publication of notice to creditors in compliance therewith are not lightly to be disregarded, and to avoid the effect of such proceedings a claimant seeking to open up the estate for a belated claim must show good cause, which the claimant in this case has failed to do.

The judgment of the district court is

AFFIRMED.

JACOB HOGSETT V. STATE OF NEBRASKA.

FILED JANUARY 4, 1934. No. 28656.

Rape: EVIDENCE: CORROBORATION. "In a prosecution for the crime commonly called statutory rape, where the prosecuting witness testifies positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction." *Mott v. State*, 83 Neb. 226; *Force v. State*, 105 Neb. 175; *Larson v. State*, 110 Neb. 620.

ERROR to the district court for Chase county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Clyde Anderson and *Hastings & Hastings*, for plaintiff in error.

Paul F. Good, Attorney General, and *Paul P. Chaney, contra.*

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

PER CURIAM.

In a prosecution by the state in the district court for Chase county, Jacob Hogsett, defendant, was convicted of rape upon Mattie Redden, a female child fourteen years of age. For that felony he was sentenced to serve a term of seven years in the penitentiary. As plaintiff in error defendant presents for review the record of his conviction.

The principal ground urged for a reversal is the failure of the state to prove circumstances corroborating the felonious act to which prosecutrix testified. After two arguments on this point and examination of the evidence at two different times, the court is of the opinion that the position of defendant upon review is well taken. Prosecutrix testified directly to the felonious act at the time and place charged in the information and defendant as positively denied it. Corroboration essential to a conviction was insufficient for that purpose under the following rule of this court:

"In a prosecution for the crime commonly called statutory rape, where the prosecuting witness testifies positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction." *Mott v. State,* 83 Neb. 226; *Force v. State,* 105 Neb. 175; *Larson v. State,* 110 Neb. 620.

For insufficiency of corroboration, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

CHARLES F. LYMAN ET AL., APPELLANTS, V. NEIL H. DUNN, APPELLEE.

FILED JANUARY 4, 1934. No. 28717.

1. Judgment: VACATING. In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered.
2. ———: ———. 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.
3. ———: ———. The lack of diligence of a party or his attorney is not an "unavoidable casualty or misfortune," under

the seventh subdivision of section 20-2001, Comp. St. 1929, preventing the party from defending an action at a former term of court.

APPEAL from the district court for Adams county: LOUIS H. BLACKLEDGE, JUDGE. *Reversed, with directions.*

J. M. Fitzgerald, R. O. Canaday and *James E. Addie,* for appellants.

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

GOSS, C. J.

This is a review of the order of the district judge, setting aside a judgment against defendant.

April 6, 1931, plaintiff Lyman sued defendant in equity for an accounting as to certain real and personal property owned by the three present parties but held by defendant, alleged to have been improperly and fraudulently handled and in part converted to defendant's own use.

June 6, 1931, defendant being in default, judgment in favor of plaintiff was duly entered against him. June 9, 1931, a stipulation on behalf of the parties was filed to the effect that the judgment might be set aside and plaintiff given 15 days to file an amended and supplemental petition. Later Higinbotham was allowed to become a party plaintiff and a petition was filed by plaintiffs Lyman and Higinbotham, alleging an oral partnership agreement of the three parties for the purpose of purchasing, handling and selling real and personal property, each to share equally in the ownership and profits. It alleged improper handling of the partnership property and failure to account therefor; and prayed for a dissolution of the partnership, for an accounting and for a judgment against defendant.

April 6, 1932, defendant applied for 20 days additional time to answer, but failed to answer. On May 10, 1932, default was entered against defendant and, upon a hearing, the court found against defendant and entered judgment against him in favor of each plaintiff severally. No

motion for new trial was filed. The record shows that this judgment was rendered at the January, 1932, term, which adjourned August 13, 1932.

August 11, 1932, defendant filed an application, in form of a verified petition, to vacate the judgment, the obtaining of which he charged to the negligence of his then counsel. He alleged in the petition that he had advanced out of his own funds for the protection of said partnership properties approximately $17,000 and received from the sale of two properties $8,000, leaving about $9,000 due from both plaintiffs; that he advanced Lyman $6,500 on a note involved in the enterprise and is entitled to recover said sum from Lyman; that he can and will account for all moneys which came into his hands and that the accounting will show the plaintiffs indebted to him approximately as above stated; and that, if the judgment is vacated, he will file an answer and cross-petition, setting forth the facts entitling him to relief, and will not delay the case for hearing. This petition was entitled "Showing and application for vacation of judgment." It was verified by affidavit of defendant. Service of notice that it would be called up for hearing forthwith, accompanied by a copy of the petition, was accepted in writing by attorneys for Lyman and Higinbotham on August 11, 1932. But it was not then called up or heard.

On October 11, 1932, being in the September, 1932, term of court, the court heard the application, upon testimony set aside the default and judgment entered May 10, 1932, and authorized defendant to answer by October 15, 1932, upon paying all costs to that date. Plaintiffs appealed from this order and from an order overruling their motion for a new trial on the issue. Defendant-appellee filed no brief and made no argument in this court. The bill of exceptions was filed on March 25, 1933. On March 28, 1933, defendant's attorney, who represented him only on the application and hearing in the district court, withdrew here and a certified copy of his withdrawal was, at his request, sent to appellee.

The assignments of error deny the jurisdiction and power of the district court to hear and determine the application and to vacate the judgment, and allege that the facts pleaded and proved are insufficient to authorize the vacation of the judgment and that it is contrary to the law and the evidence.

If the application to vacate the judgment had been heard by the court at the term at which it was filed, appellants concede that the court would have had the power to vacate the judgment. That has been the settled law in this jurisdiction many years, if there has been no abuse of judicial discretion in exercising the power within the same term. *Smith v. Pinney,* 2 Neb. 139; *Volland v. Wilcox,* 17 Neb. 46; *Harris v. State,* 24 Neb. 803; *Bigler v. Baker,* 40 Neb. 325; *Bradley v. Slater,* 55 Neb. 334. There was a rehearing in the last named case and it was again affirmed in *Bradley v. Slater,* 58 Neb. 554, the opinions being by Judge Sullivan. In the latter opinion and syllabi it was said: "Courts of general jurisdiction possess inherent power to vacate or modify their own judgments at any time during the term at which they were pronounced. This power exists entirely independent of any statute. It is derived from the common law, and the provisions of the Code of Civil Procedure relating to new trials do not assume to abolish or abridge it. Section 314 (now Comp. St. 1929, sec. 20-1142) of the Code does not deal with the power of the court, but with the rights of the litigant." "A defendant against whom judgment has been rendered by default may during the term, and after the expiration of three days from the date of the judgment, ask the court, as a matter of judicial grace and in furtherance of justice, to grant him a new trial; and the court may comply with his request regardless of the form in which it is presented." There the judgment was vacated at the same term in which it was entered.

Here the judgment was vacated at a subsequent term. In *Schuyler Building & Loan Ass'n v. Fulmer,* 61 Neb. 68, a decree of foreclosure was rendered on August 10, 1896,

finding a certain sum due from defendants and ordering a sale of the mortgaged property. During the same term, on September 28, plaintiff filed a motion asking the court to set aside the findings and order for reasons stated. Shortly afterwards the court adjourned *sine die*, without having acted upon this motion. At the next term the court granted the motion, set aside the former decree, entered a new decree against the mortgagors in a larger amount and directed the premises sold as had been ordered done in the first decree. Mortgagors appealed to this court. The concluding words of the opinion written by Norval, C. J., are applicable:

"Such decrees are final orders or judgments within the meaning of the Code and are reviewable before sale and confirmation. This being the case, the lower court could only set aside the first decree entered by granting a motion for a new trial, which should have been filed within three days after the entering of said decree. That not having been done, and the term of court at which the first decree was entered having terminated without any action on the part of the court to set it aside on its own motion, it lost jurisdiction to vacate or in any wise modify it. Hence the action of the lower court in attempting to set aside the decree of August 10, and in entering the second decree, was void and of no effect, and said second decree is, therefore, set aside and reversed, and the former decree reinstated."

In *State v. State Journal Co.*, 77 Neb. 771, an original action in this court wherein its jurisdiction was concurrent with the district court, it was held that the provisions of the Code applied; and that "The court therefore has no power or jurisdiction to set aside a judgment and allow the amendment of a petition, in its discretion, after the final adjournment of the term at which the judgment was rendered." The opinion, by Judge Letton, cites *Huntington & McIntyre v. Finch & Co.*, 3 Ohio St. 445, in which it is said:

"The court of common pleas has ample control over

its own orders and judgments during the term at which they are rendered, and the power to vacate or modify them in its discretion. But this discretion ends with the term, and no such discretion exists at a subsequent term of the court."

We adhere to the principles heretofore followed and hold that the trial court had no discretionary power or authority to vacate the judgment on application made within the judgment term but considered and ruled on at a subsequent term.

It remains to consider the application as if made under section 20-2001, Comp. St. 1929, as perhaps defendant and his attorney intended.

We recently decided: "A district court has power to vacate or modify its judgments or orders after the term at which they were made, only for the reasons stated and within the time limited in chapter 20, art. 20, Comp. St. 1929." *State v. Security State Bank, ante,* p. 516.

Section 20-2001, Comp. St. 1929, gives a district court power to vacate or modify its judgments or orders after the term at which they were made, for nine different reasons, each of which is stated in a subdivision of the section. Under the facts here the only one involved is the "Seventh. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending."

The only thing that prevented defendant from acting within the term was either his own neglect or that of his then attorney, or both. From the testimony taken and preserved, it is not clear that the failure to answer was due to the attorney, but it is not necessary to decide between them. Defendant was very lacking in diligence, and a similar lack, if any, on the part of his counsel was attributable to the client and furnished no legal grounds for the vacation of the judgment. *Ganzer v. Schiffbauer,* 40 Neb. 633; *Scott v. Wright,* 50 Neb. 849; *Funk v. Kansas Mfg. Co.,* 53 Neb. 450; *Tootle-Weakley Millinery Co. v. Billingsley,* 74 Neb. 531. We conclude that the lack of diligence of a party or his attorney is not an "unavoid-

able casualty or misfortune," under the seventh subdivision of section 20-2001, Comp. St. 1929, preventing the party from defending an action at a former term of court.

The judgment of the district court is reversed, with directions to set aside the order vacating the judgment against defendant and to reinstate that judgment.

REVERSED.

RUDOLPH H. HOBZA, APPELLEE, V. STATE FARMERS INSURANCE COMPANY OF OMAHA, APPELLANT.

FILED JANUARY 4, 1934. No. 28670.

Evidence examined, and *held* to sustain the judgment entered by the district court.

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

Arthur F. Mullen and *Paul P. Massey,* for appellant.

Dowling & Thielen, contra.

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

EBERLY, J.

This is an action at law upon a "domestic assessment association" policy bearing date August 24, 1931, issued by the defendant, State Farmers Insurance Company of Omaha, to the plaintiff, Rudolph H. Hobza, insuring the latter against loss or damage to the property described therein by fire, lightning, tornado and wind. On November 15, 1931, certain property described in this policy was completely destroyed by fire. This action was instituted to recover the loss and damage thus caused. The defendant interposed as its defense the contention that under the by-laws constituting a part of the insurance contract an assessment had been levied upon the insured which became due and payable October 1, 1931, and de-

linquent November 1, 1931, and plaintiff having utterly failed to pay the same, the policy ceased to be enforceable thereafter, and was in that condition at the time the property was destroyed. A jury was waived by stipulation and the cause tried on the merits to the court, and judgment was entered for plaintiff. Defendant appeals.

The evidence clearly establishes as a fact that the assessment payable October 1, 1931, was unpaid on November 15, 1931, when the loss occurred. But plaintiff challenges the validity of this assessment as being in excess of the limitation upon assessments provided in said policy, and contends that the legal effect of the default of plaintiff in the payment of this assessment on or before November 1, 1931, was waived by the defendant as the result of the following transaction: On November 5 the plaintiff mailed to the defendant his check for $27.15, drawn on a bank therein named, the same being the amount of the assessment. It seems that the record justifies the inference that this check was duly indorsed by the insurance company and transmitted in due course of business to the drawee bank named therein, where payment was refused and this instrument was thereupon returned because of "insufficient funds." The insurance company, it appears, had credited the check as payment of this assessment payable October 1, the entry being made on November 8, 1931. On the return to it of this check, unpaid and dishonored, it had "charged it back" on November 14, 1931. On January 2, 1932, the plaintiff evidently requested the return of this dishonored check, which was refused on January 6, 1932, the reason therefor, as stated by the secretary of the company, being: "We cannot return this check until an equivalent amount is received, as it is the only evidence we would have for the state examiner, as to why we made this charge off in the journal."

But the defendant also introduced evidence from which the following facts may be justly inferred: Hobza became a member of the State Farmers Insurance Company

of Omaha, Nebraska, in October, 1924. At that time he paid as "an advance assessment" the sum then required by section 1, art. V of defendant's by-laws; and October 1 has been treated as his "assessment date" since his membership in the company was obtained. Thereafter at a regular meeting held on the first Thursday after the second Monday in January, 1925, and on a like date in each subsequent January of the years 1926, 1927, 1928, 1929, 1930, 1931, there was levied by the board of directors an annual assessment in the sum of 2½ mills on the amount of insurance carried by plaintiff. These annual assessments were paid by plaintiff excepting only the assessment made in January, 1931. The failure to pay the assessment last referred to constitutes the entire basis of defendant's denial of plaintiff's claim. The actual loss of the property by fire is unquestioned.

Naturally the first question presented for consideration is the plaintiff's challenge to the validity of the assessment. It appears that the insurance company in this litigation may be properly termed a "domestic assessment association." An "assessment association," as defined by statute, "is one that meets its losses and expenses from assessment levied upon its members." Comp. St. 1929, sec. 44-102. See *Western Life & Accident Co. v. State Insurance Board*, 101 Neb. 152.

The fact renders controlling, so far as applicable, the sections of our insurance code pertaining to assessment associations, thereby including section 44-402, also sections 44-901 to 44-911, inclusive, Comp. St. 1929. These provisions *in pari materia* are to be construed together. *In re Estate of Mathews, ante*, p. 737.

In section 44-402, Comp. St. 1929, we find the provision: "Any assessment association organized to insure property may, in its by-laws, limit the liability of its members for assessment * * * to" a rate "which upon dwelling-houses and farm properties insured against loss by fire and lightning shall not be less than one-half of one per cent. per year after the first assessment. If the amount col-

lected in any one year, including the amount in the contingent funds, be insufficient to pay all losses sustained and expenses incurred during that year, then the members sustaining losses shall receive their proportionate share of such funds in full satisfaction of their losses."

Section 44-908, Comp. St. 1929, provides for, and authorizes, this "first assessment" which is collected at the inception of each insurance contract as referred to in section 44-402. This is in turn the foundation of the "contingency fund." The statutory plan thus evidenced contains the further provision: "Any diminution of the contingency fund (by payments, expenses, etc.) shall be a liability to be provided for by the next assessment." Comp. St. 1929, sec. 44-909.

By section 44-902, Comp. St. 1929, the right of assessment by the company is limited to a method which will secure for each member an assessment in "proper proportion to his risk" and not in excess of such member's *"pro rata* amount" of his "liability for losses and his share of the expenses," subject of course to the further limitation already referred to.

Section 44-903, Comp. St. 1929, provides: "No assessment shall be made on a member for liability occurring prior to his membership."

Section 44-902, Comp. St. 1929, also provides: "All assessments shall be made by the board of directors unless otherwise provided in the articles of association (incorporation)."

The articles of incorporation (or association) of this company provide: "The board of directors shall * * * Fourth, levy assessments." (Art. VII, sec. 2.)

Two inescapable conclusions are supported by a fair construction of all the statutory provisions above referred to, considered in reference to the facts disclosed in the record in the instant case, viz., assessments must be levied by the board of directors subject to the limitations expressed, which are to be construed as on an annual basis, and can only be levied for losses actually accrued at or

prior to the date of the assessment levied; and future anticipated losses or expenses may not be covered by assessments. Indeed, this is the undoubted rule in assessment associations in the absence of statute or express membership contract to the contrary.

"But generally the authority of the directors to make assessments to pay losses and expenses, however broad the language of the provision conferring it, is not absolute. It depends upon the contingency of the happening of the losses and expenses to which the persons assessed are liable to contribute, and which have been duly ascertained by the directors and necessitate a resort to an assessment." 32 C. J. 1216. And this power to levy assessments may not ordinarily be delegated. 32 C. J. 1215.

In other words, in view of the language embodied in our controlling statute, the articles of incorporation and the by-laws before us, the power of this company to levy assessments is strictly limited to the amount of the losses sustained and unpaid, and the actual expenses incurred, at the time the assessment is made. *Farmers Mutual Fire Ins. Co. v. Knight,* 162 Ill. 470, affirming 59 Ill. App. 274; *Vandalia Mutual County Fire Ins. Co. v. Peasley,* 84 Ill. App. 138; *Sinnissippi Ins. Co. v. Farris,* 26 Ind. 342; *Sinnissippi Ins. Co. v. Wheeler,* 26 Ind. 336; *Sinnissippi Ins. Co. v. Taft,* 26 Ind. 240; *Smith v. Republic County Mutual Fire Ins. Co.,* 82 Kan. 697; *York County Mutual Fire Ins. Co. v. Bowden,* 57 Me. 286; *Ibs v. Hartford Life Ins. Co.,* 121 Minn. 310; *Schultz v. Citizens Mutual Life Ins. Co.,* 59 Minn. 308; *Rosenberger, Light & Co. v. Washington Mutual Fire Ins. Co.,* 87 Pa. St. 207; *Orr v. Beaver and Toronto Mutual Fire Ins. Co.,* 26 U. C. C. P. (Ont.) 141.

At the trial the following facts were established by defendant's evidence: The membership of plaintiff in this company began in October, 1924. There was a contemporaneous payment of the initial "advance assessment." At the annual meeting of the board of directors in January following he was assessed 2½ mills. This action

was repeated at each annual January meeting of this body. Defendant's witness testifies that October, 1924, "is the date on which he (plaintiff) became a member and when assessments are made that would be the date on which he would owe it, the annual assessment." Yet, the only authority lawfully possessed by the board of directors was to levy an assessment at each of these annual meetings for the losses accrued and expenses made at and prior to the date of the levy and subsequent to plaintiff's becoming a member of the corporation.

Granting, arguendo, that such board of directors might make a valid levy covering only losses occurring and expenses incurred at the date of such assessment, and permit time of payment to be extended to October ensuing, still in the instant case such action would be valid only so far as would be necessary to cover these liabilities which accrued prior to the date of the adoption of the proper resolution by the proper corporate agency. All in excess of that necessary sum would be invalid, and the insured, having paid the same in full, would be entitled to a credit on future assessments to the extent of the invalid portion thus satisfied. This in the instant case would, in view of the lack of evidence in the record, be an indefinite amount.

But the nature of the evidence in the record tends rather to sustain the conclusion that the resolution of assessment adopted by the board of directors in January subsequent to October, 1924, which levied 2½ mills, was intended, so far as plaintiff was concerned, to cover and provide for the payment of the losses accruing and the expenses of the company made between the October preceding such meeting and the October following the same; and this was likewise true as to all subsequent resolutions of assessments passed. As already ascertained, so far as concerns losses and expenses subsequent to the date of the adoption of each of such resolutions, the actions of the board of directors were ineffective and invalid as to that portion of "each assessment year" beginning at the

date of the resolution adopted and ending on October 1 ensuing; for losses and expenses could only be provided for after they had accrued, and future liabilities of this nature could not be anticipated and provided for as thus attempted by the defendant. Neither can this court determine from the evidence in the record what portion of the assessment levied in January, 1931, if any, was for the satisfaction and discharge of existing liabilities of the company which had accrued at and prior to the adoption of the resolution providing for the same; nor can it be ascertained what portion of such assessment was invalid because attempting to provide for then nonexisting liabilities. At best, the controlling assessment before us must be deemed valid in part and invalid in part, the extent of each portion not being disclosed. The whole matter is thus uncertain and indefinite in all respects.

Forfeitures are not favored, and the burden of fairly establishing facts in justification of the same was, by the issues on which the case was tried, imposed on the defendant. This burden it failed to carry. No valid assessment in any definite amount was affirmatively established by the evidence. It affirmatively appears that the assessment relied on by the defendant was in part, possibly wholly, invalid. Therefore, there was no failure on part of the plaintiff to pay an assessment which, under the terms of the contract, would justify a denial of liability by the insurer. This situation clearly appears from defendant's evidence in the record and was patent when it finally rested its case. Questions of waiver and estoppel discussed by the parties, and matters of pleading connected therewith, were thereafter wholly unnecessary to the disposition of the case and not for further consideration.

It appears to be conceded by all parties to this litigation that the judgment as entered in the district court, viz., "in the sum of $1,765 with interest at 7 per cent. per annum from November 15, 1931, and costs in the sum of $12.50," due to a clerical error, is excessive in the sum of $40.

It follows that to the extent of $40 the judgment appealed from must be deemed erroneous in the instant case. The judgment of the district court will therefore be reversed unless the appellee files a remittitur in the sum of $40 within 30 days. In case such remittitur is filed, the judgment as originally entered in the district court, thus reduced, will be affirmed.

AFFIRMED ON CONDITION.

DOUGLAS COUNTY ET AL., APPELLANTS, V. ELIZABETH E. SHANNON: METROPOLITAN UTILITIES DISTRICT OF OMAHA, APPELLEE.

FILED JANUARY 4, 1934. No. 28675.

Taxation: FORECLOSURE OF LIEN: DISTRIBUTION OF PROCEEDS. The proceeds of a tax foreclosure sale, brought by the county, should be applied, first, to the payment of costs; second, to the payment in full of all general taxes of the state, county, school district, and other governmental subdivisions (Const. art. VIII, sec. 4), and the remainder, if insufficient to pay all special assessments, shall be prorated equitably upon all special assessments due on said real estate.

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

Paul F. Good, Attorney General, Edwin Vail, Henry J. Beal and *Frank H. Woodland,* for appellants.

Seymour L. Smith and *Dana B. Van Dusen, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

PAINE, J.

The state of Nebraska, the county of Douglas, and the school district of the city of Omaha, as appellants, appeal from a supplemental decree of the district court directing that the proceeds of a county tax foreclosure, being insufficient to pay all tax liens against the property, should

be prorated between the general taxes and special assessments, without distinction. The Metropolitan Utilities District of Omaha is the appellee.

This action was brought by the county attorney of Douglas county, under a resolution passed March 9, 1926, by the board of county commissioners, directing the county attorney to proceed to foreclose the lien of all taxes delinquent in said county which had been offered for sale for taxes for three consecutive years and not sold for want of bidders, under the provisions of section 77-2039, Comp. St. 1929.

A decree of foreclosure was entered March 26, 1927. Upon September 11, 1929, after sale and confirmation, a motion was filed, asking the court to determine the proper method of distribution of the proceeds of the sale between the various governmental subdivisions entitled to participate in said distribution, as such proceeds were insufficient to pay in full the costs of the proceedings and the lien of the taxes and special assessments upon the property foreclosed.

It was the purpose of the motion of the county attorney to have a determination whether or not the special assessments ranked with the general taxes, which would require that the proceeds should be prorated as to all taxes and special assessments, or whether the funds, after the payment of the costs, should first be applied to the payment in full of the general taxes with interest, and the balance, if any remaining, then be prorated on such special assessments as might remain.

Upon August 31, 1932, a supplemental decree was entered that the proceeds of the sale should be apportioned *pro rata* between the county of Douglas, city of Omaha, school district of Omaha, and the Metropolitan Utilities District of Omaha, based upon the proportion between the total taxes and special assessments due each one of these governmental subdivisions, and without distinction between such subdivisions, and also without distinction between general and special taxes.

In other words, the court directed that there was no priority as between general taxes and special assessments, and that the fund should be prorated among the various political bodies holding tax liens, regardless of whether such liens arose from general taxes or special assessments. From this order the state of Nebraska, the county of Douglas, and the school district of Omaha appeal. The Metropolitan Utilities District is appellee herein, as its contention was upheld by the trial court. The city of Omaha appears to have no interest in this appeal, for the reason that it has both general taxes and special assessments involved, and would not, therefore, be financially affected by the outcome of this appeal.

The history of tax legislation relating to the point under discussion in the case at bar began perhaps with the General Statutes of Nebraska for 1867, p. 323, in which section 54 of the revenue law declared: "Taxes upon real property are hereby made a perpetual lien thereupon." In the general revenue law passed in 1873, this same statement is found in section 51, p. 917, and in the general revenue law of 1879 it can be seen that quite often the word taxes had come to be used to include both general taxes and special assessments.

In the Session Laws of 1879, at page 182, there is perhaps the first act to authorize certain officers to purchase real estate at tax sale, and in 1881, Laws 1881, ch. 75, for the first time the legislature authorized county commissioners to foreclose tax liens in an emergency act, and provided, in section 4 thereof, that the sheriff or special master commissioner should conduct such tax foreclosure sales in the same manner as a sale upon a foreclosure of a mortgage was conducted. In section 4473, Comp. St. 1899, it refers to the county purchasing "taxes of any kind." It is contended by appellee that from 1867 until 1903 there was no declaration of priority between general taxes and special assessments, and that the word taxes included both.

Passing now to the decisions which interpreted these

various sections of our laws in force during these years, we find that in *Wilson v. City of Auburn*, 27 Neb. 435, decided October 3, 1889, Chief Justice Reese set out that special assessments should be collected in the same manner as other city or village taxes. Following this case, it is urged that for a period of 15 years decisions of this court interpreted the term taxes to include special assessments. Then the whole matter came squarely before this court when Judge Grimes held in Logan county that a county was entitled to foreclose its statutory lien without first acquiring a tax sale certificate. When the appeal reached this court, we find two opinions, by Judge Sullivan and Judge Holcomb, covering 27 pages, entitled *Logan County v. Carnahan*, 66 Neb. 685, which held that there could be no foreclosure of a tax lien unless it was based upon a tax deed or a tax sale certificate. As there had been a great number of foreclosure proceedings conducted by counties without the purchase of tax sale certificates, a bill was immediately introduced in the legislature to validate all of these former sales. This bill had an emergency clause attached, and was approved April 8, 1903, and is found in the Laws of 1903 at chapter 77. There can be no question but what this validating act implies that, where the proceeds of former foreclosures brought by the counties did not bring sufficient proceeds to pay taxes in full, after the payment of the costs the balance had been prorated upon the several tax liens.

The General Revenue Act, passed in 1903, provided in chapter 73, sec. 231, that each county should have a lien upon each tract of land for all taxes, whether the same are state, county, township, school district, road district, city, village, or other municipal subdivisions, and may foreclose the lien, and section 238 provided that, if the proceeds of the foreclosure sale are not sufficient to pay the costs and all taxes, the same shall be prorated. This act gave to the county a blanket lien for all taxes. This section has now become section 77-2039, Comp. St. 1929, and is the section relied upon by the appellee.

On the other hand, we find that in 1903 the legislature also passed the scavenger act, found as chapter 75 in the Session Laws for that year, and in section 21 thereof provided that, if the proceeds from a tax foreclosure sale were not sufficient to pay all of the taxes assessed against any particular tract of land, the proceeds should be prorated, after the payment of costs, by paying, first, the general taxes, and then the residue should be applied upon special assessments, and while this only applied to the distribution of proceeds from scavenger tax foreclosure sales, yet it made a clear distinction between general taxes and special assessments.

In *Flansburg v. Shumway*, 117 Neb. 125, this court held that there was a distinction between taxes and special assessments, and that general taxes for state, county, school districts, etc., were a first lien on real estate and take priority over all other incumbrances and liens thereon, including special assessments.

By examining the revenue act of 1903 further, we find that sections 17 and 18 of chapter 73 provided that all general taxes due the state, county, school districts, etc., should be a first lien on real estate, and take priority over all other liens thereon, and that special assessments upon the same real estate should be subject to the general taxes. These sections, with a slight change in the language, but with the meaning intact, are found as sections 77-206 and 77-207, Comp. St. 1929, and are claimed to be in conflict with that part of section 77-2039 relied upon by the appellee, and set out hereinabove. It is the duty of the court to ascertain the intention of the legislature and give a natural construction to these conflicting sections, which if possible shall give full effect to all three sections. The construction contended for by the appellee, that the proceeds of a tax sale foreclosure, if insufficient to pay all of the taxes standing as a lien against the land, should be prorated between the general taxes and the special assessments in equal proportion, involves disregarding sections 77-206 and 77-207 entirely. This would hold

that these two sections are meaningless, while in the opinion of the court they should be given full force and effect.

All of these sections of the statute just referred to must, of course, give way if found in any way to be in conflict with our Constitution, or, if not in direct conflict, must be interpreted according to the plain provisions of the Constitution which govern them.

Section 4, art. VIII of the Constitution, provides that the legislature shall have no power to release or discharge any property from its proportionate share of the taxes, and provides further that no commutation of such taxes may be authorized in any form whatever. This section was found in the Constitution of 1875 at article IX, sec. 4, and, in discussing it, this court, in *Farnham v. City of Lincoln,* 75 Neb. 502, held that this section did not apply to special assessments to pay for local improvements.

With this clause of our Constitution in mind, the sections under consideration seem to require that the proceeds from such county tax sale foreclosures be handled exactly as the foreclosures of certain mortgages bearing definite priority one over the other, and that the mortgage holding a first lien will be preferred over subsequent liens. The only difference between such an action and the case at bar is that the priority of tax liens is not fixed by contract, but is, in the case of the proceeds of a tax foreclosure, fixed by the provisions found in our Constitution and statute, and under section 77-206, Comp. St. 1929, general taxes due to a state, county, school district, and other governmental subdivisions shall be a first lien on the real estate upon which it is levied, and shall be superior to special assessments levied and assessed against the same real estate. *Harlan County v. Thompson, ante,* p. 65; *Ittner v. Robinson,* 35 Neb. 133; *Commercial Savings & Loan Ass'n v. Pyramid Realty Co.,* 121 Neb. 493; *Mutual Benefit Life Ins. Co. v. Siefken,* 1 Neb. (Unof.) 860; 25 R. C. L. 189, sec. 102; *Iowa Securities Co. v. Barrett,* 210 Ia. 53.

We hold, therefore, that a district court, in entering a decree upon the proceeds from a tax foreclosure, should direct, first, the payment of costs, and, second, the payment of all general taxes to state, county, school district, and other governmental subdivisions in full. Then, after such general taxes and costs are paid in full, if the proceeds are insufficient to pay the outstanding special assessments in full, such proceeds shall be prorated equitably towards the payment of such special assessments, and the tract of land shall thereupon be released from all general taxes and special assessments levied against the same.

We find that the trial court, in directing that the proceeds of a county tax sale foreclosure should be prorated equally between general taxes and special assessments, was in error. Decree reversed and cause remanded.

REVERSED.

WILBUR LARSON V. STATE OF NEBRASKA.

FILED JANUARY 4, 1934. No. 28800.

Rape. Evidence examined in a conviction for rape, and *held* insufficient to establish that prosecutrix was previously chaste at the time of the commission of the act charged in the information

ERROR to the district court for Nuckolls county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Bernard McNeny, L. A. Sprague and *J. S. Gilham,* for plaintiff in error.

Paul F. Good, Attorney General, and *Paul P. Chaney, contra.*

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

PAINE, J.

The defendant, plaintiff in error, was convicted in the

district court for Nuckolls county on an information charging him with statutory rape upon Fern Maxine Sibert, a female child over 15 years and under 16 years of age, previously chaste.

This case was first argued to the court upon June 6, 1933, and, because it presented difficult questions, it was set down for reargument upon November 23, 1933.

The crime was charged in the information as having been committed on or about November 30, 1932. The defendant pleaded not guilty. The verdict of the jury rests solely upon the evidence of the sheriff and deputy sheriff. They had a conversation with the defendant in the jail on January 16, 1933, immediately after he was bound over to the district court. At this hearing he had been committed to jail in default of a bond of $2,500, and, so far as the record discloses, he has been in jail since said date.

The evidence shows that the defendant and the prosecutrix were married on the 23d of December, 1932, at Mankato, Kansas. She did not tell her parents of her marriage, and continued attending school in the ninth grade, and lived at home. Her parents learned of the marriage January 11, 1933. When she was called as a witness for the state, objection was made by the defendant to her competency as a witness against her husband, the defendant, on account of the marriage relation existing between them. The objection was sustained, and the prosecutrix was withdrawn as a witness. But her marriage was, of course, no bar to a prosecution for rape. *Zell v. State,* 189 Ind. 433, 9 A. L. R. 336.

The prosecutrix became 15 years of age on the 21st day of July, 1932. The defendant was 31 years of age. On the 20th day of February, 1933, the prosecutrix was examined by a physician, who heard fœtal heart-beats and decided that she was on that date five and a half to six months along in pregnancy. This would probably place the date of conception somewhere between August 20 and September 5, 1932.

Wilbur Larson, defendant, resided with his father and mother in Superior, in the last house at the south end of Bloom street, where they had resided for some years. Pearl Sibert, the father of the prosecutrix, resided on the next lot immediately north of the Larson residence. In the Sibert home were the parents, Raymond, a married son, and his wife, and Fern Maxine, the prosecutrix, also Kenneth, Ruby, and Lloyd. They had resided there for some two years. Lewis Larson, defendant's father, had to leave home for four or five months from July, 1932, and when the defendant, Wilbur, was called to go out and play with a dance orchestra to which he belonged, his mother invited Fern Maxine over to stay with her, so that, beginning in August, 1932, Fern Maxine slept at the Larson house from one to four nights each week until January 11, 1933, when her parents found out she was married, and would not let her go there any more.

The defense called no witnesses. The state, aside from the attending doctor, called as witnesses the parents of Fern Maxine and her brother Raymond, who each testified she was a chaste and decent girl, her father testifying, in answer to question 139: "What has her character as to morality—sex morality—been, so far as you have seen, has it been good or bad?" The answer, after a vigorous objection was overruled, was, "Good." The only other witnesses called were the sheriff and deputy sheriff, who testified that on January 16, 1933, the day the defendant was bound over to the district court, they had a talk with him in the jail. He was told nothing about it being a confession, or that it would be used against him; it was simply in the nature of a visit. The sheriff testifies that in that conversation the defendant said the first act of intercourse between them occurred March 3, 1932, in an automobile south of town, and that it was her first time. Then after that on other occasions they went north of town, and that, when she was staying at his home nights, when he would get home late she would come to his bed on his invitation two or three times each

week. The defendant also told the sheriff about getting the money to go over into Kansas and get married.

The deputy sheriff's evidence agreed with that of the sheriff, and, in addition, when he was asked what else he remembered, he answered: "Well, Wilbur asked me if the fact that he had married the girl wouldn't help him, and I says, 'It certainly won't hurt you, the fact that you married her would be a good thing, but you must remember that she is a little girl.'"

After defendant rested, a motion was made for an instructed verdict on the grounds that no venue had been proved, that evidence would not sustain a verdict, and that the state had failed to prove that the prosecutrix was previously chaste prior to the time of the offense charged. Thereupon, the rest was withdrawn, and the sheriff testified: "Q. Do you know where the home of the defendant Larson is? A. Well, I know all Wilbur told me. I know where it is about." And then he testified that Superior was in Nuckolls county, Nebraska.

Superior is a city of some size, and the evidence is that from Superior it is one mile to the Kansas line, but whether this is from the center of Superior, or from the southern boundary, is not shown. The home of the defendant is the last house at the southern end of a street; there is no evidence what the distance is from his home to the state line, and the evidence is that they drove south from his home in a car the night that the first act of intercourse took place.

It is insisted by counsel for the defendant that it is not shown by the evidence that the first act of intercourse took place in Nuckolls county. This court held in *Marchand v. State,* 113 Neb. 87: "In a prosecution for rape upon an alleged previously chaste female child between 15 and 18 years of age, acts of voluntary illicit intercourse between prosecutrix and defendant in another county, previous to the commission of the act on which the prosecution is based, is a complete defense." This decision also defines a chaste female as "one who has

never had unlawful sexual intercourse with a male prior to the intercourse with which the prisoner stands indicted."

Where, as in the case at bar, there is evidence showing many voluntary acts of illicit intercourse between the parties previous to the commission of the act upon which the prosecution is based, it is necessary, under the Nebraska decisions, for the state to prove, beyond a reasonable doubt, that such acts took place within the jurisdiction of the court. That the first act of intercourse might have taken place in Nuckolls county is not sufficient. The burden was upon the state to prove affirmatively, beyond a reasonable doubt, that it did. It failed to do so.

That prosecutrix was previously chaste is an essential element of the crime charged. The chastity of a female is a fact peculiarly within her own knowledge.

Where the prosecutrix is between the ages of 15 and 18 years, at the time the act occurred on which the prosecution is based, the burden, according to many Nebraska decisions, is upon the state to affirmatively prove the previous chastity of the prosecutrix beyond a reasonable doubt. This is discussed at length in *Woodruff v. State,* 72 Neb. 815, in which case the prosecutrix testified that she had been virtuous prior to the commission of the act charged. It was held: "Where the issue of the previous chastity of the prosecutrix is involved, evidence of the general repute of the prosecutrix is not admissible to prove prior unchastity." In *Burk v. State,* 79 Neb. 241, it is stated there was no evidence of her previous chastity except her own declaration, and it was held that "the evidence should show, beyond a reasonable doubt, that she was not previously unchaste."

After carefully considering many former Nebraska decisions on this point, we have reached the conclusion, with great reluctance, that, in order for the state to make out a *prima facie* case, it must establish the previous chastity of the prosecutrix beyond a reasonable doubt, otherwise the guilt is not established, and this the evidence of the

state failed to do. *Nabower v. State,* 105 Neb. 848; *Bailey v. State,* 57 Neb. 706; *Gammel v. State,* 101 Neb. 532; *Myers v. State,* 51 Neb. 517; *Leedom v. State,* 81 Neb. 585; *State v. Kelly,* 245 Mo. 489, 43 L. R. A. n. s. 476; 52 C. J. 1012; *Krug v. State,* 116 Neb. 185; *Hudson v. State,* 97 Neb. 47.

It is contended by the prosecution that, although the state may have failed to prove the previous chastity of the prosecutrix, still the conviction of the defendant may be sustained, because several acts of intercourse between the parties were admitted to the sheriff which occurred within the statute of limitations, and took place before she became 15 years of age; that the question of previous chastity would not be an element of these offenses, and that, each act being a separate and distinct offense, it was within the province of the jury to find the defendant guilty of any one of such several acts without any proof of previous chastity. On the record before us, this contention is without merit. The case was not prosecuted upon such a theory. No such issue was submitted to the jury, for the information was not so framed.

In determining the guilt or innocence of the defendant, the jury were limited by the instructions of the court, following the information, to a consideration of the acts occurring after the prosecutrix became 15 years of age. The jury were instructed that the previous chastity of the prosecutrix was an essential element of the crime charged, and that, if the state had failed to prove the same beyond a reasonable doubt, they should acquit the defendant. Under the instructions of the court, the jury might find the defendant guilty of any act of intercourse with the prosecutrix occurring after she became 15 years of age, but not of any act of intercourse previous to that time.

The sentence pronounced in this case was for a term of not less than three years nor more than seven years in the penitentiary. In case of another conviction, the court could avoid this error, as an indeterminate sentence

cannot be given in a rape case. Comp. St. 1929, sec. 29-2620; *Strong v. State*, 106 Neb. 339.

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

REVERSED.

LENEL E. SIMMERMAN, APPELLEE, V. FRED FELTHAUSER, APPELLANT.

FILED JANUARY 4, 1934. No. 28875.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: SUBMISSION TO OPERATION. When an employee receiving compensation unreasonably refuses to undergo a minor operation, simple, safe, and reasonably certain to effect a cure, the continuing disability results, not from the injury, but from his own wilful act, and warrants the suspension of such part of the compensation payments as would be relieved thereby until he does undergo such operation.
2. ———: ———: ———: BURDEN OF PROOF. What constitutes reasonable or unreasonable refusal on the part of an injured workman to submit to treatment, including minor surgical operations, to alleviate pain and suffering, or minimize damages, where the employer agrees to pay all hospital and medical bills, is a question of fact to be determined from the evidence. The burden of proof to establish that the tendered operation is simple, safe, and reasonably certain to effect a cure is upon the employer.
3. ———: ———: ———. Where medical experts, of similar skill and experience, disagree as to the probable success of an operation, a refusal by an employee to submit thereto under such circumstances is not unreasonable.

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

Cook & Cook, for appellant.

Abbott, Dunlap & Corbett, contra.

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

PAINE, J.

This is an appeal in a compensation case by the employer against an award for disability.

The plaintiff and appellee had been employed by the defendant and appellant for nine years as a filling station attendant, and on the date of the accident, June 11, 1931, he was drawing $30 a week. The accident occurred when his employer was taking him out in the country to do some work. Two cars collided and the employer's car was wrecked. The plaintiff's arm was caught and crushed, and the employer, not being able to stop the flow of blood, telephoned for an ambulance, and at the hospital it was found that, in addition to cuts in the arm, the skin and flesh on the back of the right hand had been torn away from the knuckles to above the wrist by being ground against the gravel of the highway. A plastic operation was performed, and it was dressed every other day, and late in July, when he left the hospital, there was still an open wound, which did not heal over for several months. From the date of the accident he was paid compensation until July 27, 1931, on which date the physician of the compensation carrier told plaintiff to report back for work, and while such doctor indicated that the employee was still suffering 75 per cent. disability of the hand, he thought that some motion and exercise might strengthen the hand. The plaintiff could only perform a very minor part of his former work, and was, therefore, paid only $5 a week as wages for the first two weeks, but after August 13, 1931, he was paid $10 a week wages, which still continues.

In the brief of defendant, all of the five propositions of law relied upon for reversal relate entirely to the proposed operation, and defendant insists that plaintiff should be denied all compensation unless he submits to this operation, and that the court's finding, that no operation had been tendered prior to the date of the trial, and that there was not sufficient evidence to compel plaintiff to submit to a surgical operation as a condition precedent to his recovery of an award, is all wrong.

While our Nebraska court has not passed upon this exact point, other courts have held that a motion made

at the trial to suspend compensation until employee submits to operation, which had been tendered theretofore, may be overruled. *Gulf States Steel Co. v. Cross,* 214 Ala. 155.

The case of *Kricinovich v. American Car & Foundry Co.,* 192 Mich. 687, is relied upon in the brief of defendant. In this case the defendant's surgeon had operated twice upon plaintiff's leg for a compound fracture, and the bone appeared to be firmly united and the wound healed, yet the plaintiff continually complained of pain, of which there were no objective symptoms. Three physicians testified, and agreed that the operations which had been performed were successful, and that, *if* there was the pain as complained of by the plaintiff, it could only be caused by the entanglement of a nerve filament in the scar, or in a calloused growth thrown out, and that a slight operation to loosen up the nerve tissue might stop the pain. The operation was not dangerous to life or health. All of the physicians who testified agreed that it would involve little suffering, and was not an experiment. The plaintiff's only objection was that he was afraid he would lose his leg and possibly his life. It was held that the plaintiff should first discharge his primary duty, to make use of every available and reasonable means to make himself whole, and that this he had not done, and that he must either submit to the operation or release his employers from the obligation to maintain him.

The case at bar can be distinguished from this case in many ways. In the first place, Dr. Reeder, who had entire charge of the case, testified that there was always an element of chance in an operation to release tendons from scar tissue, and that he would not venture the assertion that it would be 100 per cent. perfect, and the evidence shows that during all these months Dr. Reeder had not recommended nor suggested an operation while he was in charge of the patient. Dr. Harvey testified that he would not recommend an operation at this time, because he had some use of the hand as it was, and there

was a chance of making it worse. Dr. Moore, who was the surgeon for the Burlington, Union Pacific, and Northwestern railroads, testified that there were adhesions of the extensor tendons to the muscles and skin of the back of plaintiff's hand, and whenever he tries to move his fingers it pulls the skin, so that the operation would be to detach the skin from the tendon and take some of the membrane covering the muscles and from this make a sheath around each finger tendon, thereby making a new tendon sheath, and, while there was an element of chance in every operation, he testified that he knew no reason why this operation would not be successful, but it could not have been done at the time of the injury because the wound at that time was infected. Therefore, we see that one of the surgeons does not recommend the operation, another surgeon does recommend it, and the one who has had charge of the plaintiff all these months never suggested it.

"Where doctors disagree as to the probable success of an operation, the trend of the decisions is that a refusal by employee to submit to the operation under such circumstance is not unreasonable." *Wingate v. Evans Model Laundry*, 123 Neb. 844. See *Kingsport Silk Mills v. Cox*, 161 Tenn. 470. If the weight of the surgical testimony is adverse to an operation, the court should not compel the employee to submit to one.

The unreasonableness of the refusal of an injured employee to permit an operation to be performed is a question of fact to be determined by the evidence, and the burden of proof to establish that the tendered operation is simple, safe, and reasonably certain to effect a cure is upon the employer. *Frost v. United States Fidelity & Guaranty Co.*, 109 Neb. 161; *King Drilling Co. v. Massenburg*, 154 Okla. 236; *Neary v. Philadelphia Coal & Iron Co.*, 264 Pa. St. 221; *Myers v. Wadsworth Mfg. Co.*, 214 Mich. 636; *Cody v. John Hancock Mutual Life Ins. Co.*, 111 W. Va. 518, 86 A. L. R. 354; *Liberty Life Assurance Society v. Downs*, 112 So. (Miss.) 484; *Schiller v. Balti-*

more & O. R. Co., 137 Md. 235; *Bloomfield Brick Co. v. Blaker*, 94 Ind. App. 230; *Ritchie v. Rayville Coal Co.*, 224 Mo. App. 1128; *Consolidated Lead & Zinc Co. v. State Industrial Commission*, 147 Okla. 83, 73 A. L. R. 1298; *Lesh v. Illinois Steel Co.*, 163 Wis. 124, L. R. A. 1916E, 105; *Snook's Case*, 264 Mass. 92; *International Harvester Co. v. Scott*, 163 Tenn. 516.

The English courts have held that the workman is not unreasonable in refusing the operation where, in the opinion of his own doctor, it involves considerable risk to life, or where the workman's doctor advises that the treatment will be useless. Harper, Workmen's Compensation, 434; 2 Schneider, Workmen's Compensation Law, sec. 496; *Moore v. List & Weatherly Construction Co.*, 144 So. (La. App.) 147.

In attempting to reconcile many cases which will be found in conflict with these general statements of law, many of such cases will usually be found upon examination to be operations for hernia. In some of these cases, hernia is styled a major operation, and it is probably so accepted by the medical profession generally. However, it is an exception to the general rule in regard to major operations, because the technique of the operation follows along such well-established lines and the danger of infection and loss of life has been reduced to such a small percentage, together with the fact that, so long as the employee is not operated upon, he is for many kinds of work entirely disabled, and after a successful operation he is restored to practically the same condition as before; therefore, the courts have generally ruled on a hernia operation as if it were a minor operation. *Moran v. Oklahoma Engineering & Machine & Boiler Co.*, 89 Okla. 185; *Gentry v. Williams Bros.*, 135 Kan. 408. In one case involving an operation for hernia, the testimony showed that one operation out of a thousand for such hernia as the plaintiff had would result fatally; that 12 per cent. would not result in a cure, and that 88 per cent. would result in cure. *Strong v. Iron & Metal Co.*, 109 Kan. 117, 18 A. L. R. 415.

It is within the discretion of the injured party whether or not he cares to take the chance of the outcome of a surgical operation. The court will not speculate as to what might be the outcome of such an operation, and under the evidence we are unwilling to hold that the same would be simple, safe, and reasonably certain to effect a cure.

There being no error in the record, the judgment of the lower court is affirmed, with an allowance to plaintiff of $100 as attorney's fee in this court.

AFFIRMED.

STATE, EX REL. SORENSEN, ATTORNEY GENERAL, V. FARMERS & MERCHANTS BANK OF DESHLER, E. H. LUIKART, RECEIVER, APPELLEE: HENRY F. BEHRING, INTERVENER, APPELLANT.

FILED JANUARY 19, 1934. No. 28736.

Banks and Banking: TRUST FUNDS. A bank becomes agent of a depositor and holds the deposit as a trust fund when, with knowledge of the fact, it accepts a deposit made for the purpose of paying a specific obligation.

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

P. I. Harrison and *W. T. Thompson,* for appellant.

F. C. Radke, Barlow Nye and *Sloans, Keenan & Corbitt, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

GOSS, C. J.

Intervener appeals from a judgment refusing his claim as a trust fund against the assets of the bank.

In November, 1931, Farmers & Merchants Bank of Deshler was in financial trouble. Some of its officers called a meeting of officers and citizens on the night of

November 10, 1931, and offered a plan of reorganization. On that occasion Henry F. Behring was present. The plan proposed by the officers was put in writing in the form of subscriptions to $25,000 worth of new stock in the bank for the purpose of reorganization. It provided that the old stockholders should surrender and cancel their old stock and would take out $45,000 in notes covering the old stock and part of the surplus account. It was further understood that, unless the full amount of $25,000 should be subscribed, the subscriptions would be canceled. All of these points of agreement appear in evidence in the writing signed on that date by nineteen persons, each subscribing for $1,000 of the proposed new capital stock. Several were officers of the bank. Mr. Behring was the last to sign. Ultimately the plan failed, probably because no more subscriptions could be secured, and on December 31, 1931, the district court declared the bank insolvent. Later E. H. Luikart was appointed receiver and proceeded to wind up the affairs of the bank.

In the meantime, expecting enough subscriptions would be obtained, Mr. Behring arranged to borrow his subscribed amount from Alma Wulf of Denver, and so informed the officers of the bank. Miss Wulf sent a check for $1,000 directly to the bank. The bank officers at once deposited it to the credit of Behring's account on December 1, 1931, without any instructions from Behring. The transaction was effected by the officer writing a single deposit slip for the amount. From this slip it was posted in the ledger account of the customer. Behring went to the bank on the same day and was informed that the bank had received the money. The officer who handled the matter testified he and the officers knew the money was for the stock subscription; that Behring did not instruct him to put it in his checking account but that the officer did that on his own initiative. Behring never had a statement of his account from the bank showing that this money was deposited to the credit of his checking account, until after the bank was closed. In December,

1931, he made four deposits and drew 19 checks, but at no time did his drawings disturb the $1,000 credited on the books of the bank to his ledger account. When the bank closed it had sufficient cash assets to pay this claim. This item had augmented the assets of the bank.

It is clearly shown by the evidence that it was the intent of both bank and customer that the particular money should be used, if at all, only to carry out the terms of the subscription agreement. It was to be used to recapitalize the bank, if it should be reorganized, and for no other purpose. Both Behring and the bank kept the faith. As between the parties, at least, it could not be appropriated lawfully until the proposed $25,000 had been subscribed. That event never occurred.

But the receiver, acting in the interests of depositors and other creditors, denied the claim as a trust fund and classified it as an ordinary claim for a deposit. The question is, which position the rules of law support under the uncontradicted facts.

The bank assumed to act as the agent for Behring when, without directions, it took the check sent to it by Miss Wulf and on its own initiative deposited it in Behring's account to await the reorganization of the bank upon the fulfilment of the terms of the subscription contract. It may be said to the credit of the officers of the bank that the evidence indicates they still respect this fund as intended for the special purpose for which it was received and held.

The ruling principle is that expressed in the recent case of *State v. Bank of Otoe, ante,* p. 530, decided November 16, 1933. The second paragraph of the syllabus says: "A bank becomes agent of depositor and holds deposit as a trust fund when, with knowledge of the fact, it accepts a deposit made for the purpose of paying a specific claim." In the text it is said: "We think that the rule, as it exists here and in most of the states, is that a deposit made for a specific purpose, as for the payment of a particularly designated claim, partakes of the nature

of a special deposit and is in a distinct class by itself. When a deposit is so made in a bank, it acts as the agent of the depositor, and if it fails to apply the deposit as directed, or should misapply it, the deposit may be recovered as a trust fund. 7 C. J. 631, 632; *Hudspeth v. Union Trust & Savings Bank,* 196 Ia. 706, 31 A. L. R. 466, and annotation to said case appearing at page 472 *et seq.*" We refrain from quoting further from that opinion, the argument in which establishes that the fund there was a trust fund. We think the principle applies with equal force to the case under consideration.

Under the facts disclosed by the record and under the controlling authorities, we hold that, when Mr. Behring's money was left with the bank and was accepted by the bank for the known purpose of paying his subscription to the capital stock of the reorganized bank when the conditions of the subscription agreement were met, the bank held the fund as trustee. Its agency was not terminated by depositing the money to his credit in the circumstances shown. The bank having failed before the conditions of reorganization became effective, the receiver obtained no better right or title to the fund than the bank had. It was not divested of its trust character and should have been allowed as a trust fund.

The judgment of the district court is reversed, with directions to allow intervener's claim as a trust fund.

REVERSED.

JOHN E. SCOTT ET AL., APPELLEES, V. D. L. MCDONALD: MORROW & MORROW ET AL., INTERVENERS, APPELLANTS.

FILED JANUARY 19, 1934. No. 28739.

Garnishment: SUMMONS: SERVICE. Under statutory provisions that a summons in garnishment shall be served as a summons in an original action is served and that in an original action an acknowledgment on the back of the summons is equivalent to service, a receipt by a garnishee for a copy of the summons in

garnishment may be sufficient to confer jurisdiction upon the court, the receipt being attached to the summons when returned.

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

Morrow & Morrow and *Mothersead & York,* for appellants.

F. J. Reed, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

ROSE, J.

This is a controversy between rival claimants of a fund paid into court by a garnishee. In the district court for Scotts Bluff county, John E. Scott recovered a judgment against D. L. McDonald April 10, 1931, for $4,471.39, on which execution was issued January 2, 1932, and returned *nulla bona* the same day. In answering a summons in garnishment issued in the case of Scott against McDonald January 2, 1932, M. B. Quivey, on that date, stated he and J. M. Chirrick, garnishees, jointly owed McDonald a debt of $135.78 which had been reduced to judgment in another action wherein the costs were $45.45. January 2, 1932, Quivey tendered into court and paid to the clerk thereof the sum of his debt and costs or $181.23.

January 5, 1932, Morrow & Morrow, attorneys, intervened in the case of Scott against McDonald, pleaded a claim for an attorneys' lien of $75 for services in procuring the judgment in favor of McDonald against Quivey and Chirrick for $135.78, and prayed for an order on the clerk to pay their claim in full out of the fund in his hands.

February 15, 1932, Carr and Neff Lumber Company intervened in the case of Scott against McDonald and pleaded that the latter assigned to intervener the judgment in McDonald's favor for $135.78, subject to the attorneys' lien; that the garnishment was void for want of service of a summons on Quivey and Chirrick; that the

district court was without jurisdiction; that intervener as assignee of McDonald was entitled to the fund in court, subject to the attorneys' lien.

Upon a trial of the issues presented by the garnishment and the claims of interveners, the district court sustained the garnishment, directed the clerk to pay the costs in the case wherein McDonald had recovered the judgment against Quivey and Chirrick for $135.78 and to turn over the remainder of the fund in court to George J. Carpenter, to whom the judgment in favor of Scott for $4,471.39 had been assigned. Interveners appealed.

It is argued as a ground of reversal that the summons in garnishment was not served on garnishee and that consequently the court acquired no jurisdiction over the fund in the hands of Quivey, one of the persons named as garnishee. On its face the summons shows it was in proper form and was regularly issued January 2, 1932. It was returned and filed January 5, 1932, and there was then attached to it the following:

"J. M. Chirrick and M. B. Quivey hereby acknowledge receipt of copies of the garnishee summons hereto attached. Dated this 2d day of January, 1932.

"J. M. Chirrick,
"M. B. Quivey."

Interveners contend that this was not service or the equivalent of service; that there is a material difference between the receipt of a copy of a writ and actual service or the acknowledgment of service; that jurisdiction can only be acquired in the manner prescribed by statute; that garnishment is an attachment by means of which money or property of a debtor in the hands of a third person may be subjected to payment of a creditor's claim; that the garnishee could not, by means of a voluntary appearance, deprive interveners of property rights.

Garnishment is a statutory remedy. Jurisdiction of the court depends on compliance with statutory requirements. There is a recognized difference between the

usual form of attachment and garnishment. In attachment the sheriff seizes property or levies on it. In garnishment the writ commands the sheriff to summon the garnishee to appear in court and answer under oath questions relating to goods, chattels, rights and credits. In attachment, possession of the property may be changed by seizure under judicial process, while in garnishment a change of possession may await an order of court. In one instance the legal process requires the seizure of property and in the other a garnishee's appearance in court is required. The distinction may become important when jurisdiction is involved. In garnishment the statutory procedure is substantially as follows: Upon a proper affidavit the clerk of the court "shall issue a summons as in other cases," requiring garnishee to appear in court and answer such interrogatories as shall be propounded to him, touching the goods, chattels, rights and credits of the judgment debtor in his possession or control. Comp. St. 1929, sec. 20-1056. "The summons shall be served as a summons in an original action is served." Comp. St. 1929, sec. 20-1058. According to civil procedure in original actions in the district court an acknowledgment on the back of the summons is equivalent to service. Comp. St. 1929, sec. 20-516. The statute provides:

"A garnishee may pay the money owing to the defendant by him to the sheriff having the order of attachment, or into court. He shall be discharged from liability to the defendant for any money so paid not exceeding the plaintiff's claim." Comp. St. 1929, sec. 20-1027.

In the case at bar the summons was not a spurious writ procured by garnishees for the purpose of depriving interveners of rights. It was a valid process issued on a sufficient affidavit. There is no evidence of fraud on the part of any one. When the summons was returned the garnishees' receipt for a copy was attached. The copy received by garnishees disclosed a demand on them to appear in court for a specific purpose. The receipt at-

tached to the summons was equivalent to acknowledgment on the back of the summons and amounted to service for the purpose of garnishment, within the intent and meaning of the statutes. The distinction which interveners make between acknowledgment of service and a receipt for a copy of the summons is deemed too refined, even for the purpose of testing jurisdiction. The summons, the receipt attached to it and the return evidenced the notice and the service essential to jurisdiction. Garnishees answered the summons and one of them paid into court the entire amount of the indebtedness owing to McDonald. All rival claimants appeared in court and litigated their claims. The answer of the garnishees was not a voluntary appearance. The act of answering was performed under the command of the summons pursuant to statutory authority. In point of time, the garnishment preceded the filing of any attorneys' lien and was prior to the assignment of the judgment in favor of McDonald. There was therefore no error in the proceedings and judgment of the district court.

AFFIRMED.

FIRST NATIONAL BANK OF WYMORE, APPELLANT, V. ADOLPH GUENTHER, APPELLEE.

FILED JANUARY 19, 1934. No. 28750.

1. **Appeal.** Determination of issues of fact in a law action is for the jury. Their verdict, based on conflicting evidence, will not be disturbed unless manifestly wrong.
2. **Infants:** CONTRACTS. Infant may avoid his contract, except for necessaries, in a reasonable time after attaining his majority. If he affirm after attaining majority, the contract may not thereafter be avoided on the ground of infancy.
3. **New Trial.** Error in instruction is no ground for a new trial unless prejudicial to complaining party.
4. **Chattel Mortgages:** DISCHARGE. Chattel mortgage may be discharged by substituting in lieu thereof a real estate mortgage, if the parties so agree.

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

J. A. McGuire, for appellant.

Hubka & Hubka, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

GOOD, J.

This is an action in replevin. Plaintiff claimed a special ownership by virtue of a chattel mortgage on the property replevied. Defendant Adolph Guenther answered, denying the validity of the chattel mortgage and asserting that it was without consideration. His wife, Cora Guenther, and son, Walter Guenther, intervened and claimed title and right of possession to a quantity of the corn that was taken under the writ. A trial of the issues to a jury resulted in a verdict and judgment thereon in favor of defendant and interveners. Plaintiff has appealed.

Respecting many of the questions presented, the evidence is sharply conflicting. The rule is well recognized that this court will not interfere with the verdict of a jury, based on conflicting evidence, in a law action unless it is manifestly wrong. The verdict of the jury requires this court to take that view of the evidence most favorable to the defendant and interveners.

The record discloses the following facts: In 1930 defendant owned a farm of 160 acres, which was encumbered to the extent of $15,000. He was indebted to the plaintiff, which held a chattel mortgage upon most of his personal property, in a sum slightly in excess of $3,000. In January, 1931, defendant exchanged the home farm for another farm, hereinafter referred to as the Odell farm, title to the latter being taken in the name of his wife, Cora Guenther. For the purpose of trade, the home farm was valued at $20,000, with encumbrance of $15,000, and, for the same purpose, the Odell farm was valued at $16,000 and encumbered for $11,000. In March, after this exchange, Mrs. Guenther, by written lease, leased the Odell farm to her son Walter for a period of one year,

at a rental of two-fifths of the crop grown on the leased premises.

Shortly after Mrs. Guenther acquired title to this farm, plaintiff's cashier called upon the Guenthers and requested them to give to plaintiff a second mortgage upon the Odell farm, to secure the note which was then secured by the chattel mortgage above mentioned. Defendant and his wife testify that it was the understanding and agreement that, if they would execute the second mortgage on the real estate, plaintiff was to release and discharge the chattel mortgage, and after they had executed the real estate mortgage, defendant requested the surrender of the chattel mortgage; that plaintiff's cashier represented to them that it would be better for them to leave the mortgage standing of record, as it would protect defendant from the claims of other creditors, but with the understanding that the mortgage was, in fact, released. Some months later, when the note, which was secured by the real estate mortgage, had become due, plaintiff's cashier again called upon defendant and asked him to renew the chattel mortgage. Defendant then referred to the fact that the mortgage was extinguished, but was advised by the cashier that it was to his interest to have the mortgage appear to have been renewed and a matter of record, to continue to protect him against the claims of other creditors, and upon the understanding that it was for that purpose only, he executed a new chattel mortgage, which is the one that forms the basis of this action. Defendant further testifies that he did not read the instrument, but relied upon plaintiff's cashier, and did not know that he had inserted in that mortgage a description of the corn growing upon the Odell farm. The evidence further shows that neither of the interveners had ever authorized the defendant to mortgage the corn on the Odell farm; nor did they know that he had done so until within two or three days before this action was begun. It is plainly evident that, if the corn grown on the Odell farm was the property of interveners, defendant could

not, without their consent, encumber it by a chattel mortgage.

Defendant and his wife, after the exchange of farms, continued to reside on the home farm as tenants, while Walter moved to the Odell farm, several miles distant, where he put in a crop and raised 120 to 125 acres of corn. The record shows that 1,115 bushels of corn, raised by him, were taken under the writ of replevin.

Plaintiff first complains of the refusal of the court to give an instruction that the lease from Cora Guenther to Walter Guenther was void because of the latter's minority. The record shows that he lacked four or five months of attaining his majority at the time the lease was executed. However, the rule of law is quite well settled in this jurisdiction, and we think in most jurisdictions, that the contract of a minor for other than necessaries is not void but voidable at his option after attaining his majority. *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54; *Ward v. Laverty*, 19 Neb. 429; *O'Brien v. Gaslin*, 20 Neb. 347; *Uecker v. Koehn*, 21 Neb. 559; *Englebert v. Troxell*, 40 Neb. 195; *Krbel v. Krbel*, 84 Neb. 160. It is the general rule that if he does not desire to be bound he must, within a reasonable time after attaining his majority, disaffirm the contract. In the instant case, he did not disaffirm, but, on the contrary, has affirmed, the contract after attaining his majority and is bound thereby. The court rightly refused the instruction requested by plaintiff.

Plaintiff complains that the court erred in two instructions relative to the interest of Cora Guenther and Walter Guenther in the corn grown on the Odell farm, in which he told the jury that Mrs. Guenther's interest, if they found for her, would be three-fifths, and Walter's interest two-fifths, of the corn taken from that farm. It is clear that the court simply transposed the relative proportions. It should have been two-fifths to Cora and three-fifths to Walter, but, in another instruction defining the issues, the court gave the correct proportions, and the jury in their verdict found in accordance with the

issues raised by the pleadings and the facts disclosed by the evidence. Plaintiff asserts that, because of this mistake of the court, the verdict is contrary to the law, as given to the jury by the court's instructions. Technically, this is correct, but, in any event, it is not harmful to the plaintiff. If the corn, grown on the Odell farm and taken under the writ, belonged to the two interveners, it was immaterial to plaintiff whether it went to one or the other of the interveners. Plaintiff was not harmed by the instruction. Harmless error in the instructions of the court is not ground for reversal of the judgment.

Plaintiff suggests on oral argument that the verdict is not supported by the evidence, in that the evidence indicates that 200 bushels of corn were taken under the writ in excess of that for which the jury found the plaintiff should account. We fail to see why plaintiff should complain. If it received 200 bushels of corn more than it was required to account for in the action, it was to its advantage and not to its harm.

With respect to the rights between plaintiff and defendant as to the other property taken under the writ, as we have above indicated, the evidence was in direct and irreconcilable conflict, but the jury were the triers of fact and, under the circumstances, their finding is conclusive upon this court, although it might, had it been the trier of fact, have found differently. A chattel mortgage may be discharged by substituting a real estate mortgage as security for the debt, if the parties so agree.

Plaintiff argues several propositions of law with respect to transfers between husband and wife, apparently upon the theory that the title to the Odell farm, taken in the name of intervener Cora Guenther, was fraudulent. It must be observed that no issue was raised in the pleadings upon that question. Plaintiff knew of the transfer and knew the property was in Mrs. Guenther's name when it took the mortgage; in fact, the officers of the bank, or some of them, drafted the papers for the conveyance and exchange of properties. The evidence, how-

ever, clearly shows that, although the home farm was valued, for trading purposes, at $20,000, it was worth little, if any, more than the encumbrance against it. It was their homestead and was not subject to fraudulent alienation. If the husband had transferred that property directly to his wife, the conveyance could not have been attacked as fraudulent, because homestead property is not subject to fraudulent alienation. The cases cited and relied upon have relation to actions in the nature of creditors' bills, directly attacking the conveyances as in fraud of creditors. No such action is here involved.

We find no error in the record prejudicial to plaintiff. Judgment

AFFIRMED.

EDITH BACON, APPELLEE, V. WESTERN SECURITIES COMPANY ET AL., APPELLANTS.

FILED JANUARY 19, 1934. No. 28699.

1. **Homestead**: INCUMBRANCE: VALIDITY. A mortgage purporting to incumber a homestead, executed and acknowledged by the husband, but to which the signature of the wife is forged, is void.
2. ———: ———: ESTOPPEL. When a wife learns that a mortgage is outstanding against her homestead, which she knows she has not executed nor acknowledged, her failure to make complaint to mortgagee will not estop her from claiming relief against it.
3. **Mortgages**: CERTIFICATE OF NOTARY: CONCLUSIVENESS. The certificate of a notary public, in regular form, upon a real estate mortgage, is not conclusive as to the facts therein set out, when it is proved that one of the signatures to said mortgage was forged.

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

Glenn N. Venrick and *Clarence T. Spier*, for appellants.

De Lamatre & De Lamatre, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

PAINE, J.

This was an action in equity, brought by a widow to quiet title against certain mortgages outstanding against her homestead, a residence property in Omaha. The court granted the relief prayed for by the plaintiff.

The petition, filed September 2, 1931, alleges in substance that the plaintiff, Edith Bacon, was the owner in fee simple of a certain residence lot in the city of Omaha, and had occupied the same continuously since she received title to it upon November 13, 1916. She further set out that there was on record in Douglas county against this property a series of nine mortgages, to wit: (1) Mortgage dated April 9, 1925, for $2,250, to the Conservative Savings & Loan Association; (2) a mortgage dated November 12, 1925, for $3,000, to the above mortgagee; (3) a mortgage dated January 3, 1928, for $800, to the Omaha Safe Deposit Company; (4) a mortgage dated March 18, 1926, for $4,500, to the Conservative Savings & Loan Association; (5) a mortgage dated September 12, 1928, in the sum of $4,700, to the Western Securities Company; (6) a mortgage dated September 13, 1928, for $638.40, to the Omaha Safe Deposit Company; (7) a mortgage dated October 1, 1930, for $3,800, to the Western Securities Company, duly assigned to the Penn Mutual Life Insurance Company; (8) a mortgage dated October 1, 1930, for $990, to the Western Securities Company; (9) a mortgage dated October 1, 1930, in the sum of $313.32, to the Omaha Safe Deposit Company.

The plaintiff testified that she did not sign, execute, or acknowledge any of the aforesaid nine mortgages, or the notes secured thereby. The evidence discloses that these nine mortgages were forged instruments, to each of which her husband signed his name and forged her name without her knowledge. They were husband and wife from December 1, 1916, until the death of the husband,

John P. Bacon, on June 10, 1931. It was decided by the trial court that the last three mortgages above set out should be canceled and surrendered and the title of the property quieted as against them, and the notes also be surrendered.

The evidence discloses further that the first group of this series of nine mortgages was paid off and discharged of record through the funds secured from the later mortgages.

Upon January 28, 1929, a foreclosure action was brought to foreclose mortgage No. 6, and summons was left at the residence for the husband and wife, which action was dismissed without prejudice upon October 24, 1930.

Upon November 6, 1929, a foreclosure action was also commenced upon mortgage No. 5, and service of summons was had upon the husband and wife on that day by leaving the same at their usual place of residence, and after the decree was entered on January 31, 1930, Cecil F. Shopen filed a request for stay for Edith and John P. Bacon on February 7, 1930, and, while pending stay, these two decrees of foreclosure were satisfied on October 18, 1930, by funds secured by Mr. Bacon from mortgages Nos. 7, 8, and 9. The evidence further discloses that the Western Securities Company mailed a registered letter to the plaintiff, notifying her they would bring foreclosure action on mortgage No. 5, and that she received this letter and signed the registry receipt for it upon October 24, 1929, and that the action was instituted thereon upon November 6, 1929. She claims to have left for McCook, Nebraska, immediately after signing the registry receipt, and remained there for five weeks, and that she never read the letter, and was not in Omaha at the time the summons was left at the home.

Her evidence that her signature was forged was supported by that of John H. Bexten and Oscar H. Holquist, two men who pass on disputed signatures in the First National Bank of Omaha. No handwriting experts were called by the defendants.

Cecil F. Shopen, an attorney-at-law, testified that he was not employed by plaintiff to represent her in the foreclosure suit, and had no transactions with her in reference thereto, but was employed by her husband.

1. Section 40-104, Comp. St. 1929, provides: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Nebraska cases are so numerous in support of this law, and the holdings have been so uniform, that one need but cite a few of the many cases. *McCreery v. Schaffer,* 26 Neb. 173; *Storz v. Clarke,* 117 Neb. 488; *Wilson v. Wilson,* 83 Neb. 562; *France v. Bell,* 52 Neb. 57; *Thompson v. Foken,* 81 Neb. 261. Our court, in addition to this uniform holding in regard to deeds and mortgages, has also held that an executory contract for the sale of the homestead, which the wife does not sign, is likewise invalid. *Meek v. Lange,* 65 Neb. 783; *Lichty v. Beale,* 75 Neb. 770; *Davis v. Merson,* 103 Neb. 397.

In the case at bar, the evidence was convincing that the signatures of both husband and wife to each of the mortgages were made by the same person, and that that person was the deceased husband.

2. The defendants insist that the plaintiff was guilty of want of ordinary diligence in taking no steps to ascertain the condition of the outstanding liens against her land after receiving their registered letter, and that, if she had promptly made complaint, the mortgages 7, 8, and 9, canceled by the decree of the trial court, would never have been executed; and it is argued that, as her husband did not die until June 10, 1931, if she had made complaint, innocent mortgagees would not be now called upon to suffer, and that she is now estopped from denying the validity of these mortgages.

If plaintiff had been guilty of active fraud, she might be estopped from asking that the mortgages be canceled, but mere passive failure to act, without any fraud on her

part, cannot preclude her from claiming the protection of the homestead law of our state. *Giles v. Miller,* 36 Neb. 346; *France v. Bell,* 52 Neb. 57; *Storz v. Clarke,* 117 Neb. 488; *Interstate Savings & Loan Ass'n v. Strine,* 58 Neb. 133; 13 R. C. L. 662, sec. 119.

3. Ordinarily it is true, as contended for by the defendants, that the certificate of a notary public, in regular form, is, in the absence of fraud, conclusive in favor of those who in good faith rely upon it. Evidence, which is merely in contradiction of the facts certified, will not be received. *Phillips v. Bishop,* 35 Neb. 487. But, in the case at bar, fraud is proved, and it is disclosed that the husband of plaintiff usually took the mortgage to the notary with both signatures affixed, and usually the accommodating notary affixed his seal. In one case a notary testified that plaintiff's acknowledgment was taken over the telephone, but the records of the telephone company show that the telephone was disconnected at that time. In one case the notary testifies that a lady accompanied Mr. Bacon, but would not swear it was the plaintiff. Other notaries testify to telephone acknowledgments of some woman called to a telephone by Mr. Bacon. One notary is very positive that he knew plaintiff's voice, and recognized it over the telephone on two occasions; but the evidence is clear that, during the period of time covered by these two days, the plaintiff was visiting in McCook, Nebraska. There is no evidence of any notary that is clear and convincing that the plaintiff ever executed or acknowledged any of these instruments.

There is a maxim, *Causa proxima, non remota, spectatur,* indicating that it is the proximate, and not the remote, cause that governs. In the case of some of these mortgages, the proximate cause of their loss was their own acknowledgment of it by their own notary, and when they come into a court of equity they plead for affirmative relief, and then this maxim governs, as they were negligent so far as the notary they selected was concerned. Had they carefully examined these signatures and seen

that they were written by the same person, they would not have taken the mortgages nor advanced their money.

The decrees of foreclosure which defendants want enforced are founded upon a forged signature, which makes a void mortgage.

Two exhaustive articles by Dean Foster upon the Nebraska homestead law may be found in volume 3, Nebraska Law Bulletin. He tells us that the three textbooks on homesteads are Smyth, Thompson, and Waples, the last written in 1893, and since that publication no text-writer has entered into this field, where the authorities are disagreed upon nearly every phase of the subject. Really nothing is settled except that homestead laws are to be construed liberally to carry out the intention of the legislature.

A liberal construction of the laws relating to the points discussed, and many others set out in the briefs, discloses no just ground for reversing the finding of the lower court, and the judgment is therefore

AFFIRMED.

ARTHUR BRIGHT V. STATE OF NEBRASKA.

FILED JANUARY 19, 1934. No. 28752.

1. **Criminal Law**: CARRYING CONCEALED WEAPONS. The offense created by section 28-1001, Comp. St. 1929, is a felony, as the same is defined by section 29-102 of such statute.
2. ———. Where an offense is not designated by the statute which creates it, either as a felony or misdemeanor, but its punishment is prescribed, then the grade of such offense is determined by the punishment.
3. ———: VARIANCE. *Held*, that the weapon offered in evidence as exhibit A is an automatic pistol as charged in the information, and that there is no variance between the allegations of the petition and the evidence.
4. **Instructions** given, examined, and found to correctly state the law applicable to the facts.
5. **Held**, that instructions offered by defendant were properly refused.
6. **Criminal Law**: SENTENCE. Where the punishment of an offense

created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

ERROR to the district court for Madison county: CHARLES H. STEWART, JUDGE. *Affirmed.*

Hugh J. Boyle and *H. F. Barnhart,* for plaintiff in error.

Paul F. Good, Attorney General, and *Paul P. Chaney, contra.*

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

CLEMENTS, District Judge.

The defendant, Arthur Bright, was charged in the information with the offense of carrying concealed, on or about his person, a certain loaded automatic pistol.

He was convicted of this offense and sentenced to the penitentiary for one year, and prosecutes error to this court.

The petition contains eight assignments of error. Six only of these are urged in the brief and of these but three need be considered at any length.

The first error assigned is that the court erred in overruling the motion of defendant to quash the indictment. This motion is based upon the theory that the offense of carrying concealed weapons, created by section 28-1001, Comp. St. 1929, is not a felony, because a penalty less than confinement in the penitentiary may be imposed for its violation, and that the use of the term "feloniously" in the information is prejudicial. This theory is untenable.

Section 29-102, Comp. St. 1929, defines "felony" as:

"Such an offense as may be punished with death or imprisonment in the penitentiary. Any other offense is denominated a 'misdemeanor.' "

Section 28-1001, Comp. St. 1929, provides:

"Whosoever shall carry a weapon or weapons concealed

on or about his person such as a revolver, pistol, * * * shall on conviction be fined in any sum not exceeding one thousand dollars or imprisoned in the state penitentiary not exceeding two years."

It is apparent that, under the charge in the information, the defendant could be, and in fact he was, sentenced to imprisonment in the penitentiary. He was, therefore, charged with, and convicted of, a "felony."

The general rule for the construction of statutes, such as this, is found in Corpus Juris, under the title "Criminal Law:" "In most jurisdictions a crime is a felony under such a statute, if it may be punished by imprisonment in a penitentiary or a state prison, although the court or jury may have the discretion to reduce the punishment to imprisonment in a jail or to a fine." 16 C. J. 56.

"Where an offense is not designated by the statute which creates it, either as a felony or misdemeanor, but its punishment is prescribed, then the grade of such offense is determined by the punishment." 16 C. J. 56.

The information in this case charged a felony, and the use of the term "feloniously" in the information was not prejudicial to the defendant.

This court has held in several cases that the use of the term "felonious" in an information is unnecessary, but the court has never held that it is erroneous or prejudicial. In *Richards v. State,* 65 Neb. 808, the court said:

"Its use would, it is true, have the sanction of custom, but not of utility or positive law."

The general rule is stated in 31 C. J. 700: "An unnecessary employment of the term 'felonious' does not, however, vitiate the indictment."

The motion to quash was properly overruled.

The second assignment of error is: "The court erred in overruling the defendant's objection to and admitting exhibit A (the revolver) in evidence."

The defendant contends that there was a fatal variance between the allegations of the information and the proof,

in that the weapon offered in evidence, exhibit A, was not the weapon described in the information. The information describes the weapon as a "certain loaded automatic pistol." Exhibit A is shown by the evidence to be the weapon found on the person of the defendant at the time of his arrest. It is a short firearm, designed to be held and aimed in one hand. It has no revolving cylinder. The cartridges are contained in a magazine, which inserts in the handle or butt. The action is automatic, the recoil from one discharge bringing forward and injecting into the chamber of the weapon another cartridge.

"Pistol" is defined as: "A short firearm intended to be aimed and fired from one hand. Pistols are now usually either revolvers, or automatic, or semiautomatic, magazine pistols."

"Revolver" is defined as: "A firearm (commonly a pistol) with a cylinder of several chambers or, formerly, several barrels so arranged as to revolve on an axis, and be discharged in succession by the same lock." Webster's New International Dictionary.

It is quite evident from these definitions that exhibit A is an automatic pistol as described in the information. It is true that one of the witnesses, in describing the weapon, used the term "revolver." The terms pistol and revolver are used in common parlance indiscriminately as applying to either class of weapons. Strictly, however, a revolver must have a revolving cylinder, chambered for cartridges.

There was no variance between the information and the proof offered.

The third, fourth, and fifth assignments of error relate to the instructions of the court, given on his own motion, and instructions offered by defendant and refused. We have examined the instructions given and find they state the law and are applicable to the facts proved. The instructions offered by defendant were properly refused.

The last assignment of error that we need to notice is: "The court erred in imposing sentence in the penitentiary

in the state of Nebraska against the defendant upon the evidence adduced at the trial."

Section 28-1001, Comp. St. 1929, was enacted under the police power of the state, and to conserve the safety of its citizens. Realizing that its infraction might consist of a mere technical violation, with no criminal intent or a violation involving moral turpitude, and danger to life or limb, the legislature gave to the trial court great latitude in the impositions of a penalty. In the case of a technical violation, the penalty may be as small as a fine of one dollar. In an aggravated case, it may be as great as two years in the penitentiary.

It may be conceded that, if the story of the defendant is taken at its face value, viz., that at the time of his arrest, he was taking the weapon in question to a man with whom he had negotiated a sale, that he had no intention of concealing it, but had placed it between the cushion and the back of the seat in which he was riding, where it was found by the officers, then a sentence of one year in the penitentiary is out of proportion to the offense.

If, however, as testified by the officers making the arrest, he was driving upon the streets of Norfolk while in an intoxicated condition, at an excessive rate of speed, and, when stopped, he was found to have an automatic pistol, fully loaded, and in firing position, concealed on his person, inside his shirt, at the waist-line, then the sentence imposed does not appear to be excessive.

The trial judge heard the evidence, saw the witnesses on the witness-stand, and evidently accepted the evidence of the officers as true. We do not feel that the sentence imposed by him should be interfered with.

AFFIRMED.

ERNEST HOERLER, APPELLEE, V. A. G. PREY ET AL., APPELLANTS.

FILED JANUARY 19, 1934. No. 28735.

1. Process: SUMMONS TO ANOTHER COUNTY. Where plaintiff alleged and proved a joint liability against defendants as principals in conversion, jurisdiction was obtained over one defendant by service of process in county other than that in which action was brought; the authority to summon defendant in other county depended on right to recover against resident defendant or defendants served with process in county of forum.
2. Animals: AGISTER'S LIEN. Agister's lien under feeding contract *held* superior to subsequent chattel mortgage, notwithstanding there was an extension of feeding period as provided for in contract.
3. ———: ———. Statute creating an agister's lien is remedial in its nature and should be liberally construed.
4. ———: ———. Agister's lien is not, as between parties or persons having notice thereof, lost by change of possession not inconsistent therewith, and where there are not circumstances indicating intent to waive, relinquish or abandon it.
5. Trial. Where verdict would have had to be directed, there was no prejudicial error in denying jury trial.

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

Mothersead & York, for appellants.

Neighbors & Coulter, contra.

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

LANDIS, District Judge.

This is a proceeding wherein Ernest Hoerler, plaintiff below, appellee here, obtained a decree against the First National Bank of Grand Island, Nebraska, and A. G. Prey, defendants below and appellants here.

The decree appealed to this court separately by the appellants adjudges appellee to have a valid and superior agister's lien, that appellants have no interest in, lien upon or right and title to the sum of $1,142.35 received

from the proceeds of the sale of steers and that appellants either pay into court for the benefit of the appellee said proceeds or appellee have and recover judgment therefor.

The record reflects without dispute that appellee contracted in writing with S. E. Dennis to fatten 56 head of steers. The compensation for fattening was to depend upon the weight gained. The contract contemplated that the cattle should be fed until fat and the market conditions warranted their sale. Among its provisions are that a change of time in the feeding period should be evidenced in writing, and that appellee would furnish the feed "necessary to fatten for a period of 120 days or more." Appellee fed the cattle through the 120-day period and continued thereafter to do so at the request of Dennis, but required him to advance money to buy additional feed, which was done.

A. G. Prey secured by indorsement and assignment from Dennis a note and chattel on these cattle. Prey in turn indorsed the note and chattel to the First National Bank of Grand Island. The note and mortgage were executed subsequent to appellee's contract and receipt of the cattle for feeding. Appellee had neither actual nor constructive notice of the mortgage until quite some time after he had possession of the cattle under his contract. Both Prey and the bank knew that appellee was feeding the cattle covered by the chattel mortgage on a gain basis. Dennis ordered the cattle sold at Chicago. Appellee accompanied them to Chicago where the commission company sold them on open market June 4, 1931, for the net sum of $4,707.85. Dennis, the shipper, sent along structions to pay him for the amount due thereunder. Prey instructed the commission company that all the proceeds should go to the bank on the mortgage. The commission company remitted $3,565.50 of the proceeds of the sale to the bank and held $1,142.35 due appellee. At the instance of Prey a bond was furnished the commission company to hold them harmless and then the $1,- a copy of his feeding contract with appellee, with in-

142.35 was remitted to the bank. Both Prey and the bank knew that appellee was claiming this money under his feeding contract before it was turned over to them, made demand therefor and took affirmative action to obtain such proceeds. The bank actually got the money from the commission company, credited Prey's account therewith and subsequently applied same on Prey's indebtedness to it.

The question of jurisdiction is properly raised and preserved in the record. The only service of process had on the defendant First National Bank was by service of copy of summons in Hall county, Nebraska. The jurisdiction over the bank depends upon the stating and proving of a cause of action against appellant Prey. The rule is declared in *Morearty v. Strunk,* 118 Neb. 718: "The authority of plaintiff to summon a defendant in a county other than the one in which the action is brought depends on plaintiff's right to recover judgment against a resident defendant or a defendant served with summons in the county of the forum." The petition states a cause of action in conversion against appellants. Prey and the bank participated in the conversion of the fund due appellee under his agister's lien. Both of them, with knowledge, benefited by the money. The bank got the money. Prey received credit for it on his indebtedness to the bank. Under the law both the bank and Prey were liable as principals in conversion. "In wrongful conversion, each and all knowingly participating therein, or who, with knowledge, benefit by its proceeds in whole or in part, are principals." *Talich v. Marvel,* 115 Neb. 255. Appellee pleaded and proved a joint liability against appellants, hence there was jurisdiction obtained in Morrill county over the bank.

Appellants make no complaint as to the validity of appellee's agister's lien, but claim that it is inferior to the assigned chattel mortgage held by the bank. Priority for the chattel mortgage is grounded upon there being an extension of time of feeding. The cattle were fed

more than 120 days, and appellants insist that the additional period was pursuant to a new contract. This change in time was not evidenced in writing, but that provision of the contract would obtain between the parties to the contract and is not material to the appellants.

The feeding contract contemplated an extension or decrease of the feeding period, and that the cattle should be fed until fat and the market conditions warranted their sale. Appellants frankly state they have found no authorities on agister's lien to sustain their contention. During the 120-day feeding period appellee's agister's lien had priority; nothing occurred thereafter to divest him thereof, and at the time of the conversion such priority still obtained.

The statute creating an agister's lien is remedial in its nature and should be liberally construed. It is not, as between the parties or third persons having notice thereof, lost by change of possession not inconsistent with it, and where there are no circumstances indicating an intent to waive, relinquish or abandon it. *Becker v. Brown*, 65 Neb. 264.

There is no question of fact to submit to a jury under this record. No conflict in the testimony appears; only questions of law for the court to determine. A verdict would have had to be directed for the appellee. Hence, there was no prejudicial error in denying a jury trial.

The decree entered by the trial court is the only one which could have been legally entered herein; is right, and is, as to each appellant,

AFFIRMED.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED JANUARY 22, 1934. No. 28966.

1. **State Railway Commission**: FINDINGS: REVIEW. "On an appeal from an order of the state railway commission, the finding of

the commission will be given the same effect as the verdict of a jury, and the order will not be reversed unless it is clearly wrong." *Rawlings v. Chicago, B. & Q. R Co.*, 109 Neb. 167.

2. **Street Railways.** Upon common-law principles, street railways have always been held by this court to be common carriers.
3. ———. The Nebraska state railway commission has jurisdiction over street railways in the cities of the state.
4. ———. The adoption of a home rule charter does not, of itself, give a city jurisdiction over a street railway save in matters of strictly municipal concern.
5. **Carriers.** The bus service and the curtailment thereof, involved herein, was not a matter of strictly municipal concern to the city of Omaha, but was under the jurisdiction of the Nebraska state railway commission.

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

Seymour L. Smith, Louis J. Te Poel and *Philip N. Klutznick*, for appellant.

Kennedy, Holland & De Lacy, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

GOSS, C. J.

The Nebraska state railway commission granted the application of the Omaha & Council Bluffs Street Railway Company for authority to curtail its transportation by buses in the city of Omaha. The city of Omaha appealed.

In considering this appeal we are bound by the established rule: "On an appeal from an order of the state railway commission, the finding of the commission will be given the same effect as the verdict of a jury, and the order will not be reversed unless it is clearly wrong." *Rawlings v. Chicago, B. & Q. R. Co.*, 109 Neb. 167. See *Byington v. Chicago, R. I. & P. R. Co.*, 96 Neb. 584; *Hooper Telephone Co. v. Nebraska Telephone Co.*, 96 Neb. 245; *Southern Nebraska Power Co. v. Taylor*, 109 Neb. 683, 689; *Farmers & Merchants Telephone Co. v. Orleans Community Club*, 116 Neb. 633, 635.

On the hearing before the commission it was shown that the applicant operates, as a common carrier, the Omaha street car system, consisting of about 135 single track miles of street railway and 44 round trip miles of bus lines in the city. It also operates as lessee about 28 single track miles of street railway in Council Bluffs, Iowa, and the Douglas street bridge over which the street cars pass between the two cities. These leased properties do not constitute any part of the Omaha street car system. The accounts and inventories of the company are so kept that there is no confusion in respect thereto.

On September 22, 1924, the commission fixed a valuation of the property used in the operation of the Omaha street car system at $14,100,000 and fixed 7 per cent. as the rate of return to which appellant was entitled on that valuation. On the hearing hereof that valuation was brought down to date, taking cognizance of additions and betterments and applying the requisite depreciation. This resulted in a valuation of $14,399,261, without the inclusion therein of any going concern value. The evidence showed the company to have outstanding first mortgage bonds amounting to $6,518,000, bearing interest at 5 per cent. per annum. The company's operating experience shows a deficit on the authorized return as follows, in round numbers: 1930, $590,000; 1931, $604,000; 1932, $690,000; first four months of 1933, $248,000. The history of operation shows a decrease in passengers hauled from 1913 to 1933. In 1920 passengers carried were 61,650,839. In 1932 they were 27,425,357, in both cars and buses. The first four months of 1933 showed a decrease of over 27 per cent. in passengers carried as compared with the same period in 1932. Notwithstanding hard times, the use of private automobiles has not abated. New competition has arisen through taxicabs and public cars, encroaching upon the field of mass transportation, by the carrying of several passengers for the fare of one. Because of the falling off in patronage the company has been unable to sell capital stock or bonds, but has

found it necessary to pay for additions and betterments out of cash reserve. The result has depleted this reserve to approximately $300,000. The commission finds that prudent management will not warrant further depletion of cash reserve; that the company has met the constant falling off in street car patronage by reduction in salaries and wages, by savings in the purchase of electric power, by progressive installation of one-man car operation, by consolidation of barns and rerouting of lines, but the possibilities of further economies of that nature are practically exhausted; and the only remaining possibility of savings is to eliminate needless or unjustified service.

For 15 years the company has neither earned nor paid dividends on its common stock. For more than 5 years the same applies to its preferred stock. During 1932 it paid only 3 per cent. on its bonded debt. Unless the first four months of 1933 were later bettered as to income, there was danger that it would not be able to pay 3 per cent. for that year. There is a provision in the mortgage securing these 5 per cent. bonds that, unless a minimum of 3 per cent. is paid annually, a default may be declared.

Upon the insistence of the city, the company, in 1925 and 1926, installed six bus lines and in 1929 and 1930 four additional bus lines. The street car system has been in operation more than 40 years. From the first the bus lines, taken either as a whole or separately, showed operating deficits. The total deficit began at about $25,000 and has increased to about twice that amount yearly. The company being willing to carry on in part, in the hope that bettered conditions may justify it, asked and was allowed by the commission to stop service completely on certain lines, to curtail hours of service on some lines, and to curtail mileage on other lines.

Without going into further and unnecessary detail, we find that the evidence justified the findings of fact, which we have sought to condense, and the order based thereon. Under the rule of law, heretofore recited, we cannot disturb the findings of fact and order made by the Nebraska

state railway commission when it is based upon the facts, if that body, established by the Constitution, has jurisdiction.

Upon common-law principles, street railways have always been held by this court to be common carriers. *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890; *Pray v. Omaha Street R. Co.*, 44 Neb. 167; *East Omaha Street R. Co. v. Godola*, 50 Neb. 906; *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672; *Lincoln Traction Co. v. Webb*, 73 Neb. 136. In 1906 the people of Nebraska adopted section 20, art. IV, as a part of the state Constitution, providing for a state railway commission and defining its powers and duties. After that (1929) this court has held that "Bus companies operating after the manner of the defendant herein are common carriers of passengers and are liable as other common carriers upon common-law principles." *Griffen v. Lincoln Traction Co.*, 118 Neb. 459.

Prior to the adoption of home rule charters for cities, we continued to hold that the Nebraska state railway commission has jurisdiction over street railways in cities of the state. *Herpolsheimer Co. v. Lincoln Traction Co.*, 96 Neb. 154; *In re Lincoln Traction Co.*, 103 Neb. 229; *Omaha & C. B. Street R. Co. v. Nebraska State Railway Commission*, 103 Neb. 695.

The city of Omaha asserts the commission erred in assuming jurisdiction and in holding that it had jurisdiction to pass upon the application of the street car company. The argument of the city is that, by virtue of its home rule charter, the municipality had the sole jurisdiction to pass upon the curtailment of the bus service here involved.

Section 5, art. XI, an amendment to the Constitution, providing for home rule charters, adopted in 1920, reads: "The charter of any city having a population of more than one hundred thousand inhabitants may be adopted as the home rule charter of such city by a majority vote of the qualified electors of such city voting upon the ques-

tion, and when so adopted may thereafter be changed or amended as provided in section 4 of this article, subject to the Constitution and laws of the state."

Section 20, art. IV of the Constitution, providing for the state railway commission, adopted in 1906, reads: "There shall be a state railway commission, consisting of three members, who shall be first elected at the general election in 1906, whose terms of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the legislature. Of the three commissioners first elected, the one receiving the highest number of votes, shall hold his office for six years, the next highest four years, and the lowest two years. The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

The city of Omaha argues that, assuming the two provisions above quoted are in conflict, the special provisions should control, citing *Elmen v. State Board of Equalization and Assessment,* 120 Neb. 141, to the effect: "When general and special provisions of a state Constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control when the special provisions do not apply." We think this is a sound rule as applied to the case in which it was announced, but that it is not applicable here. There the two provisions of the Constitution under consideration both dealt with the veto power of the governor, one in general terms, the other with relation to the budget. Here one provision relates to regulatory jurisdiction over common carriers, specially committing to the commission "the regulation of rates, service and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the

duties enumerated in this provision." Const. art. IV, sec. 20. On the other hand, the Constitution expressly provides that any home rule charter shall be "subject to the Constitution and laws of the state." Const. art. XI, sec. 5. If the people had intended to modify the jurisdiction of the railway commission, as argued by the city, it would have been easy to express the thought in unequivocal language. In 1925 the legislature adopted an act (Laws 1925, ch. 39) authorizing street railways to supplement their transportation by rail by adding motor propelled buses, but the first section (now section 74-1101, Comp. St. 1929) provided, in part: "Such bus service rendered by a street railroad or street railway, shall be subject to regulation as to rates, fares and service by the same regulatory body as street railway rates, fares and service are then regulated and controlled." As we view it, there is no conflict between the two quoted sections of the Constitution. The purpose of the framers was to leave the state railway commission with its jurisdiction and powers and to delegate to eligible municipalities, adopting home rule charters, a limited jurisdiction over matters of strictly municipal concern.

Cities having home rule charters are not subject to state legislation in matters purely municipal, but, upon such subjects as pertain to state affairs as distinguished from strictly municipal affairs, the provisions of the state Constitution and the general laws of the state are as applicable in a home rule municipality as they are elsewhere in the state. "The Constitution does not define which laws relate to matters of strictly municipal concern and which to state affairs. There is no sure test which will enable us to distinguish between matters of strictly municipal concern and those of state concern. The court must consider each case as it arises and draw the line of demarcation." *Carlberg v. Metcalfe,* 120 Neb. 481, reviewing cases.

Mass transportation of passengers by common carriers within the state is, and ought to be considered, under our

existing Constitution and laws, a matter of state concern. It would be anomalous to commit to a regulatory body, created by the Constitution, jurisdiction over intrastate steam railroads carrying passengers for hire everywhere within the state boundaries and to deny that jurisdiction over a carrier operating within a home rule charter municipality. Such a classification applied to intrastate steam railroads or to city street railways is not suggested by the Constitution and laws. To adopt it would subject the various municipalities of the state, now and hereafter having such transportation, to a chaotic lack of uniformity of regulation. We are of the opinion that the Nebraska state railway commission has jurisdiction over the street railway in the city of Omaha, notwithstanding that city is governed as to its municipal affairs by a home rule charter, and that the curtailment of bus service involved herein was not a matter of municipal concern to be regulated by the city council, but was subject to the jurisdiction and control of the commission.

The city of Omaha complains because the railway commission declined to hold hearings in Omaha. The commission refused on account of lack of funds appropriated and available. This was a matter within the discretion of the commission. Besides, it does not appear that the city was injured by the ruling.

The order of the commission is

AFFIRMED.

IN RE ESTATE OF LEROY C. WROTH.
EMMA JENSEN, APPELLANT, V. ALONZO D. WROTH ET AL., ADMINISTRATORS, APPELLEES.

FILED JANUARY 22, 1934. No. 28780.

Sales. 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.

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

James H. Hanley and *Thomas J. O'Brien,* for appellant.

Dorsey & Baldrige, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

GOOD, J.

This action involves the ownership of an automobile. Plaintiff claims title by gift from Leroy C. Wroth. Defendants deny the gift.

Wroth died in August, 1931, and his estate is being administered in the county court of Douglas county. Plaintiff filed a petition in that court, alleging the gift to her by Wroth, and praying the court to direct the administrators to deliver the automobile to her. The trial in that court resulted in a judgment for the estate. Plaintiff appealed to the district court, and on the trial there, after plaintiff had introduced her evidence, the court directed a verdict for defendants. From that judgment plaintiff has appealed.

The question involved is: Was the evidence sufficient to require the submission of the cause to the jury? The only evidence of the gift by Wroth to plaintiff was oral statements claimed to have been made by Mr. Wroth in the presence of one Miss Williamson and a Mr. Lindsay. In effect, they testified that Wroth said in their presence that he had given the car to plaintiff; that it was her car, and she was to take it home and keep it. There is no evidence of any bill of sale and transfer by Wroth to plaintiff in the manner provided by sections 60-310 and 60-325, Comp. St. 1929.

Section 60-310, in part, provides: "Upon the transfer of ownership of any motor vehicle, its registration shall expire, and the person to whom ownership of such vehicle is registered, and the person to whom ownership of such vehicle is to be transferred, shall forthwith join

in a statement of said transfer, indorsed upon the reverse side of the certificate of registration of said motor vehicle, in the space provided for said purpose, which statement shall be signed by the transferer in the manner and form of his signature, contained on the face of said certificate, and which statement shall likewise be signed by the transferee, who shall also set forth, below his signature, his post office address."

Section 60-325 contains this proviso: "Provided, upon the transfer of ownership of any motor vehicle the title shall not pass until the certificate of registration properly executed, shall be filed in the department of public works as required in this article." The record fails to show that any attempt was made to comply with either of these sections.

While this court has not passed directly upon the question involved, it was indirectly involved in the case of *Wallich v. Sandlovich,* 111 Neb. 318, wherein it was held: "The failure of a supposed owner of an automobile to register the same with the state authorities as required by the statute is a suspicious circumstance, which, together with other matters referred to in the opinion brought to the notice of the purchaser, is sufficient to put the purchaser upon inquiry as to the vendor's title." However, other courts, with motor vehicle registration acts similar to our own, have passed upon the question.

In *Merchants Securities Corporation v. Lane,* 106 N. J. Law, 169, it was held: "Legal title to a motor vehicle can be established only through the documentary evidence of sale and purchase prescribed by an act entitled 'An act relating to and regulating the sale and purchase of motor vehicles requiring presence of manufacturer's number on same, requiring issuance of bill of sale and assignment of same and providing penalties therefor,' approved April 15, 1919. Pamph. L. p. 357, and its supplements and amendments."

In the case of *Endres v. Mara-Rickenbacker Co.,* 243 Mich. 5, it was held:

"In view of the purpose and language of Act No. 46, Pub. Acts 1921, especially section 4, making it a crime to sell an automobile without delivering an assigned certificate of title thereto, as required by section 3 of said act, as amended by Act No. 16, Pub. Acts 1923, a sale or transfer in violation of said act is void, although not expressly so provided therein.

"An automobile dealer who sold a car, loaned license plates, and delivered possession to the buyer without delivering a certificate of title as required by Act No. 16, Pub. Acts 1923, amending Act No. 46, Pub. Acts 1921, is liable as owner, under Act No. 287, Pub. Acts 1925, sec. 11, for the negligence of the buyer in driving the car, since the sale was void."

In *Isaacson v. Van Gundy,* 48 S. W. (2d) (Mo. App.) 208, it was held: "No title passes unless certificate is assigned buyer at time of delivering motor vehicle (Laws 1927, p. 313)."

In *Scarborough v. Detroit Operating Co.,* 256 Mich. 173, it was held: "Conditional contract for sale of automobile, giving to purchaser exclusive use thereof, is void under 1 Comp. Laws 1929, sec. 4658, where seller neglected to transfer certificate of title to purchaser." See, also, *Kelly v. Lofts,* 253 Mich. 552; *Bos v. Holleman De Weerd Auto Co.,* 246 Mich. 578.

Title to motor vehicle cannot be passed between living persons by mere oral declarations. In order to pass title it is necessary to comply with the provisions of sections 60-310 and 60-325, Comp. St. 1929. The statute covers transfers of title to motor vehicles either by sale or gift *inter vivos.* It is incumbent on plaintiff, to establish her title to the automobile in question, to produce, or account for its nonproduction, documentary evidence, showing that the statutory requirements have been complied with. This she has failed to do.

It follows that the judgment is right.

AFFIRMED.

STATE, EX REL. COUNTY OF DAWSON, APPELLEE, V. DAWSON COUNTY IRRIGATION COMPANY, APPELLANT.

FILED JANUARY 22, 1934. No. 28860.

1. **Statutes: CONSTITUTIONALITY.** Chapter 143, Laws 1927, is broader than its title, in that it attempts to impose on counties and municipalities the duty of maintaining bridges over artificial waterways, other than irrigation ditches, which cross the public highways.
2. ———: ———. A legislative act, to the extent that it is broader than its title, violates section 14, art. III of the Constitution.
3. ———: ———. Section 2, ch. 143, Laws 1927 (Comp. St. 1929, sec. 46-619) is special legislation and inhibited by section 18, art. III of the Constitution.

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

Cook & Cook, for appellant.

T. M. Hewitt and *York & York, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

GOOD, J.

This is a proceeding in mandamus to compel respondent to repair certain bridges, constructed by it over its irrigation ditches and laterals where they intersect and cross public highways in Dawson county. Relator was given the relief it sought. From the judgment granting that relief respondent has appealed.

The facts are not in dispute. The controversy hinges on the validity of section 46-619, Comp. St. 1929. Respondent contends that said section relieves it of the duty of keeping the bridges in question in repair and safe for public use, and that the duty to make such repairs rests upon relator.

Relator concedes that, if said section 46-619 is valid, then the obligation to keep the bridges in repair and safe for public use rests upon it and not upon respondent, but

contends that said section is invalid because it violates section 14, art III of the state Constitution, in that the title to the act, of which said section is a part, contains more than one subject, and that the subject is not clearly expressed in the title; that the act is broader than its title and, as an amendatory act, is not germane to the original sections sought to be amended; that it violates section 18, art. III of the state Constitution, in that it constitutes special legislation. It is also alleged that it violates other provisions of the state and federal Constitutions, which, in view of the conclusion hereinafter stated, it will be unnecessary to consider.

Section 46-619, Comp. St. 1929, in its present form, was enacted as section 2, ch. 143, Laws 1927. The title to this act reads: "An act to amend section 8459, Compiled Statutes of Nebraska for 1922, as amended by section 1, chapter 132, Laws of Nebraska for 1925, and to amend section 8469, Compiled Statutes of Nebraska for 1922, relating to irrigation and drainage, providing that no ditch or canal shall be closed from May 1st to October 1st in each year; providing that from November 1st to April 1st of the succeeding year diversion for filling storage reservoirs shall have preference over diversions for direct irrigation; providing that counties or municipal corporations, as the case may be, shall maintain bridges on highways crossing irrigation ditches; and to repeal said original section as amended."

Prior to this enactment the statutory law of the state imposed upon irrigation companies and owners of millraces, whose waterways cross public highways, the duty of building and maintaining bridges over their ditches, laterals, canals and raceways. In *Dawson County v. Dawson County Irrigation Co.*, 104 Neb. 137, this court held: "It is the duty of the owners of irrigation canals or ditches to construct and keep in repair bridges on highways crossed by their ditches or canals." The decision was based upon section 3446, Rev. St. 1913, which is in almost identical language with that contained in section

8469, Comp. St. 1922, which is sought to be amended by chapter 143, Laws 1927. The statutory imposition on irrigation and drainage districts and irrigation companies to build and maintain bridges over their irrigation canals and ditches, where they intersect and cross public highways, is merely declaratory of the common law, as was held by this court in *Richardson County v. Drainage District*, 92 Neb. 776.

It will be observed that the title to the act of 1927 provides for counties or other municipalities to maintain bridges over highways crossing irrigation ditches, but does not refer to drainage ditches, mill-races or other artificial waterways which may be constructed across public highways. In the body of the act the language is perhaps sufficient to cover all of these, but it must be borne in mind that the scope of a legislative act and its force and effect are limited by its title. If the act is broader than its title, then, to the extent that it goes beyond the scope of its title, it is invalid. This rule is so well established that citation of authorities to sustain it is not deemed necessary. Then, it must be held that chapter 143, Laws 1927, can operate, if at all, only to impose upon counties or municipalities the burden of maintaining bridges over irrigation ditches.

While it has often been held by this court that the legislature may classify objects and persons for the purpose of legislation, the classification must rest upon some reasonable basis. It must appear that the classification rests upon some difference of situation or circumstances which, in reason, calls for distinctive legislation for the class. The class must have a substantial quality or attribute which requires legislation appropriate or necessary for the particular class, but which would be inappropriate or unnecessary for those without the class. *State v. Bauman*, 120 Neb. 77, and cases there cited.

Why irrigation companies should be relieved of the burden of maintaining bridges over their canals, ditches and laterals, while drainage districts, mill-race owners and

other persons or companies, constructing ditches or artificial waterways across highways, are required to maintain them, is not apparent.

We think the present case falls squarely within the rule laid down in *State v. Farmers & Merchants Irrigation Co.*, 59 Neb. 1, wherein it was held: "Section 58, article 2, chapter 93a, Compiled Statutes, 1897, which assumes to exempt irrigation companies from the operation of the general law requiring railroad corporations, canal companies, etc., to erect and maintain bridges and crossings on the highways where their roads, canals or ditches cross such highways, is special legislation, and, being in violation of the Constitution, is void." In the body of the opinion it was said (p. 3): "The respondent contends that the section quoted, so far as it relates to irrigation companies, was impliedly repealed by chapter 69, Session Laws of 1895. * * *

"The rule established by the authorities is that while it is competent for the legislature to classify, 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. * * *

"Applying now to the case before us the test suggested by the authorities cited, it seems perfectly plain that section 58 of the irrigation act cannot be sustained without disregarding entirely the constitutional interdict against special legislation. Prior to 1895 all owners of ditches crossing highways were charged by section 110 of the road law with the duty of keeping public bridges across their ditches in repair. The legislature, by section 58, assumed to exempt irrigation companies from this burden, while leaving all other ditch owners still subject to it. Upon what ground can this classification be justified? Why should these companies be put in a class by themselves and be given immunity from the burdens which all others, under similar conditions, are required

to bear? Their ditches are not, by the section in question, segregated from other private ditches on account of any peculiar characteristics which they possess. The legislation is manifestly as appropriate to the class excluded as to the class included; and the only reason we can discover for diverse legislation with respect to them is the arbitrary and insufficient one of ownership."

We are of the opinion that the act of 1927, as limited by its title, constitutes special legislation and is inhibited by section 18, art. III of the Constitution.

Counsel for respondent cite and rely upon *Franklin County v. Wilt & Polly*, 87 Neb. 132. In that case the fee owner of land constructed a mill-race upon his own land in 1873. Seven years later a highway was laid out so as to intersect said raceway. The county constructed a bridge over the raceway and later it became out of repair, and the county sought, by mandamus, to compel the owner of the mill-race to make the repairs. In the opinion it was said (p. 135): "But if the highway is laid out over an artificial waterway theretofore constructed, the proprietor of the canal, unless bound by the terms of a franchise or private contract, is under no duty to construct or repair a viaduct in the highway and over the waterway." In that opinion it was further said: "Independently of the statute, the miller's liability in case his raceway crosses a highway laid out before the raceway is constructed is well established. In that event he should reunite the way by the construction of a bridge and thereafter keep it in repair." In the instant case, the irrigation ditches and laterals were constructed after the highways were laid out. That case is, therefore, not applicable to the situation presented by the record.

A railway company may be required to build and maintain crossings where the railroad is intercepted by a highway, even though the highway is laid out after the railroad is constructed. *State v. Chicago, B. & Q. R. Co.*, 29 Neb. 412. The decision in that case is buttressed upon the police power of the state. Such burden is imposed

on railway companies for the protection of the public, without regard to the time when the highway was laid out.

Error prejudicial to respondent has not been shown. It follows that the judgment of the district court should be and is

AFFIRMED.

NORTH PLATTE LODGE, B. P. O. E., APPELLANT, V. BOARD OF EQUALIZATION, LINCOLN COUNTY, APPELLEE.
SUTHERLAND LODGE, I. O. O. F., APPELLANT, V. BOARD OF EQUALIZATION, LINCOLN COUNTY, APPELLEE.
WALLA WALLA LODGE, I. O. O. F., APPELLANT, V. BOARD OF EQUALIZATION, LINCOLN COUNTY, APPELLEE.
MASONIC TEMPLE CRAFT, TRUSTEE, APPELLANT, V. BOARD OF EQUALIZATION, LINCOLN COUNTY, APPELLEE.

FILED JANUARY 22, 1934. NOS. 28954, 28955, 28956, 28957.

1. **Stipulations.** In cases involving general public interests, while litigants have the undoubted right to stipulate as to the facts, it is not competent for them to stipulate what the law is so as to bind the court. Such stipulations as to law, if made, will be disregarded.
2. ———. Decisions of questions of law must rest upon the court, uninfluenced by stipulations of parties as to the existence and proper construction of a law, as to the legal conclusions from a given state of facts, and as to the legal effect of a written instrument.
3. **Evidence** examined, and *held* insufficient to sustain each of the judgments appealed from.

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

Hoagland, Carr & Hoagland, for appellants.

E. H. Evans, C. S. Beck and *Urban Simon, contra.*

Paul F. Good, Attorney General, and *Edwin Vail, amici curiæ.*

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

EBERLY, J.

The records disclose that at the regular meeting of the board of equalization of Lincoln county in June, 1931, applications were made on behalf of Walla Walla Lodge No. 56, I. O. O. F., Masonic Temple Craft, North Platte, North Platte Lodge No. 985, B. P. O. E., Sutherland Lodge No. 312, I. O. O. F., separately, to have certain property owned by them respectively in Lincoln county, Nebraska, determined to be exempt from taxation, or in the alternative to have the assessed valuation of the same as made by the proper taxing authorities in 1930 reduced. Thereafter on June 22, 1931, upon hearing, the petition of each of the corporations named was denied. Separate appeals to the district court for Lincoln county were thereupon prosecuted by each of the parties aggrieved by this order. In that court issues were framed and a trial was had on the merits, which resulted in separate final orders made and entered on June 6, 1933, which separately determined that each of the corporations named were religious, charitable, and educational institutions, and as such all property owned and used exclusively by such institutions for the purpose of conducting their business is exempt from taxation, but that the first and lower floor of the building owned by Walla Walla Lodge No. 56, I. O. O. F., located on lots 1 and 2 Independent Order of Odd Fellows subdivision of lots 1 and 2 of the original town of North Platte; the first two lower floors of a building situated on the north 88 feet of lots 3 and 4, block 133 of the original town of North Platte, owned by the Masonic Temple Craft; the first and lower floor and the north 44 feet of the second and third floors of a building owned by North Platte Lodge No. 985, B. P. O. E., situated on the south 110 feet of lot 5, and the west 14 feet of the south 110 feet of lot 6, in block 133 of the original town of North Platte; the first and lower floor of the building situated on lots 1 and 2, block 5, original town of Sutherland, Lincoln county, Nebraska, owned by Sutherland Lodge No. 312, I. O. O. F., being each rented

by the respective owners thereof, were not exempt, but subject to taxation as provided by law, and that all of the rest of the property thus described was, and is, exempt from general taxation; and the trial court further directed that a certified copy of the orders thus entered be served upon the county commissioners of Lincoln county, and also upon the county treasurer of Lincoln county, Nebraska. However, thereafter on June 30, 1933, on the district court's own motion, an order was entered wherein the total assessed valuation of the property owned by Sutherland Lodge No. 312, I. O. O. F., was reduced from the sum of $3,100, as returned for assessment in 1930, to the sum of $2,600.

In this connection section 77-1503, Comp. St. 1929, with reference to the taxation of mortgaged real estate, provides: "The total assessed value of any real property, including the interests of the mortgagor and mortgagee, shall not be changed except when all the real property of the county is assessed, unless its value is changed by reason of altered conditions."

Quære: Is the relief granted by the trial court consistent with the limitation quoted?

From the final orders thus entered appellants severally appeal, and each insists in this court that the district court erred in adjudging that any portion of their respective properties was subject to taxation; that the valuations of each of these properties as made by the taxing authorities was excessive as compared to the assessments of like properties in North Platte to such a degree that appellants are entitled to have such excess determined and its valuations lowered to that extent, and particularly would this be true if any portions of the premises under consideration were ultimately determined to be exempt from taxation.

The bills of exceptions disclose that in behalf of each appellant there was tendered as proof certain stipulations made in open court, being in substance that the appellants were and are the owners of the properties described

in their several petitions, and claimed to be exempt from taxation, and that each is a charitable, educational, and religious institution within the meaning of the terms as defined and determined by the supreme court of Nebraska in the case entitled, "Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Commissioners of Lancaster County, Nebraska." *Ancient and Accepted Scottish Rite v. Board of County Commissioners,* 122 Neb. 586. The last paragraph of this stipulation contains the following, viz.: "It is further stipulated that the above * * * lodge property owners, if owning their property under the same circumstances and conditions as the property owner of the Scottish Rite case at Lincoln owned its property, that said properties would be entirely exempt from taxation upon the same principle and theory as adopted in the Scottish Rite case."

In considering the force and effect of this stipulation entered into by the parties to this litigation, it must be kept in mind that the controlling question in each case here before us is the claimed right of exemption of the property involved from general taxation. The decision of these matters will necessarily affect the substantial interest of the general public. This situation emphasizes the necessity and importance of adherence in this class of cases to the following commonly accepted principles of procedure, viz.: "While litigants have the undoubted right to stipulate as to the facts, it is very generally held that it is not competent for them to stipulate as to what the law is so as to bind the court, and that such stipulations will be disregarded. Decisions of questions of law must rest upon the judgment of the court, uninfluenced by stipulations of the parties or counsel * * * as to the existence of a law, as to its validity or invalidity, * * * as to the legal conclusion from a given state of facts, as to the legal effect of a contract." 60 C. J. 50.

In other words, "the people of the state are entitled to know what is the law on public questions, rather than what we find it to be upon agreement of parties." *Ford v. Dilley,* 174 Ia. 243, 250.

In view of the language employed in section 77-202, Comp. St. 1929, the following provisions of the Constitution express the controlling principles which determine the present litigation:

"Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property." Const. art. VIII, sec. 1.

But, "The legislature by general law may exempt * * * property *owned and used exclusively* for educational, religious, charitable * * * purposes, when such property is not *owned or used* for financial gain or profit to *either the owner or user.*" (Italics ours) Const. art. VIII, sec. 2.

We assume, but do not determine, that the stipulation already referred to, standing alone, would be competent to establish as a fact the exclusive ownership for purposes of taxation of the several properties respectively in the appellants herein. But this assumption is apparently overthrown by the uncontradicted evidence preserved in the bill of exceptions that all of the property in suit was at the time of its assessment, and still is, encumbered by unpaid real estate mortgages, as follows:

The real estate owned by Walla Walla Lodge No. 56 by a present existing real estate mortgage, the exact amount and terms of which are undisclosed; the real estate of Masonic Temple Craft by a present existing real estate mortgage securing the payment of $102,500; the real estate of the North Platte Lodge No. 985 by a present existing real estate mortgage of $17,000; and the real estate of Sutherland Lodge No. 312, by two real estate mortgages aggregating $6,000.

In addition the evidence indicates that a portion of one of the lodge properties was leased to the owner of a commercial business for a term of approximately five years or more.

For the purpose of assessment and taxation a mortgage on real estate is by statute declared to be an interest therein. In the absence of stipulation or condition in

such instrument to the contrary, this interest is assessable to the mortgagee. It is only the value of such encumbered real estate, in excess of any mortgage taxable to or taxed to the mortgagee, that may be taxed to the mortgagor or owner. Comp. St. 1929, sec. 77-1503. True, when any mortgage contains a condition that the mortgagor shall pay the tax levied upon the mortgage or the debt secured thereby, the mortgage shall not be entered for separate assessment, *but both interests shall be assessed and taxed to the mortgagor or owner of the real estate.* This court appears committed to the view that the existence of the condition as to payment of taxes on the real estate mortgage assessed, and the prescribed tax book entries required to be made by the taxing authorities, do not operate to merge the taxable interests of mortgagee and mortgagor, but has awarded relief in equity on the basis of their separate continuance. In fact it appears that these interests are regarded for taxation purposes as undivided shares in property. *Bowen v. Holt County,* 101 Neb. 642; *Matthews v. Guenther,* 120 Neb. 742.

In addition the existence of a lease for years on certain property in suit herein suggests an ownership of "an interest in land" properly the subject of an independent assessment as the property of the lessee. Comp. St. 1929, secs. 77-101, 77-102, 36-103, 36-107.

It would seem that the applicants for exemption have failed to establish to a reasonable certainty the nature and extent of their separate interests in the properties which they assert are wholly exempt from taxation. Neither have they attempted to establish the exempt character of this interest in lands vested in the mortgagees and the liens thereof.

In the *Scottish Rite* case (122 Neb. 586) the existence of tenancies in the premises in suit, and of real estate mortgages thereon, was not in any manner involved. The absolute ownership of the property for taxation purposes was established in the applicants for exemption. It follows that the questions heretofore suggested as important

in the instant proceedings were not presented, considered or decided by the court in the *Scottish Rite* case on which appellants apparently rely.

It would seem, in the absence of express law or controlling precedent, that our exemption statute would hardly justify according an exemption from taxation in excess of the actual interest of the claimant in the property in suit. Further, the usual tax clause in real estate mortgages, by the terms of the statute providing therefor, does not, it would appear, reinvest the mortgagor with the "interest in the land" conveyed to the mortgagee, or preserve its exempt character in the mortgagor, but amounts to no more than a devise by which the payment of taxes properly assessable on the mortgagee's interest, and while in fact actually so assessed, becomes the obligation of the mortgagor. However, this point, not being directly presented by the record, is not decided.

In view of section 1, art. VIII of the Constitution, quoted, exemptions from taxation will never be presumed. The burden of proof by competent evidence of the facts supporting such claim is imposed on those seeking to secure an exemption of property from general taxation. This includes not only the establishment of an exemption, including the fact that such property is not used for financial gain or profit to owner or holder, but also the precise extent of applicant's exemption therein. Until the amount, nature and terms of the several real estate mortgages, as well as the terms of the existing lease, are disclosed, evidence to establish the exact extent of applicants' taxable interests, if any, in the lands in suit is lacking. Assuming from the tax record entries introduced in evidence that both the interest of the mortgagor and the interest of the mortgagee were included therein, still it would seem that competent evidence as to the extent of each would be a prerequisite to awarding complete relief under any theory of law applicable to the facts. In view of the public interest involved, and the fact that it appears that omitted evidence is available which will prob-

ably materially affect the ultimate disposition of this case, this court is unanimously of the opinion that the causes should be remanded to the trial court in order, if necessary, that the issues may be reformed and the omitted evidence supplied.

Under the circumstances set forth in these records presented on appeal, we are satisfied that the district court erred in its award of relief in each of the above entitled cases. Each of said judgments is therefore reversed, and each cause remanded for further proceedings in harmony with this opinion, with directions to the district court to permit amendments to the pleadings by the several parties, and the introduction of further additional competent evidence in support thereof.

REVERSED.

FRONTIER COUNTY AGRICULTURAL SOCIETY, APPELLANT, V. FRONTIER COUNTY ET AL., APPELLEES.

FILED JANUARY 22, 1934. No. 28932.

1. **Agriculture**: COUNTY FAIRS: COUNTY AID. To entitle an agricultural society, formed under the provisions of section 2-201, Comp. St. 1929, to county aid, such society must have raised and paid into its treasury, by voluntary subscription or fees imposed upon its members, $50 or more annually and the president of said society must certify to the county clerk the amount thus paid.
2. ———: ———: ———. It is not required by section 2-201, Comp. St. 1929, that the annual payments into the treasury of an agricultural society are to be made during the calendar year in which the levy is to be made. The annual payments, referred to in the statute, are to be made by such agricultural society during the year intervening between the time provided by law for the annual levy of taxes, and before the filing of the required certificate. The certificate set out in the opinion *held* to comply with the statute as thus construed.
3. **Pleading**: DEMURRER. The petition *held* to state facts sufficient to constitute a cause of action and the trial court erred in sustaining the demurrer thereto.

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

G. E. Simon and *Perry, Van Pelt & Marti,* for appellant.

O. E. Bozarth, Cloyd E. Clark and *F. J. Schroeder, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

HASTINGS, District Judge.

The Frontier County Agricultural Society, plaintiff and appellant, filed a claim against the county of Frontier for county aid for the year 1930, under section 2-201, Comp. St. 1929. The claim was allowed by the county and an appeal taken therefrom by William Schilpp, a taxpayer of said county. A demurrer was filed to the third amended petition of the plaintiff upon the grounds that plaintiff had no legal capacity to sue, and the petition did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the plaintiff electing to stand upon its petition, the action was dismissed. The ruling of the trial court upon the demurrer and the dismissal of plaintiff's cause of action is assigned as error.

It is conceded by counsel for the appellee, Schilpp, that the appellant has the legal capacity to sue. The sole question presented is whether the petition states facts sufficient to constitute a cause of action.

From the facts alleged in the petition and admitted by the demurrer it appears that appellant is an agricultural society organized as required by law; that it has adopted the rules and regulations prescribed by the proper officers and the state board of agriculture; that it has raised and paid into its treasury by voluntary subscription and by fees imposed upon the members of said society, since its organization and the adoption of said rules and regulations, the sum of more than $50 annually; that it raised and paid into its treasury by voluntary subscription and by fees imposed upon its members more than

$50 during the year 1930; that on the 11th day of July, 1930, it filed with the county clerk of Frontier county a certificate signed by its president as follows:

"To the county clerk of Frontier county, Nebraska.

"Pursuant to section 6 of the 1922 Compiled Statutes of the state of Nebraska, the undersigned George I. Johnson, president of the Frontier County Agricultural Society, hereby certifies that there was raised and paid into the treasury by voluntary subscription or by fee imposed upon the members of the Frontier County Agricultural Society, more than the sum of $50, during the year last past, to wit, the sum of $238.

"I further certify that the annual fair of the Frontier County Agricultural Society for the year 1930 is to be held at Stockville, Nebraska, from August 26 to August 30, inclusive, and that the total amount of premiums to be awarded will be in excess of $2,000.

"Attest—R. D. Logan, Secretary.

"George I. Johnson, President."

The certificate was subscribed and sworn to by the president and secretary of said society.

That thereafter, during the year 1930, at the time the county board levied taxes for county and other purposes, it levied a tax for the aid of said society sufficient to raise the amount required by law for that purpose, and that said tax has been substantially paid; that in August, 1930, it held a five day fair on the dates as stated in its certificate and that it expended in premiums more than $2,000. A copy of the claim filed with the county board is made a part of the petition. It sets out the dates in August, 1930, on which the fair was held and states that it expended in premiums more than $2,000. This was subscribed and sworn to by both the president and secretary of the society.

The only question raised as to the sufficiency of the petition to state a cause of action that merits consideration is whether the certificate is sufficient under the pro-

visions of the statute to entitle the appellant to county aid.

The statute, so far as material to the question involved, provides:

"Whenever twenty (20) or more persons, residents of any county in this state, shall organize themselves into a society for the improvement of agriculture within said county, and shall have adopted a constitution and by-laws agreeable to the rules and regulations furnished by the usual and proper officers, and when the said society shall have raised and paid into the treasury, by voluntary subscription or by a fee imposed upon its members, fifty ($50) dollars or more annually, and whenever the president of said society shall certify to the county clerk the amount thus paid, the county board shall, at the time other levies and assessments for taxation are made, levy a tax upon all property within the county not to exceed one-fourth mill on each dollar of the assessed valuation or so much thereof as is necessary to raise the maximum amount provided for in this act, which tax each year shall be assessed, levied and collected as other state and county taxes and shall be paid by the county treasurer to the treasurer of the managing board of directors of such agricultural fair." Comp. St. 1929, sec. 2-201.

The statute requires that whenever an agricultural society formed agreeable to its provisions shall have raised and paid into its treasury by voluntary subscription or by fees imposed upon its members $50 or more annually, and whenever the president of said society shall certify to the county clerk the amount thus paid, the county board shall, at the time other levies for taxation are made, levy a tax for the aid of such society. A compliance with the foregoing provisions of the statute is a condition precedent to the right of such agricultural society to county aid. *Sheldon v. Gage County Society of Agriculture,* 75 Neb. 485.

It is contended by counsel for the appellee, Schilpp, that the payments required by statute to be made annually mean that such payments are to be made each calendar

year in which a levy is sought and since it does not appear from the certificate that such payments were paid into the treasury of the society during the year 1930, prior to the filing of the certificate, the appellant was not entitled to county aid. We think this is a narrow construction of the statute. There is nothing in the statute that indicates that the required payments are to be made during the calendar year in which the levy is sought and before the filing of the certificate. The annual payments required by the statute and the amount the certificate is required to show paid are prerequisites to invest the county board with the power and authority, at the time that the annual levies for taxes are made, to make a levy for county aid to a society organized thereunder.

Taking into consideration the connection which the required payments bear to the levy of taxes, the time for making levies and that taxes are levied annually, we think it was the intention of the legislature that the annual or yearly payments required to be raised and paid into the treasury of the society should be raised and paid in during the year intervening between the levy of taxes for each year and before the appropriate time for filing of the required certificate. It is contemplated by the statute that the certificate should be filed during the year for which the levy is sought and before the levy for taxes for that year.

From the certificate in question it appears that the money was raised and paid into the treasury of the society "during the year last past." The phrase, "during the year last past," as used in the certificate, means during the year immediately preceding July 11, 1930, the date of the filing of the certificate with the county clerk. Its fair import is that throughout the course of the year from July 11, 1929, to July 11, 1930, there was raised by voluntary subscription or fees imposed upon its members and paid into its treasury $238. The statute does not require that the certificate set out the date the required payment was made; it is sufficient if it shows it

was paid during the course of the year intervening between the annual levy of taxes.

Under the statute so construed, we hold that the certificate complied therewith and the county board had the authority to make the levy of a tax to give financial support and aid to the appellant society for the year 1930. It follows from what has been said that the petition states facts sufficient to constitute a cause of action and that the trial court was in error in sustaining the demurrer. For the reasons given, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

CHRISTIAN ANDERSON, APPELLEE, V. HENRY ALTSCHULER, APPELLANT.

FILED JANUARY 22, 1934. No. 28629.

Automobiles: COLLISION: NEGLIGENCE: DIRECTION OF VERDICT. Where, in an action for damages, the evidence discloses certain physical facts which stand undisputed, and where the facts in evidence show beyond reasonable dispute that plaintiff's negligence was more than slight as compared with the negligence of defendant, and to such extent that no reasonable mind can believe that such contributory negligence on the part of the party injured was slight and the negligence, if any, of the defendant gross in comparison therewith, in such a case the jury should be instructed to find for the defendant.

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

Roy B. Ford and *Dowling & Thielen,* for appellant.

Dressler & Neely, contra.

Heard before GOOD and EBERLY, JJ., and MESSMORE, RAPER and YEAGER, District Judges.

MESSMORE, District Judge.

This is an appeal from the district court for Madison county, wherein appellee, plaintiff below, obtained a judg-

ment against appellant, defendant below, for damages growing out of an automobile accident which occurred on the state highway known as numbers 20 and 81, in Pierce county, in September, 1931.

Appellee, in his petition, alleged that at the time of the accident in question he was 22 years of age and sued for injuries to his person and property; alleged that he was driving west on said highway in a careful manner on his right-hand side of the road and at a reasonable and proper rate of speed; that appellant was traveling east on said highway at a reckless and excessive rate of speed and on appellant's left-hand side of said highway; that appellee, noting the position of appellant's car, believed appellant intended to turn into a filling station on the north side of said highway and about opposite the place where the cars collided; that appellee thereupon retarded the speed of his car in order to permit appellant to turn into said station, as appellee anticipated he would do, but which appellant did not do but continued to drive east on said highway on the wrong or north side of the same, which was the side appellee in his lawful right was obliged to drive on; that appellant drove his car eastward on said highway at a speed of 45 to 50 miles an hour and drove his car directly head-on and into appellee's car; further, that the injuries to his person, which were permanent in character, and the damage to his automobile were caused by the negligent operation of appellant's car by appellant and that said negligence of appellant was the sole cause of the accident.

Appellant, in his answer, admitted the occurrence of the collision at the time stated; alleged further that any damage sustained by appellee to his person or property was the direct and proximate result of his own negligence.

By cross-petition appellant alleged that he was driving his car eastward on said highway and appellee westward; that appellee drove his said car in a grossly careless and reckless manner at a speed of 60 to 65 miles an hour,

first on the left side of the road, then on the right side, and then back on the left or south side thereof, and then crashed almost head-on with appellant's car, throwing appellant forward; that appellee was guilty of further acts of negligence in the operation of his automobile at the time and place in question by not having the same under control, without maintaining the proper lookout, without having said car equipped with proper brakes and braking appliances and failing to use such braking appliances, such as appellant did have, and that such acts of negligence were the direct and proximate cause of the injuries sustained by appellee, if any, and of the damage to appellee's property.

Appellee filed a general denial in reply.

The principal assignments of error relied upon by appellant for a reversal of this action are that the verdict is not sustained by the evidence and is contrary to and against the clear weight of the evidence, and that the negligence of appellant, if any, is as a matter of law less than gross in comparison with the negligent acts of appellee, which as a matter of law are greater than slight in comparison with any negligent acts of appellant.

The evidence discloses that appellee had been in Norfolk on the day of the accident and had left there about 3:15 or 3:30 in the afternoon, arriving at the scene of the collision about 4:30 p. m., the distance from Norfolk to the scene of the collision being about 28 or 30 miles; that appellant and his 3 companions had been to Minnesota on a fishing trip and were returning therefrom, having left the fishing ground about 4 a. m. of the day of the accident and having driven some 400 odd miles to the place of collision.

A blue print drawn to scale, properly admitted, disclosed without much question the true situation and the lay of the ground at the point of collision. Measurements of distances were submitted by competent evidence. The exact degree of the grade of the hill was in dispute, but it figured about 5 per cent.

An examination of the blue print in evidence shows that the position of the Hudson car, owned and driven by appellant, at the time of impact was about 27 feet west of the east point of the west driveway into the filling station and approximately 12½ feet south of the approximate margin of travel indicated on the blue print on the north side of the highway, where the left front wheel of the Hudson, designated by the letter A on the blue print, rested immediately after the impact. Slightly to the south of the letter A and a trifle to the east appears the capital letter B on the blue print, denoting the point where the left front spring clip of the Hudson rested. These two points were pointed out by the eyewitness Schuttler and his son. Assuming these measurements to be accurate, as portrayed by the scale on the blue print, that is, an inch equals 20 feet, the physical facts then show that at the time of impact the Ford car, owned and driven by appellee, had he held the right side of the road, as indicated in his testimony, could have passed without collision.

Appellee's statement as to his rate of speed in coming down the hill was that he was then traveling about 35 to 40 miles an hour. The pictures of the automobiles, several of which were introduced and received in evidence, disclose that appellee's automobile was struck on the right side, the radiator smashed back in the position of the windshield, the right lamp broken, the right fender turned, the right front wheel turned, and glass broken out of the windshield on the right side thereof.

The Hudson car of appellant was struck on the left front side, demolishing the left lamp and fender, and the radiator was demolished to such an extent that it was pushed back toward the windshield and to the right, and the left front fender torn from the running board and the left rear fender bent in towards the body of the car.

The evidence without dispute discloses that the Ford roadster immediately after the impact whirled around so that its front pointed east and was immediately in

front of the Hudson. Appellee's explanation of his driving was to the effect that he believed appellant intended to turn into the filling station and that he was driving on the wrong side of the road.

There was one eyewitness to the accident called by both appellee and appellant, by the name of H. W. Schuttler, who stated that the Ford was coming down the hill at the rate of 60 to 65 miles an hour. The record does not disclose the rate of speed of either car at the time of impact. This witness further testified that both cars seemed to turn to the right or south of the road at the time of impact; that there was room, had appellee held his own side of the road, to have passed on the north side of the road without damage to appellant and with a clearance of 20 feet; that a truck had passed in such a manner with the two cars standing in their relative positions immediately after the accident.

Appellant testified that appellee, coming down the grade at a high rate of speed and when about 200 feet distant from the point of impact, had started towards the right of the highway, and the evidence supports his contention in so far as the eyewitness Schuttler was able to determine this fact to be true; his testimony being that appellee did start towards the south side of the highway at a point about 200 feet distant from the place of impact.

Appellee further testified that he did not believe that appellant was going to turn his car into the filling station and that appellee did not have time to turn his car far enough to the right to avoid the impact; that he, appellee, was on the north half of the road and that he stayed on his half of the road. The physical facts, as related in this opinion, would indicate that this contention is correct.

Elmer Scherer, called by appellant, testified that he was at the scene of the accident shortly after it happened near the filling station; that he saw an automobile going around the curve as he entered highway 81 and 20 in his Pontiac automobile and that he was distant about 75 feet from

this automobile at that time; that it continued on west of him; that it was a Ford roadster and traveling at the rate of about 60 miles an hour when he first observed it; that the Ford passed out of his sight and he saw it next immediately after the impact; that the witness at that time was at the top of the hill, a distance of 1,575 feet or more than a quarter of a mile east of the point of collision; that by the time the witness reached the bottom of the hill the occupants of the two cars involved in the collision were out of their respective cars. This testimony stands undisputed and uncontradicted and a computation of the distances traveled by both cars corroborates almost to a mathematical certainty the statement of Scherer and other evidence disclosed by the record that appellee was traveling 60 miles an hour down the hill just prior to the time of collision.

Several other witnesses were called, one, who did not see the accident, a son of the eyewitness Schuttler, but who corroborated his father as to the relative positions of the automobiles in question after the accident. The medical testimony is undisputed.

The physical facts as disclosed by the record show that the negligence of appellee was more than slight in comparison with the negligence of appellant. This being true, a recovery by appellee would be barred and the comparative negligence rule would not apply. We are cognizant of appellee's contention that the question of speed, in so far as it goes to negligence, is a question for the jury, but no reasonable mind can conclude other than that the evidence introduced and received in this case shows appellee was traveling at an excessive rate of speed and the evidence is overwhelming that he was going at least 60 miles an hour. The uncontradicted physical facts corroborate the testimony of the eyewitness Schuttler and of the witness Scherer.

While the rule is well settled and is the statutory law of Nebraska that one who has been damaged through the negligence of another may recover, even though he him-

self is guilty of contributory negligence, provided his own negligence is slight and the negligence of the other gross in comparison therewith, it is equally true that appellant may not be held if, as a matter of law, the weight of the evidence shows appellee's negligence to have been in any degree greater than slight, or if the weight of the evidence shows the negligence of appellant to be any less than gross in comparison with slight negligence on the part of appellee. We believe that the physical facts and the evidence warrant this conclusion.

Appellee's testimony disclosed that he was proceeding on his own side of the road and on cross-examination he stated that he intended to hold his side of the road. Therefore, taking all the facts into consideration, both physical and stated, "if he does nothing for his own security he is negligent, and if the physical facts leave no doubt so that reasonable minds would not differ in that he either proceeded recklessly or failed without reasonable excuse to take the precautions which the conditions indicate were available to him, he is as a matter of law guilty of negligence more than slight, which under our rule of comparative negligence bars a recovery" (*Eggeling v. Chicago, R. I. & P. R. Co.*, 119 Neb. 229); this in the event that he was approaching on his own or right side of the road, as he stated.

It is the settled rule in this state that, where different minds may draw different inferences from the same state of facts, as to whether such facts establish negligence, it is a proper question for the jury, and not for the court; but that rule is subject to the qualification that the inference of negligence must be a reasonable one. Where it is impossible to infer negligence from the established facts without reasoning irrationally, and contrary to common sense and the experience of the average man, it is not a question for the jury, and the court should direct a verdict for the defendant. *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642; *Kelly v. Gagnon*, 121 Neb. 113.

"Where it is disclosed in an action for personal injuries that plaintiff was guilty of contributory negligence, he

cannot recover unless his negligence is shown to be slight in comparison with that of the defendant." *Peterson v. Millnitz,* 119 Neb. 365.

When the facts in evidence, in an action for damages by reason of alleged negligence on the part of a defendant, clearly show contributory negligence on the part of the party injured, to such an extent that no reasonable mind can believe that such contributory negligence is slight and the negligence, if any, of defendant gross in comparison therewith, it is error, by an instruction to the jury, to authorize the jury to make such comparison and base their verdict thereon. *Johnson v. City of Omaha,* 108 Neb. 481.

"Where the facts show beyond reasonable dispute that the plaintiff's negligence was more than slight, as compared with the negligence of the defendant, it is the province of the court to direct a verdict for the defendant." *Allen v. Omaha & S. I. R. Co.,* 115 Neb. 221.

Many other decisions of like import are cited by appellant in support of his contention for a reversal of this case. Some of them cited by the court in this opinion have to do with common carriers, but the rule in reference to negligence in respect to which it is interpreted in this opinion is the same in automobile cases. One distinction that may be drawn is that the elevator case cited by appellant, *Sodomka v. Cudahy Packing Co.,* 101 Neb. 446, is not pertinent to the issue in this case because the degree of care required in an elevator case is higher than required of automobile drivers in the operation of their automobiles.

In view of all the evidence and the physical facts in this case, after a careful reading and analysis of the bill of exceptions, and in view of the decisions herein cited, we conclude that the judgment of the lower court should be set aside and the action reversed and dismissed.

REVERSED AND DISMISSED.

CHARLES LENTZ, APPELLEE, V. OMAR BAKING COMPANY, APPELLANT.

FILED JANUARY 26, 1934. No. 28604.

1. Sales: WARRANTY. Where seller makes an affirmation of fact or promise, the natural tendency of which induces buyer to purchase, relying thereon, it is an express warranty. Comp. St. 1929, sec. 69-412.
2. ———: ———: ACTION FOR BREACH. In action to recover damages for breach of warranty, that horse is gentle and suitable for buyer's known use, it is not necessary to establish seller's knowledge that horse has evil propensities.

APPEAL from the district court for Douglas county: FRED A. WRIGHT, JUDGE. *Affirmed on condition.*

Kennedy, Holland & De Lacy, for appellant.

S. L. Winters, contra.

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

DAY, J.

This was an action to recover damages for personal injuries received by plaintiff by reason of a breach of a warranty by the defendant in the sale of a horse. The defendant appeals from a judgment in favor of plaintiff for $3,989.35.

The plaintiff, a cripple by reason of an affliction to his hips, walked slowly, awkwardly, and with difficulty. He purchased a horse from the defendant. The defendant's agents were told about his physical condition, his age, sixty-nine years, and his need for a gentle horse. The defendant assured the plaintiff that the horse in question was such an animal. In fact, the evidence discloses that the horse was used on a bakery wagon for several years, going over the route without hitching while the driver went into various houses to serve customers for bakery goods. When the plaintiff with the help of others first hitched the horse to a buggy and got in, the horse without warning ran away, broke the side of the barn, a part

of the fence, caught the buggy on a heavy post and broke loose from it and ran away.

Both of the plaintiff's legs were broken in this event. Thereafter, the horse was sold by the plaintiff to a man who used him upon a garbage wagon, where again he walked over his route without being tied while the driver was calling at various houses. So far as the record discloses, the incident when the horse ran away with the plaintiff is this horse's only deviation from the character of a safe and gentle horse. It is difficult to understand, but the fact is undisputed that upon this one occasion he did not behave as a gentle horse suitable for the plaintiff to drive. There is no explanation in the record as to the cause of the runaway except that he was not gentle. It seems he ran away without apparent cause.

There was much conversation between the daughter of the plaintiff and employees of defendant in negotiating the sale. It was thoroughly understood that plaintiff was a cripple and his necessity required a horse of unquestioned gentleness. It is apparent under the circumstances that the plaintiff must have been induced to purchase the horse by the express warranty of the defendant. The evidence supports a finding that there was an express warranty as to this horse. The horse so warranted did not prove to be gentle and as a result the plaintiff was injured.

Where seller makes an affirmation of fact or promise, the natural tendency of which induces buyer to purchase, relying thereon, it is an express warranty. Comp. St. 1929, sec. 69-412. The defendant was not entitled to a directed verdict in this case, as contended.

It is not necessary to prove seller's knowledge of the evil propensities of a horse where there is an express warranty, to recover for breach. This is not a tortious action but contractual, and negligence is not involved. Therefore the common-law rule of scienter is not applicable. *Vaningan v. Mueller,* 208 Wis. 527. In *Cameron v. Mount,* 86 Wis. 477, the court held that, where pro-

spective purchaser was induced to drive a horse by an absolute warranty that horse was gentle, the action sounded in tort, but that it was not necessary to prove knowledge of its falsity. These two opinions of the Wisconsin court cite many authorities to which we refer by reference. The appellant does not cite any, nor have we found any, to the contrary, which would support the theory upon which it seems to have tried the case.

Since we have determined that this is a contractual action arising from a breach of warranty and that it was not necessary to prove the seller's knowledge that the horse was not gentle when it ran away without apparent cause, the assignments of error relating to the refusal to give instructions on this point need not be considered because they do not state the law applicable to the facts in this case.

Requests for instructions upon other points were substantially satisfied by instructions given by the court. The court was requested to instruct the jury that the burden of proof was on plaintiff to prove by a preponderance of the evidence that the horse was not gentle at the time he was sold. The emphasis in the appellant's argument is that the instruction given by the court did not use the expression "burden of proof." The court should have so instructed the jury. But an instruction that in fact places the burden of proof upon the plaintiff to establish by a preponderance of the evidence the material and necessary allegations of petition is sufficient in this regard. Such an instruction (No. 2) was given by the court. *Peterson v. Schaberg,* 116 Neb. 346, supports this view, although the instruction in that case was prejudicially erroneous for another reason.

The verdict in this case was for $3,989.35. The plaintiff was a cripple before the accident. He was sixty-nine years old. The hospital expenses were $395.35 and doctor's bills were $300. He could walk after a fashion before and take care of chickens and other chores. At the time of the trial, he had to be "taken care of like a baby

and could not get out of bed." The evidence as to much pain and suffering is convincing. However, the plaintiff, due to his advanced age and previous crippled condition, did not have a large loss of future earnings under the circumstances of his case. For this reason, the verdict seems excessive, and we have reached the conclusion that the verdict should be reduced to $3,195.35. If the plaintiff files a remittitur of all in excess of this amount within 20 days, the judgment will be affirmed. Otherwise, it is reversed and remanded.

AFFIRMED ON CONDITION.

J. F. MOREDICK, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED JANUARY 26, 1934. No. 28653.

1. **Railroads: TRAIN CREWS.** Legislature having recognized railway motor car as one classification of trains, a penal law, which does not include said classification but requires passenger trains of five cars or less to have crew of an engineer, a fireman, a conductor, and a brakeman or flagman, not applicable to motor cars. Comp. St. 1929, sec. 74-519.
2. ———: ———. Order of railway commission not made in the exercise of its legislative power but directing railroad to comply with law not applicable is erroneous.

APPEAL from the Nebraska State Railway Commission. *Reversed and dismissed.*

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

Gray & Brumbaugh, for appellee Moredick.

Paul F. Good, Attorney General, and *Edwin Vail,* for Nebraska State Railway Commission.

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

DAY, J.

This is an appeal from an order of the state railway commission requiring the Chicago & Northwestern Railway Company in the operation of its motor cars to comply with section 74-519, Comp. St. 1929, commonly known as the "full crew" law, relating to passenger trains. The plaintiff, J. F. Moredick, is the agent of the national organization of railroad trainmen. A number of motor trains are involved, but there is no disputed question of fact as they are all motor cars, some of them with one trailer, and are operated as trains with a crew consisting of a motorman, a conductor, and a man who is alleged to perform the duties of expressman, baggageman, and brakeman. The order of the commission is based solely upon the provisions of the statute, and the determination of this case requires a construction of section 74-519, Comp. St. 1929, which reads: "It shall be unlawful for any railroad company doing business in the state of Nebraska to operate or run over its road or any part thereof, or suffer or permit to be run over its road or any part thereof, outside of the yard limits, any passenger, mail or express train carrying passengers, whose regular equipment consists of more than five cars, with a crew, consisting of less than one engineer, one fireman, one conductor, one brakeman and one flagman; and further provided, passenger trains whose regular equipment consists of five cars or less may be operated with a crew consisting of one engineer, one fireman, one conductor and one brakeman or flagman."

Does the foregoing provision of the statute apply to a motor car or motor train? This provision was originally enacted as a part of chapter 98, Laws 1909. At the same session, there was enacted other legislation (Laws 1909, ch. 97) relating to gasoline motor cars. True, this other legislation related to toilets and smoking compartments. Nevertheless, the legislature recognized the classification of motor cars just as they have freight, passenger, and mixed trains. It also recognizes the distinction between

steam passenger trains and gasoline motor cars or motor trains. At the time of the passage of the "full crew" law, motor cars were recognized as a different and distinct classification of trains and have come to have a definition accordingly which legislators and everybody else recognize as a separate classification. The legislature has not seen fit to prescribe the size and character of its crew. Until it does, there is no power lodged in this court to require the railroad company to comply with the statute. In this respect, this case is analagous to and is controlled by the case of *State v. Chicago, St. P., M. & O. R. Co.*, 115 Neb. 306.

It is further evident from the language of the section that it was not intended to apply to motor cars or motor trains. The quoted statute provides that a passenger train of less than five cars may be operated with a crew consisting of one engineer, one fireman, one conductor, and one brakeman or flagman. There is no purpose to be served now and there was not at the time of the enactment of the statute in having a fireman and engineer on such a train, so that, in order to hold this statute applicable to a motor train, it would be necessary in effect for this court to amend the provisions of the law. This we decline to do. This language clearly indicates that it was not the legislative intent to regulate motor cars.

The railway commission in its order did not pretend to exercise any independent legislative authority under its constitutional powers but based the order solely upon the erroneous assumption that the statute was applicable to motor cars.

Since section 74-519, Comp. St. 1929, the "full crew" law, is not applicable to motor trains, the order of the railway commission is reversed and the complaint dismissed.

REVERSED AND DISMISSED.

E. H. LUIKART, RECEIVER OF BENNINGTON STATE BANK, APPELLEE, V. GUS BUNZ ET AL., APPELLANTS.

FILED JANUARY 26, 1934. No. 28710.

1. **Banks and Banking**: LIABILITY OF STOCKHOLDERS: REMEDY. Receiver of banking corporation has full right and lawful authority to prosecute an action to collect constitutional stockholders' liability for benefit of creditors. Const. art. XII, sec. 7.
2. ———: ———: CONSTITUTIONAL PROVISION. Provision of Constitution as to stockholders' liability is self-executing.
3. **Constitutional Law**: BANKS AND BANKING: LIABILITY OF STOCKHOLDERS. Provision of Constitution, relating to remedy to enforce constitutional stockholders' liability against stockholders of insolvent state bank, applies even though such liability accrued prior to its adoption.
4. ———. No vested rights are impaired by statutory or constitutional provision which creates a remedy for an existing right.
5. **Banks and Banking**: LIABILITY OF STOCKHOLDERS: REMEDY. Constitutional double liability of stockholders of insolvent state bank could not be enforced under Constitution prior to amendment of 1930, until bank's assets had been exhausted and amount due thereon had been judicially determined.

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

Charles W. Haller, for appellants.

F. C. Radke, Barlow Nye, James H. Hanley and *Robins & Yost, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

DAY, J.

This is a suit in equity brought by the receiver of an insolvent state bank to recover the stockholders' double liability for the benefit of all unpaid creditors of the banking corporation. All the stockholders in said bank were made defendants, and judgments were entered against each for the amount of their liability as determined by their ownership of the corporate stock of the bank.

The appellants' challenge to the right of the receiver

of the bank will be considered first. It is conceded that this court has held: "The remedy for the enforcement of the entire double liability imposed by the Constitution upon stockholders of a state bank in the event of insolvency is a suit in equity by a creditor for the benefit of all the creditors, or by the receiver, against all the stockholders." *Rogers v. Selleck* (1928) 117 Neb. 569. See, also, *Brownell v. Anderson,* 117 Neb. 652, and *Brownell v. Adams,* 121 Neb. 304. The opinion in *Rogers v. Selleck, supra,* was based upon the holding in *State v. Farmers State Bank* (1925) 113 Neb. 497, in which it was held: "When a bank has become insolvent, a receiver appointed, the assets of the bank sold and applied, and the amount due on the stockholders' liability judicially determined, the receiver of such bank may prosecute an action to recover same, under the supervision of the court." And, quoting from the body of the opinion: "If the amount due on the stockholders' liability had been judicially determined, one creditor, in behalf of himself and all other creditors, or the receiver of such bank, under the direction of the court, could prosecute an action to recover same. Section 8038, Comp. St. 1922, provides: 'Every receiver, immediately upon taking possession, * * * may, if necessary, enforce the liabilities of stockholders, officers, or directors.' See, also, *Farmers Loan & Trust Co. v. Funk,* 49 Neb. 353; *State v. German Savings Bank,* 65 Neb. 416. That part of the opinion in *Hamilton Nat. Bank v. American Loan & Trust Co.,* 66 Neb. 67, wherein it is held that 'a receiver can proceed to the enforcement of such liability only at the instance of the creditors themselves' is out of harmony with our holdings above cited, and is in direct conflict with section 8038, *supra,* and to that extent is overruled."

However, section 8038, Comp. St. 1922, was repealed in 1929. Laws 1929, ch. 38. A similar provision was enacted in 1933. Laws 1933, ch. 18, sec. 59, Comp. St. Supp. 1933, sec. 8-1,130. This suit was filed January 26, 1932, at a time when there was no statutory provision relative

to this subject. However, section 7, art. XII of the Constitution, as amended in 1930, provides: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing or existing while he remains such stockholder, and all banking corporations shall publish quarterly statements under oath of their assets and liabilities. The stockholder shall become individually responsible for the liability hereby imposed, immediately after any such banking corporation, or banking institution shall be adjudged insolvent, and *the receiver of said corporation or institution shall have full right and lawful authority, as such receiver, forthwith to proceed by action in court to collect such liabilities;* and the provisions of section 4, article XII, of the Constitution of the state of Nebraska shall not be construed as applying to banking corporations or banking institutions." Comp. St. Supp. 1933. In *Bodie v. Pollock,* 110 Neb. 844, it is held by this court that section 7, art. XII of the Constitution, is self-executing. Therefore, instead of the statutory provision mentioned in *State v. Farmers State Bank, supra,* we have in this case a self-executing provision of the Constitution which provides that the receiver shall prosecute the action for stockholders' liability, which provision of the Constitution became effective in 1930. This provision of section 7, art. XII of the Constitution, does not change the liability of the defendants but merely relates to the remedy. Because it only provides the remedy by which the constitutional liability shall be enforced, it is applicable to this case. No vested rights are impaired by statutory or constitutional provision which creates a remedy for an existing right. 12 C. J. 975; *Stein v. Indianapolis Bldg. Loan Fund & Savings Ass'n,* 18 Ind. 237; *Whipple v. Farrar,* 3 Mich. 436, 64 Am. Dec. 99; *Atkins v. Atkins,* 18 Neb. 474; *Lycoming v. Union,* 15 Pa. St. 166, 53 Am. Dec. 575.

This suit, commenced by the receiver January 26, 1932, to enforce bank stockholders' liability, is the remedy provided by section 7, art. XII of the Constitution. Without respect to the constitutional provision, the rule is in harmony with all the decisions of this court except one expressly overruled. The constitutional mandate requires that we adhere to that rule.

The appellants complain that the suit was prematurely brought. The constitutional double liability of stockholders of insolvent state bank could not be enforced under the Constitution as it was prior to 1930, until its assets had been exhausted, and the amount due thereon had been judicially determined. *Dempster v. Williams,* 118 Neb. 776; *Rogers v. Selleck,* 117 Neb. 569; *State v. Banking House of A. Castetter,* 116 Neb. 610; *State v. Farmers State Bank,* 113 Neb. 497; *Bodie v. Pollock,* 110 Neb. 844. The evidence shows that all of the tangible assets of the bank were disposed of, the proceeds thereof distributed, and on January 20, 1932, the district court for Douglas county, Nebraska, judicially ascertained the exact amount justly due to the creditors of the bank from the stockholders, after applying the proceeds of all of the corporate property, and fixed that amount as $92,-821.91. But the appellants contend that there is pending a suit by the receiver against the directors of said bank to recover $174,840.76. The evidence discloses that the defendants, two of whom are appellants herein, filed demurrers to the petition, which were sustained February 26, 1932, and subsequently on July 25, 1932, plaintiff not desiring to plead further, the cause was dismissed.

The trial in the case at bar was commenced July 25, 1932, and lasted two days. Thereupon the court took the case under advisement until October 4, 1932. One question raised by demurrer in the directors' case was that the petition itself showed that the statute of limitations had run. There is no evidence that an appeal was taken. If an appeal had been taken, there was ample time for appellants to have introduced evidence of that fact prior

to the decision of this case on October 4, 1932. As the record stands, the conclusion is inevitable that the liability of the directors had been finally determined.

Even if the judgment of the court that the assets of the bank had been exhausted were subject to collateral attack, a question not necessary to determine here, there is no evidence here that the judgment was wrong or that there were any assets of the bank which had not been exhausted. The suit was not prematurely brought.

Another assignment of error, relating to the failure of the trial court to decree exempt the homestead and after-acquired property of one appellant, a married woman, does not present a question for determination in this case.

AFFIRMED.

RACHEL MCDONALD, ADMINISTRATRIX, APPELLEE, V. ELMER WRIGHT, APPELLANT.

FILED JANUARY 26, 1934. No. 28733.

1. Negligence: COMPARATIVE NEGLIGENCE: QUESTION FOR JURY. Where the evidence is in conflict and such that reasonable minds might draw different conclusions as to comparative negligence of parties, question is for determination of jury.
2. Appeal: INSTRUCTIONS: COMPARATIVE NEGLIGENCE. In a case involving comparative negligence, an instruction that plaintiff may recover if it is established by preponderance of evidence that defendant was guilty of gross negligence, "unless you find that it affirmatively appears by a preponderance of the evidence that the plaintiff's son (decedent) was also guilty of gross negligence," is prejudicially erroneous.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

Maher & Carrigan, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LOVEL S. HASTINGS, District Judge.

DAY, J.

This was an action brought by the plaintiff to recover damages for the wrongful death of her son as the result of a collision between the Ford sedan driven by him and the defendant's truck. The defendant appeals from a judgment in favor of plaintiff.

The sufficiency of the evidence to sustain a verdict is questioned. An examination of the evidence discloses that, upon the question of the negligence of both parties, there is evidence very much in conflict. The evidence is such that reasonable minds might draw different conclusions as to the comparative negligence of the parties. In such a case, the question is one for the determination of the jury. *Casey v. Ford Motor Co.*, 108 Neb. 352. It can neither be said as a matter of law that there was negligence on the part of plaintiff which was more than slight, nor that the negligence of defendant was less than gross in comparison with the contributory negligence of plaintiff. *Day v. Metropolitan Utilities District*, 115 Neb. 711; *Traphagen v. Lincoln Traction Co.*, 110 Neb. 855. There is evidence in the record tending to prove negligence on the part of both plaintiff and defendant. Substantially every statement of fact relating to negligence made by a witness on one side is contradicted by a witness for the other party. This case was for submission to the jury.

Other assignments of error are directed to the instructions. One instruction contains this statement, "and if you find that defendant's negligence was the proximate cause of the accident," which is said by appellant to be an assumption by the court that defendant was negligent. *Pratt v. Western Bridge & Construction Co.*, 116 Neb. 553, cited by appellant, does hold that such an assumption is erroneous. It also holds that "such error is not cured by other instructions defining 'slight negligence,' 'gross negligence,' 'burden of proof,' 'preponderance of evidence,' where the doctrine as to comparative negligence is erroneously stated by the court."

However, in *Christensen v. Tate,* 87 Neb. 848, this court held that "instructions must be considered and construed together." In a previous instruction, the court told the jury that, before plaintiff could recover, he must establish by a preponderance of the evidence that the defendant was negligent. This presents a similar situation to that in *Clausen v. Johnson,* 124 Neb. 280. We disposed of the question there by quoting from *Christensen v. Tate, supra,* as follows: "When the jury in one instruction is told that, in order to find for the plaintiff, they must first find that the damages complained of were caused by defendant's negligence, a subsequent instruction that, if they find for the plaintiff, the plaintiff would be entitled to recover the damage he has sustained by reason of the negligence of defendant, is not erroneous as assuming that the defendant was negligent." This case comes within the rule.

But the same instruction meets a more serious challenge in that it states in another part that under certain conditions the plaintiff may recover, "unless you find that it affirmatively appears by a preponderance of the evidence that the plaintiff's son was also guilty of gross negligence."

The word "gross" was undoubtedly inserted by inadvertence by the trial judge, but it is prejudicial to the defendant in that it erroneously requires him to establish by a preponderance of the evidence that plaintiff's son was guilty of gross negligence to defeat a recovery. All that the law requires defendant to so prove to defeat plaintiff's recovery is that her son's negligence was more than slight. This instruction could only be justified if there were only two degrees of negligence, slight and gross. But this court has recently defined gross negligence as "negligence in a very high degree, or the absence of even slight care in the performance of a duty." *Morris v. Erskine,* 124 Neb. 754. See *Swengil v. Martin, ante,* p. 745; *Gilbert v. Bryant, ante,* p. 731. These cases were decided under statute providing that in a certain case

recovery could not be had, unless defendant was guilty of gross negligence. But that statute does not define gross negligence.

The books generally state that there are more degrees of negligence in the absence of statutory standards. They are generally stated as slight, ordinary, and gross negligence. 20 R. C. L. 22, sec. 17; 45 C. J. 666; 1 Thompson, Negligence, 18. The instruction to the jury that the defendant could not defeat a recovery "unless you find that it affirmatively appears by a preponderance of the evidence that the plaintiff's son was also guilty of gross negligence" was prejudicially erroneous. That plaintiff's son was also guilty of gross negligence is prejudicially erroneous for, if plaintiff's son was guilty of more than slight negligence, plaintiff could not recover. Comp. St. 1929, sec. 20-1151.

Appellant contends that the verdict is excessive and criticizes the instruction as to the measure of damages. The instruction is said not to be sufficiently explicit to be applicable to the evidence. Since it is necessary that this case be tried again, it is unlikely that the same instruction will be given again, especially if the attorney for the appellant may help by submitting a proper instruction applicable to the evidence in the case with a request that it be given. The excessiveness of the verdict need not be considered as it is necessary to submit the case to another jury.

REVERSED AND REMANDED.

EDWARD R. GREEN, APPELLANT, V. ERNEST K. FIESTER ET AL., APPELLEES.

FILED JANUARY 26, 1934. No. 28744.

Mechanics' Liens. Where there is a contract for a specified sum to furnish the labor and the material for repair of building, a detailed account is not necessary.

APPEAL from the district court for Adams county: J. W. JAMES, JUDGE. *Reversed, with directions.*

Stiner & Boslaugh and *Edmund P. Nuss*, for appellant.

J. E. Willits, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

DAY, J.

This is a suit to foreclose a mechanic's lien arising out of the repair of a building following its damage by a tornado. The plaintiff's petition alleged that he entered into a contract with the defendant, Ernest K. Fiester, who is the owner, to furnish the material and perform the labor necessary to repair a building for the sum of $1,068.02, and that the work and labor were performed according to the contract. The plaintiff filed an affidavit setting out the account in writing of his claim with the register of deeds as provided by section 52-103, Comp. St. 1929. The defendant filed a general denial. Upon a trial the district court found that the plaintiff furnished labor and material for the repair of the building in question, and that there was due the plaintiff from the defendant on account of said work and labor the sum of $162.05. From this judgment, the plaintiff appeals to this court.

Both the sworn statement of account which was filed by the plaintiff and the petition filed by the plaintiff to foreclose the lien set out that a contract existed between the plaintiff and the defendant to repair the building for the sum of $1,068.02. The evidence discloses that, after the building had been damaged by the storm, the plaintiff was requested to make an estimate of the cost for doing the work. This was done, but the adjuster for the insurance company which had insured the building objected that the estimate was too high. It was agreed between the adjuster for the insurance company and the defendant that he would proceed with the repairs and settlement would be made on the basis of the cost of

repairs. The defendant proceeded to do considerable work along this line. But before the work was completed, the plaintiff alleges that defendant called him in and entered into the contract as set out in the petition, in which he agreed that plaintiff was to take over the work and complete the repairs of the building for the amount of the adjustment by the insurance company, less the amount which the defendant had paid or would pay on the work or material. The plaintiff's testimony was that the amount paid the defendant by the insurance company was $1,957.97 and that the amount paid out for labor and material by the defendant was $889.95, and that therefore on account of this agreement the contract price for doing this work was $1,068.02. It is established by the evidence that the plaintiff was paid $1,748.20 by the insurance company, from which should be deducted $889.95 which would fix the amount due plaintiff $858.25 if the contract is found to be as contended by the plaintiff. The plaintiff's evidence as to the contract is corroborated by the defendant. These undisputed facts support the testimony of plaintiff that such a contract existed. The defendant made no claim for the loss on the building but turned the receipts for money spent on repairs to plaintiff who was to complete the work and prepare the claim for the entire repairs and present it to the insurance company. This was done and an adjustment was agreed upon between the adjuster and the plaintiff. The defendant never made any statement to the insurance company of the loss. This is a brief résumé of the evidence relating to the alleged contract under which the labor and materials were furnished for the repair of the defendant's building. It preponderates in favor of plaintiff's claim.

It is urged that the details of the work and the items of material are not proved. It is true that the plaintiff is rather vague on the various items, but he accounts for this by his claim that he turned over his check, receipts and record of labor to the insurance adjuster and had been unable to get them back. Of course, where there is

a contract for a specified sum to furnish the labor and the material for the repair of a building, a detailed account is not necessary. *Doolittle & Gordon v. Plenz*, 16 Neb. 153, and *Guiou v. Ryckman*, 77 Neb. 833.

The judgment of the district court is reversed and the cause remanded, with directions to the trial court to enter judgment for $858.25 and interest as provided by law.

REVERSED.

ANDREW SHERMAN REALS, APPELLEE, V. CHARLES GRAZIS, APPELLANT.

FILED JANUARY 26, 1934. No. 28766.

1. **Appeal:** INSTRUCTIONS: COMPARATIVE NEGLIGENCE. Where evidence does not disclose contributory negligence on part of plaintiff, an instruction should not be given on comparative negligence.
2. ———: ———: HARMLESS ERROR. If an erroneous instruction is given which submits issues to jury without support in the evidence and there was no prejudice to complaining party, it is not reversible error.
3. **Evidence** of condition of heart admissible under allegation of petition that plaintiff was injured by negligence of defendant which caused disability, where such disability consists in part of a weakened heart resulting from pneumonia contracted because of accident.
4. **Damages:** PERSONAL INJURIES. In personal injury action, plaintiff may recover compensation for damage which is proved by preponderance of evidence, including pain and suffering.

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

King & Haggart, for appellant.

Raymond E. McGrath, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

DAY, J.

This is an action to recover damages for personal injuries resulting from an accident in which plaintiff, who was a pedestrian on the highway, was struck by defendant's automobile. The plaintiff was walking along the road following a team hitched to a harrow driven by his stepson. In an attempt to pass the plaintiff, his stepson, and the team, the defendant collided with plaintiff. The defendant appeals from a judgment in favor of plaintiff.

The defendant complains that the court's instruction to the jury relating to comparative negligence was erroneous. The part of the instruction causing the complaint here is: "Plaintiff's damages must be reduced in the proportion that plaintiff's contributory negligence bears to the whole amount of damages sustained." The language challenged was criticized in *Sgroi v. Yellow Cab & Baggage Co.*, 124 Neb. 525. The instruction in this case is not identical with the one in the *Sgroi* case, but both contain the statement to which objection is made. In the *Sgroi* case, the court held it did not constitute prejudicial error, since it could only affect the amount of the verdict and there was no complaint that the amount of the verdict was excessive. It could not be prejudicial in this case, since the evidence would not support a finding that there was any contributory negligence on the part of the plaintiff.

The evidence discloses that the plaintiff was walking along a graveled street, where the conditions were similar to that of a country highway, following a team driven by his stepson. The defendant drove up behind the plaintiff and brought his car almost to a stop. The plaintiff saw the defendant in his car and signaled that he was about to turn left into a private driveway. Thereafter, the defendant attempted without warning to pass the plaintiff, in daylight, and in doing so struck him in the back, injuring him. True, defendant testified about plaintiff: "Why, when I started to turn, Mr. Reals, he raised his hands up, and when I was about two feet from him

he raised his hands up and walked right into my car and he catched first the bumper by his leg and put him back on my fender and he rolled down from the car about two foot." The physical facts are such that this could not have been the situation at the time the accident happened. The record is that the plaintiff was naturally very much excited at the time, then made statements contradictory, and that there would not have been an accident under such conditions. His cross-examination indicates that, at the time of the trial, he really did not know in detail how the accident happened. There is no evidence from which an inference of negligence may be drawn on the part of the plaintiff. The negligence of the defendant was so obviously the proximate cause of the accident that no other verdict except one for the plaintiff could have been sustained.

Since there was no issue of fact upon the question of contributory negligence, an instruction on comparative negligence should not have been given. But the giving of such an instruction was not prejudicial to the defendant, although it might have been to the plaintiff if the verdict had been adverse to him. Where evidence does not disclose contributory negligence on the part of the plaintiff, an instruction should not be given on comparative negligence. *Lewis v. Miller,* 119 Neb. 765. In such a case, if an erroneous instruction is given which submits issues to jury without support in the evidence and there was no prejudice to complaining party, it is not reversible error. *Stiefler v. Miller,* 120 Neb. 11.

A physician testified concerning the plaintiff's heart condition due to pneumonia resulting from the accident. The defendant's motion to strike this testimony was sustained on the theory that an allegation of internal injuries, where specific injuries to other parts of the body had been pleaded, did not permit introduction of evidence as to the condition of the heart. Later, the trial court permitted the same physician to testify as to the condition of the heart, upon a question as to plaintiff's present

condition, there being an allegation in the petition relating to his present physical condition. The physician testified as to the physical injuries to the plaintiff. He testified that he took an X-ray and put him in bed and applied heat to keep him warm, because, following an injury of this kind where there is a fracture, there is always a shock to the system and a lowering of the circulation, and it is necessary to apply heat to make up for the deficiency of the shock; that on the fourth day symptoms indicated the approach of pneumonia, which people of plaintiff's age often develop when it is necessary to keep them flat on their back as a result of injury. The doctor further testified positively that the pneumonia was a direct result of having to keep the plaintiff flat on his back because of the injury, together with the shock from the accident lowering the resistance. The doctor further testified that his present condition was such as a result of the pneumonia which caused the heart damage; also that he was unable to work without becoming very short of breath. It is the testimony of the doctor concerning the condition of the heart that is the cause for complaint. In the state of the record which establishes without dispute (there being no medical testimony introduced on behalf of defendant) that the plaintiff was injured and that as a result of such injuries he developed pneumonia with the subsequent heart injury, we think the proof clearly conforms to the pleadings, which alleged that the plaintiff was injured as a result of the accident, and that due to said injuries he was "totally disabled and incapacitated since the accident;" and that the evidence was clearly admissible.

Another assignment of error is directed to the giving of the instruction on damages. The objection to the instruction is that the jury were not told that damages for future loss of earnings and pain and suffering were only such as are reasonably certain to result from the accident. The objection is not well taken, as the instruction directs the jury to return an amount which will fairly compen-

sate the plaintiff for the damage he has sustained, including pain and suffering. The instruction as given does not violate the rule announced in the case cited by the appellant, *Burkamp v. Roberts Sanitary Dairy,* 117 Neb. 60, in which case the court instructed the jury that in fixing plaintiff's damages they may consider the pain and suffering which plaintiff "will probably suffer in the future." The instruction in this case did not instruct the jury that plaintiff could recover for future pain and suffering. Pain and suffering already endured were, of course, a proper element.

Another instruction concerning which complaint is made relates to the relative rights of the parties in the highway. The instruction given by the court upon this question in general terms defined the rights of the respective parties in the highway. The instructions requested by the defendant upon this subject are not applicable to the facts in the case. The legal rights of a pedestrian in the highway and the driver of an automobile were determined by this court in *Cotten v. Stolley,* 124 Neb. 855.

The defendant asserts that the verdict was excessive. The plaintiff recovered a verdict for $6,000. The trial court required the plaintiff to file a remittitur of $1,500, which was done, making the judgment as it now stands $4,500. This court has given careful consideration to the very serious injuries of the plaintiff and in addition has considered his age and earning capacity and is of the opinion that the judgment of $4,500 is not excessive in view of the evidence in this case.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. CITIZENS BANK OF STUART, E. H. LUIKART, RECEIVER, APPELLANT: FIRST NATIONAL BANK OF OMAHA, INTERVENER, APPELLEE.

FILED JANUARY 26, 1934. No. 28784.

1. Banks and Banking: TRUST FUNDS: NOTICE. Knowledge of president and managing officer of bank will be imputed to the bank when such officer is acting for the bank.
2. ———: ———: ———. When bank has knowledge of ownership of fund wrongfully placed in its possession for which it has parted with no consideration, such fund is a trust for the owner.
3. Appeal. Finding of fact in another case between different parties upon other or different evidence, which is not a part of the record, cannot be considered by the court.

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

F. C. Radke, Frank Warner, Barlow Nye and *Ziegler & Dunn,* for appellant.

Finlayson, Burke & McKie and *J. A. Donohoe, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

DAY, J.

This is a proceeding in the receivership case of the Citizens Bank of Stuart wherein the First National Bank of Omaha, as intervener, seeks to establish a trust fund in relation to a certain sum of money. The receiver classified the claim as a general deposit. The district court held that the claim was a trust fund and a preferred claim superior to all other claims against the assets of the insolvent state bank. The receiver appeals from this judgment.

The claim arose in this manner: Bert and Jesse Hoyt, ranchers of Boyd county, Nebraska, executed and de-

livered to John M. Flannigan, president and one of the managing officers of the bank, their promissory note secured by chattel mortgage on some cattle. Shortly thereafter, John M. Flannigan sold, transferred and assigned this note to the First National Bank of Omaha. After the maturity of the note, the Hoyts executed a bill of sale for the cattle to Jepsen, an officer of the First National Bank as trustee therefor. At the same time, it was agreed in writing between the Hoyts and Jepsen that the Hoyts should sell the cattle at private sale and remit the proceeds to Jepsen. In case the cattle were not sold prior to November 15, 1930, they were to be sold at public sale and the proceeds applied to the indebtedness of the First National Bank of Omaha. The contract also provided that in case the cattle or any of them were not sold, as agreed, they were to be delivered to Jepsen. Under this contract, a public auction sale of the cattle was held at the ranch by the Hoyts, not on November 15, but on November 17, 1930, and John M. Flannigan, president and managing officer of the Citizens Bank of Stuart, was one of the clerks. The expenses of the sale and the taxes were paid from the proceeds and John M. Flannigan on November 19 and November 20, 1930, placed the net proceeds, $8,040.51, in the Stuart bank as a deposit of Bert and Jesse Hoyt, without their knowledge or consent. The First National Bank of Omaha was the owner of the fund in question. The chattel mortgage, the bill of sale covering the cattle, and the contract whereby the cattle were to be sold by the Hoyts establish this fact.

John M. Flannigan, president and managing officer of the Citizens Bank of Stuart, knew all about the transaction. He was the original payee and still had a liability on the note. As clerk of the sale, he knew that certain purchasers having knowledge of the transaction refused to take a bill of sale from the Hoyts and demanded one from Jepsen. But instead of turning the proceeds over to the First National Bank of Omaha, they were entered wrongfully as a deposit in the bank of Bert and

Jesse Hoyt, without their knowledge or consent, and the Hoyts do not now and never have claimed the fund. Jepsen asked for a settlement on the ranch immediately after the sale. Flannigan told him he would turn the proceeds over at Stuart. Jepsen made almost daily demands thereafter that Flannigan turn over the proceeds, which were refused. The bank closed December 1, 1930.

The knowledge of the president and managing officer, who with knowledge of the ownership of a fund in his possession wrongfully places it as a deposit in the name of another party without said party's knowledge and consent and who does not claim the fund, may be the bank's knowledge, and the deposit is a trust fund. *United States Nat. Bank v. Dunbar State Bank,* 118 Neb. 624.

"A bank receiving a deposit of funds of a village, the mayor and village clerk of such village then being the president and cashier of such bank, holds such funds as trustee for the village."

"Knowledge of the president and cashier of a bank who are also mayor and village clerk of a village, in the absence of actual notice or knowledge on the part of the village, will be imputed only to such bank when it appears that such officers are acting only for and in the interest of themselves and of the bank." *Union Nat. Bank v. Village of Beemer,* 123 Neb. 778.

"Knowledge of active managing officer of bank, where officer handled transaction, but acquired information as treasurer of school district, will be imputed to bank." *Lincoln Nat. Bank & Trust Co. v. School District,* 247 N. W. 433 (124 Neb. 538).

Where officer has knowledge fund belongs to one and deposits it to another's credit his knowledge is that of the bank. *McCann v. State,* 4 Neb. 324; *State v. American State Bank,* 108 Neb. 92. Knowledge of president and manager will be imputed to bank, where officer is acting for bank. *Nebraska State Bank v. School District,* 122 Neb. 483; *State v. Brown County Bank,* 112 Neb. 642.

The receiver in his brief states: "In the case of *First*

Nat. Bank v. Flannigan, 122 Neb. 545, it appears that the checks from this sale were not all cleared until the 1st day of December, 1930, the day on which the Stuart bank was closed. In this case the court found that Mr. Jepsen had authorized and ratified the actions of Mr. Flannigan when he agreed to come to Stuart for settlement and in carrying out the agreement between Jepsen and Flannigan the deposit was made in the Citizens Bank of Stuart with the consent and authority of Jepsen, resulting in a general deposit of the funds."

This was a different case between different parties and the evidence in that case is not before the court. The receiver is not in a position to urge that Flannigan was the agent of Jepsen and therefore of the First National Bank, since he offered Flannigan as a witness to prove that he was employed by the Hoyts as a justification for depositing the money in the name of the Hoyts.

The evidence in this case establishes beyond a doubt that neither Jepsen nor the First National Bank of Omaha by word or act ratified the act of Flannigan in depositing the fund in the name of the Hoyts. In fact, Jepsen's persistent demand for the money was annoying to Flannigan.

The appellant is mistaken when he asserts that the court in the above-cited case found that Jepsen ratified the deposit. We do not so read. Anyway, the evidence herein is that he did not know what had become of the money, until after the bank closed. If it is urged, indirectly, that these checks were put in the bank for collection and clearance, the fund is still a trust fund. Section 62-1812, Comp. St. 1929, which went into effect July 25, 1929, makes it such. *State v. Farmers State Bank, ante,* p. 427.

Other assignments of error, such as that the First National Bank waived its lien on the cattle and that the evidence did not show fund belonged to intervener, are not well taken in view of the overwhelming evidence to the contrary. The assets of the bank were augmented

wrongfully to the extent of the pretended deposit, not for the First National Bank, but in the name of the Hoyts. The bank gave up nothing in return. The judgment of the district court is right and without error.

AFFIRMED.

JOYCE LUMBER COMPANY, APPELLANT, V. ALVA T. ANDERSON, COUNTY TREASURER, APPELLEE.

FILED JANUARY 26, 1934. No. 28871.

Taxation: INTANGIBLE PROPERTY. Intangible tax returns shall be filed with county assessor of county in which taxpayer is domiciled. Comp. St. 1929, sec. 77-703.

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

Montgomery, Hall & Young, for appellant.

T. M. Hewitt, contra.

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

DAY, J.

This is a suit in equity brought by the plaintiff to enjoin the defendant, the county treasurer of Dawson county, from collecting certain intangible taxes which have been levied against the plaintiff in said county. The trial court decided against the plaintiff, and it prosecutes appeal to this court.

The only question involved in this appeal is whether or not certain accounts receivable and bank deposit of the plaintiff are taxable in Dawson county. The plaintiff is a domestic corporation with its principal office and place of business in Omaha, Douglas county, and is engaged in the business of selling building material and coal, and in the prosecution of said business, it operates a branch

yard in Dawson county, Nebraska. The plaintiff, on May 7, 1932, filed its tangible property return with the assessor of Dawson county and filed an intangible tax return in the said county advising that all its intangible property was owned and reported in Douglas county. The plaintiff filed a return of the intangible property involved in this case in Douglas county. After this return had been made, the assessor of Dawson county filed an intangible return for plaintiff on bank deposits and book accounts, whereupon the county levied a tax of $27.75 which the county treasurer, defendant herein, is attempting to collect. The plaintiff's tax on its tangible property in Dawson county, amounting to $169.75, has been paid upon a stipulation that it was without prejudice to the rights of the parties to litigate the remaining tax on intangibles of $27.75.

The legislature in 1921 enacted new tax laws which classified specifically various types of property for the purposes of taxation. The definition of intangible property is: "The term 'tangible property' includes all personal property possessing a physical existence, but excluding money. The term 'intangible property' includes all other personal property, including money." Comp. St. 1929, sec. 77-104. In view of this legislative definition, *Nye-Schneider-Fowler Co. v. Boone County*, 99 Neb. 383, is not applicable for that taxation is purely a statutory matter and the legislature may change judicial definitions. It was decided under section 77-1402, Comp. St. 1929, which applies to tangible property, which is indicated by the language used, "like grain elevators, lumber yards or any established business," all of which are tangible property.

The intangible property sought to be taxed in Dawson county was taxable only in Douglas county, where the plaintiff corporation has its principal office or place of business. The branch yard in Dawson county is only an incident of its business. Section 77-703 of the intangible tax law provides that return shall be filed with the county

assessor of the county in which the taxpayer is domiciled. This controls in this case, and the judgment should be reversed, with directions to the trial court to enter a decree enjoining the county treasurer of Dawson county from collecting the intangible tax, which is the subject of this controversy.

REVERSED, AND REMANDED, WITH DIRECTIONS.

SIMEON J. THOMPSON ET AL., APPELLANTS, V. CHARLES H. JAMES ET AL., APPELLEES.

FILED MARCH 3, 1934. No. 28836.

GOOD, J., dissenting.

This is an action in the nature of *quo warranto* in which relators claim to be duly elected and qualified members of the county board of supervisors of York county, and that they have been wrongfully excluded from their official positions by respondents, who have usurped the offices of relators. The district court sustained a demurrer to relators' petition, and dismissed the action. This court reversed the judgment of the district court in an opinion appearing, *ante*, p. 350. Later, a reargument of the cause was had on motion for rehearing, and the opinion was adhered to by a majority of the court.

I did not participate in the original adoption of the opinion and cannot concur in the views therein expressed. The question presented is whether the electors of York county, by their ballots, have changed the number of supervisors from twenty to five. The proposition to change the number of supervisors from twenty to five was submitted on the ballot to the voters at the general election, and a majority of the electors voting thereon was in favor of reducing the number to five.

Relators contend that the election was void because the form of the proposition on the ballot was not that prescribed by the statute, and also because the proposition

was not placed upon the ballot on which were printed the names of candidates for office. For a more detailed statement of the facts, reference is made to the majority opinion. The form of submitting the proposition, as prescribed by statute, and that used by the county clerk are both set out in the majority opinion and will not here be repeated.

Due consideration of the question requires some reference to other statutes than the one quoted in the majority opinion. By the provisions of section 26-201 to section 26-204, Comp. St. 1929, provision is made for adopting township organization and for the election of seven supervisors. By the provision under which the election was held in going from supervisors elected by township to supervisors elected by district, the number of supervisors is fixed at five, so that there is statutory provision for both seven and five supervisors in a county. Probably in order to avoid any confusion as to whether the number should be five or seven, the county clerk placed upon the ballot the proposition, for reducing the number of supervisors from twenty to five and against the same proposition. In the majority opinion it is suggested that township supervisors and district supervisors are entirely distinct offices. We think this is an error. The supervisors, whether elected by township or by district, are essentially county officers. Their salaries are paid by the county. They have no duties to perform save as members of the county board of supervisors. They are as much county officers as members of the legislature are state officers, although elected by districts, and it is immaterial whether the district consists of a township or of several townships. The supervisors are, in fact, county officers and have the same duties to perform, regardless of whether the number is five, seven or even twenty, as was the situation in York county.

It is a rule that, where the statute prescribed the form in which a proposition should be submitted to the electors, such form should be followed and will be required

by the court, if timely application is made therefor. Had the aid of the court been invoked prior to the election, no doubt the county clerk would have been required to place the statutory form on the ballot. It is also a well-recognized rule that mere irregularities in the form of submitting a proposition to the electors will not vitiate the election and render nugatory the will of the electors, unless the proposition, as submitted, does not fairly submit to the voters in an intelligent form the proposition on which they are to vote.

In *Ellis v. Karl,* 7 Neb. 381, it was held: "In ordering an election on the question of the relocation of a county seat, thirty days' notice is required. But even if the notice be for a less time than this, a court of equity will not, for this reason alone, declare the election void at the suit of a party who participated therein, especially where it is not shown that a different result would probably have been obtained if the full statutory notice had been given."

In *State v. Thayer,* 31 Neb. 82, it was held:

"The provision of law requiring the governor, thirty days previous to an election at which any state officer is to be chosen, to issue his proclamation therefor is directory merely.

"Under our Constitution and laws the elective franchise is vested in the electors, and its exercise regulated by law. It is not deposited in the executive to be doled out by proclamation."

In *State v. McFarland,* 98 Neb. 854, it was held: "The failure to give the statutory notice of election of county commissioners will not of itself invalidate an election. But, if it appears that such failure has prevented the electors generally from voting upon a question, it cannot be held that there has been an election upon that question."

In *Tutt v. Hawkins,* 53 Neb. 367, it was held: "The intention of an elector must be ascertained from his ballot, and any inaccuracies in the preparation of such

ballot cannot be urged for the first time after an election, to defeat the clearly expressed intention of the voter."

In *Rideout v. City of Los Angeles,* 185 Cal. 426, it was held: "Where violations of directory provisions of an election law are not so gross or radical as to give rise to a presumption of unfairness, the burden is upon the contestant to prove that unfairness resulted from such violations."

In *Baldauf v. Gunson,* 90 Colo. 243, the supreme court of Colorado said (p. 245): "The power to reject election returns should be exercised with great caution and only as a last resort."

In 9 R. C. L. 1061, sec. 77, it is said: "Since the purpose of the statutes in reference to the preparation of ballots is to prevent fraud and secure freedom of choice, they should not by technical obstructions make the right of voting insecure. Statutes are binding on the officers for whose guidance and direction they are needed, and so far as their provisions affect the officers and their decisions they are mandatory and must be enforced. But if any irregularities occur in an official ballot due to the error or mistake of an election officer, it is the rule that they do not vitiate the vote of an elector innocent of any wrong in the matter."

Among other cases more or less in point are the following: *State v. Skirving,* 19 Neb. 497; *State v. Russell,* 34 Neb. 116; *Spurgin v. Thompson,* 37 Neb. 39; *Bingham v. Broadwell,* 73 Neb. 605; *Griffith v. Bonawitz,* 73 Neb. 622; *Gauvreau v. Van Patten,* 83 Neb. 64; *White v. Slama,* 89 Neb. 65; *State v. Grimm,* 115 Neb. 230; *Shaw v. Stewart,* 115 Neb. 315; *State v. Sheets,* 119 Neb. 145.

I submit that the question before the electors of York county was whether they should have a county board consisting of twenty members, or a county board consisting of five members. In essence, it means: Shall the will of the electors of York county, duly expressed by ballot at an election, be overthrown or thwarted simply because the county clerk did not place upon the ballot the

precise form prescribed by statute? As submitted upon the ballot, the proposition was clear and certainly could mislead no one. The statutory form could not have enlightened the voters any more than the form that was used. In this connection it should not be overlooked that a great saving would be made to the taxpayers in the expenses of the county government. The voters desired to curtail the expense of the county government and showed their desire by their ballots. Neither the relators nor any person who was opposed to reducing the number of supervisors from twenty to five challenged the form until after the election. They were evidently satisfied with the form in which it was submitted on the ballot. They were willing to do battle on the question as submitted and take the chances of winning. If the vote had been in their favor the county would still have had twenty supervisors. Now that they have lost, they seek to win upon the theory that the election was invalid because the statutory form was not used on the ballot. To even suggest that the form used on the ballot was misleading to the electorate is to cast an unwarranted aspersion upon the intelligence of the electorate of York county. The form used gave them as full information as the statutory form would have given. There is nothing to show that any elector was misled. There is no charge that any one was misled.

In the opinion it is suggested that it was an irregularity not to place the proposition upon the ballot on which were printed the names of candidates for office. On reargument that position was abandoned, and relators practically concede that there was no merit in that contention. Moreover, the ballot upon which the proposition was submitted was a regular ballot, required by statute. It was on the ballot together with a proposition for adopting a law by the initiative. That ballot was as regular as the one containing the names of candidates for office. The fact that 3,186 electors voted to reduce the number of supervisors from twenty to five, while 3,019 voted

against the proposition, shows that the question was given great consideration by the electors of York county. A majority of the electors have shown by their ballots that they desire to reduce the expenses of the county government by reducing the number of supervisors. Their will should not be overthrown nor thwarted by reason of a trifling error on the part of the county clerk.

I submit that the judgment of the district court is right and should be affirmed.

PAINE, J., concurs in this dissent.

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1. Agister's lien under written feeding contract *held* superior to subsequent chattel mortgage, notwithstanding there was an oral extension of feeding period. *Hoerler v. Prey* 822
2. Agister's lien statute is remedial and should be liberally construed. *Hoerler v. Prey* 822
3. Agister's lien *held* not lost by change of possession. *Hoerler v. Prey* 822

Appeal. SEE CRIMINAL LAW. MASTER AND SERVANT, 9-12. TRIAL.

1. Offer of proof is requisite to review of alleged error in sustaining objection to question propounded to a witness. *Campbell v. Columbia Casualty Co* 1
2. An order requiring a petition to be made more definite will be sustained where there was no abuse of discretion to plaintiff's prejudice. *Scott v. Scott* 32
3. On appeal, a remittitur may be required as a condition of affirmance, where excess of recovery may be estimated with reasonable certainty from the record. *Machurek v. Ohio Nat. Life Ins. Co* 35
4. Verdict based on conflicting evidence will not be disturbed unless clearly wrong. *State v. Commercial Casualty Ins. Co* 43
   First Nat. Bank v. Guenther 807
5. Questions not presented to nor passed on by the trial court will not ordinarily be considered on appeal. *Harlan County v. Thompson* 65
6. The constitutionality of a statute cannot ordinarily be raised for the first time in the appellate court. *Mergenthaler Linotype Co. v. McNamee* 71
7. Admission of incompetent evidence in a case tried to the court is immaterial, if the judgment is supported by sufficient competent evidence. *In re Estate of Black* 75
8. Evidential facts and facts inferable therefrom may be regarded as proved in considering assigned error in overruling defendant's motion for nonsuit. *Hook v. Kempf* 79
9. Appeal must be taken within time limit. *Morrill County v. Bliss* 97
10. Trial court has no inherent power to extend time for taking appeal. *Morrill County v. Bliss* 97
11. The trial court cannot extend time for taking appeal by vacating decree after term and re-entering the same decree. *Morrill County v. Bliss* 97

12. Appeal must be taken within the statutory time to confer jurisdiction on the supreme court. *Bradley v. Kalin* 363
13. The trial court cannot extend time for taking appeal. *Bradley v. Kalin* 363
14. One cannot enforce part of a decree and urge reversal of another part, where to do so would result in inconsistent findings on the same evidence. *Fleishman v. Armstrong* 151
15. A judgment will not be reversed because of an indefinite instruction, unless complainant offered a more definite instruction, or it appears that the jury were misled. *Bank of Axtell v. Johnson* 154
16. Generally, a judgment will not be reversed because of an erroneous ruling which is not prejudicial. *In re Estate of Slattery* 194
17. It is the duty of a court, on recognizing want of jurisdiction, to stay proceedings, dismiss the action, or otherwise notice the defect. *Stewart v. Herten* 210
18. Evidence contained in a bill of exceptions in an equity suit may be reviewed in absence of a motion for a new trial. *Douglas County v. Barker Co* 253
19. A motion for new trial is necessary to a review of errors of law occurring on the trial of an equity case. *Pitman v. Henkens* 621
20. Affidavit used in hearing on motion for deficiency judgment must be preserved in bill of exceptions to be available on appeal. *First Trust Co. v. Glendale Realty Co.* 283
21 Assignment of error not treated in brief will not be considered. *Doran v. National Surety Co* 299
22. Assignment of error not called to attention of trial court in motion for new trial will not be reviewed. *Doran v. National Surety Co* 299
23. Appellant cannot complain on appeal of instruction following instruction submitted by appellant. *Doran v. National Surety Co* 299
24. Error in instruction on measure of damages *held* without prejudice where the verdict was a general one for defendant. *Doran v. National Surety Co* 299
Murphy v. Shibiya 487
25. The rule that an issue not raised in the trial court is not cognizable in the appellate court applies to an application for a moratorium on appeal from confirmation of mortgage foreclosure sale. *Wallace v. Clements* 358
26. When, in a suit to disconnect land from a city, the court has made an inspection, its findings are entitled to great weight. *Witham v. City of Lincoln* 366

27. The supreme court cannot consider evidence in another case, not in the record, although referred to in the brief. *Speidel v. Scotts Bluff County* 431
28. All parties who may be affected by modification or reversal of the judgment must be made parties to an appeal. *Reilly v. Merten* 558
29. Appeals in equity are triable *de novo* in the supreme court. *Pitman v. Henkens* 621
30. Amendment of petition to foreclose mortgage, to include the statutory words "or any part thereof" in alleging no action at law had been had to recover the debt, allowed in supreme court. *Pitman v. Henkens* 621
31. Generally, the power of the supreme court to permit amendment of a pleading to conform to proof is exercised only to sustain a judgment and not to reverse it, unless refusal to permit amendment would cause miscarriage of justice. *Pitman v. Henkens* 621
32. Withdrawal from case on appeal not allowed. *City of Omaha v. Douglas County* 640
33. In an action to recover market price of corn at a date to be selected by seller within a reasonable time, failure to instruct on what constituted "reasonable time" *held* not error, when such an instruction is not requested. *Pittenger v. Salisbury & Almquist* 672
34. Objection to remarks of trial court will not be considered on appeal, in absence of objection at the trial or in motion for new trial. *Pittenger v. Salisbury & Almquist* 672
35. In reviewing a peremptory instruction for defendant, issuable facts which evidence for plaintiff tends to prove will be regarded as established. *Gilbert v. Bryant* 731
36. An executor appealing in his individual interests from an order of county court in a probate matter must give bond. *In re Estate of Mathews* 737
37. Statutes regarding appeal in probate matters must be considered together in determining the amount of an appeal bond. *In re Estate of Mathews* 737
38. Bond on appeal in a probate matter must be in a sum which will reasonably assure payment of the debt, costs and damages. *In re Estate of Mathews* 737
39. Where bond on appeal from probate court is insufficient, the district court may, on motion, order execution of a proper bond, and may dismiss the appeal on failure to comply with such order within a reasonable time. *In re Estate of Mathews* 737
40. Denial of jury trial *held* not error, in view of the evidence. *Hoerler v. Prey* 822

41. Findings of state railway commission have the same effect as a jury's verdict. *Omaha & C. B. Street R. Co. v. City of Omaha* 825
42. Instruction on comparative negligence *held* erroneous in requiring proof that plaintiff was guilty of "gross negligence" to defeat recovery. *McDonald v. Wright* 871
43. In absence of evidence of contributory negligence on part of plaintiff, an instruction on comparative negligence should not be given. *Reals v. Grazis* 877
44. Reversal cannot be predicated on a nonprejudicial instruction. *Reals v. Grazis* 877
45. Finding in another case, not a part of record, cannot be considered. *State, ex rel. Sorensen, v. Citizens Bank* 882

Attachment.

A party cannot intervene in an attachment action to have the question of ownership of the attached property determined. *Geis v. Geis* 394

Attorney and Client.

1. The purpose of a disbarment proceeding is not primarily to punish the attorney, but to determine in the public interest whether he should be permitted to practice law. *State, ex rel. Sorensen, v. Ireland* 570
2. Attorneys, in performance of obligations and duties assumed, must conform to certain standards in relation to clients, to courts, to the profession, and to the public. *State, ex rel. Sorensen, v. Ireland* 570

Automobiles. SEE CARRIERS, 2.

1. Driving an automobile in the center of a public bridge 16 feet wide, thus forcing another against a railing to prevent collision, is evidence of negligence. *Hook v. Kempf* 79
2. Evidence that there were two steel wheel treads through the center of a public bridge *held* not to prove a one-way drive as a matter of law. *Hook v. Kempf* 79
3. Motorists passing on a public bridge must keep on the right of the center, if the bridge is a safe two-way drive, though one reaches the bridge before the other. *Hook v. Kempf* 79
4. Issue of defendant's negligence in driving an automobile in center of safe, two-way public bridge, causing passing motorist to strike railing, *held* question for jury. *Hook v. Kempf* 79
5. County *held* not liable for death of person thrown from running board of automobile. *Kudrna v. Sarpy County* 83
6. Generally, it is negligence for a motorist to drive so fast at night that he cannot stop in time to avoid collision with an object within the area lighted by his lamps, but an exception exists where the object cannot

be observed by exercise of ordinary care in time to avoid a collision. *Adamek v. Tilford* 139
7. A husband's negligence while driving his automobile may not be imputable to his wife, but she is responsible for negligent failure to warn him of known approaching danger and to protest against his recklessness. *Murphy v. Shibiya* 487
8. In action by wife, as guest of husband in automobile, against third party, evidence *held* to establish negligence of husband and gross negligence of wife. *Murphy v. Shibiya* 487
9. Petition in action against motorist for injuring guest *held* to sufficiently plead gross negligence. *Gilbert v. Bryant* 731
10. In guest's action against motorist for injury, the issue of gross negligence was for the jury. *Gilbert v. Bryant* 731
11. "Gross negligence," under statute relating to motorist's liability to an injured guest, means negligence in a very high degree, but not necessarily extending to wanton or wilful or intentional disregard for the guest's safety. *Gilbert v. Bryant* 731
12. By enacting the guest law, the legislature did not intend to destroy entirely the civil remedy of a guest for an actionable wrong. *Gilbert v. Bryant* 731
13. "Gross negligence," within statute relating to motorist's liability to guest, means negligence in a very high degree, or absence of even slight care in performance of duty. *Swengil v. Martin* 745
14. Title to automobile can be transferred between living persons only by compliance with statute. *In re Estate of Wroth* 832

Banks and Banking.

1. Members of the guaranty fund commission *held* not liable to depositors for loss resulting from operation of insolvent bank. *Morrill County v. Bliss* 97
2. One subrogated to right of United States to priority as preferred creditor of insolvent bank *held* without prior right to payment from stockholders' liability fund. *State, ex rel. Sorensen, v. Thurston State Bank* 120
3. Evidence *held* to sustain conviction of receiving deposits while bank was insolvent. *Flannigan v. State* 163
4. Public policy will not permit a national bank to contract against liability for negligence of its officers and agents. *Hernandez v. First Nat. Bank* 199
5. Presentment of pass-book and receipt signed by depositor *held* necessary to withdrawal of deposit in savings de-

partment of national bank. *Hernandez v. First Nat. Bank* 199
6. Bank *held* liable for payment of savings deposit on forged savings department receipts. *Hernandez v. First Nat. Bank*..... 199
7. A deposit of funds in the savings department of a national bank, on an agreement for repayment with interest, creates the relation of debtor and creditor, and not that of trustee and *cestui que trust*. *Hernandez v. First Nat. Bank*..... 199
8. A savings department of a national bank is not a "savings bank." *Hernandez v. First Nat. Bank*..... 199
9. A state bank can pledge assets for security of deposits only when duly authorized by law. *Luikart v. City of Aurora* 263
10. A state bank may pledge its assets for security of the deposit of a city of the second class. *Luikart v. City of Aurora*..... 263
11. Statute making it a felony for an officer of a state bank to give a consideration in addition to legal interest for making a deposit *held* not to preclude a bank from pledging assets for security of a deposit of a city of the second class. *Luikart v. City of Aurora*..... 263
12. Where a national bank lawfully acquires an interest in realty as security for a debt, it may purchase other interests therein or incumbrances thereon, or covenant to pay a lien on the land. *Lincoln Joint Stock Land Bank v. Bexten* 310
13. Subject to the national banking act, national banks are subject to the rule that an undisclosed principal is bound by simple contracts of an agent within the scope of his authority. *Lincoln Joint Stock Land Bank v. Bexten*.... 310
14. A national bank is bound where its agent takes title to realty in his individual name for the bank's security. *Lincoln Joint Stock Land Bank v. Bexten*..... 310
15. Knowledge of president of bank, who was village treasurer, *held* imputable to bank in transactions where the treasurer acted solely for the interests of the bank. *State, ex rel. Sorensen, v. Bank of Otoe*..... 383
16. Where a village treasurer deposited village funds in a bank of which he was president but which had not been designated as a depository, the bank held the funds as trustee, and, on its insolvency, the village was entitled to a preferred claim on the assets of the bank. *State, ex rel. Sorensen, v. Bank of Otoe*..... 383

17. Knowledge of managing officer of a bank, who is also school district treasurer, *held* imputable to the bank in its relations to unauthorized deposits of school moneys. *State, ex rel. Sorensen, v. Bank of Otoe* 414
18. A bank, not designated as a depository, receiving deposit of funds from school district treasurer, who is also managing officer of the bank, holds the funds as trustee, entitling school district to preference on bank's insolvency. *State, ex rel. Sorensen, v. Bank of Otoe* 414
19. Assets of insolvent bank *held* impressed with trust in favor of holder of draft issued in payment of cashier's check presented while bank was open. *State, ex rel. Sorensen, v. Farmers State Bank* 427
20. Money deposited in a bank by referee in partition, to be paid out on order of court, *held* a trust fund entitled to preference on bank's insolvency. *State, ex rel. Sorensen, v. Farmers & Merchants State Bank* 437
21. Term "otherwise secured" defined. *State, ex rel. Sorensen, v. Bank of Campbell* 485
22. A certificate of deposit secured by a guaranty of payment *held* not "otherwise secured," so as to exclude it from the class entitled to first lien on bank's assets. *State, ex rel. Sorensen, v. Bank of Campbell* 485
23. Deposit of city funds in a state bank is "otherwise secured" as to priority on bank's insolvency, where the city requires the bank to give a depository bond and pay the premium therefor. *State, ex rel. Sorensen, v. State Bank of Omaha* 492
24. A county deposit in a state bank is "not otherwise secured" as to priority on bank's insolvency, where a depository bond is given to the county, it paying the premium therefor, and none of the bank's assets are used in procuring security for the deposit. *State, ex rel. Sorensen, v. State Bank of Omaha* 492
25. Where a managing officer, knowing a bank is insolvent, authorizes it to remain open and to receive deposits, he is guilty of knowingly permitting acceptance of deposits, though he has no actual knowledge of their receipt. *Gutru v. State* 506
26. In a prosecution for receiving deposits with knowledge of bank's insolvency, withdrawals of deposits by relatives of defendant and other bank officers are competent on the issue of defendant's knowledge of the bank's insolvency. *Gutru v. State* 506
27. An order allowing a claim in a bank receivership case constitutes a judgment, which cannot be vacated after

the term except in the manner prescribed by statute. *State, ex rel. Sorensen, v. Security State Bank* 516
28. In a prosecution for receiving deposits knowing the bank to be insolvent, the amount of deposits, relative value of assets, and extent of reserve are material inquiries. *Flannigan v. State* 519
29. Intentional fraud, deceit, false reports of banking affairs, and wrongful entries are not elements of crime of receiving deposits knowing the bank to be insolvent. *Flannigan v. State* 519
30. A bank president who authorizes deposits to be received knowing the bank to be insolvent may be criminally liable though he did not personally accept deposits. *Flannigan v. State* 519
31. Credit given a bank depositor for a check drawn on it by another depositor is equivalent to payment. *State, ex rel. Sorensen, v. Bank of Otoe* 530
32. A bank becomes trustee of a deposit made to pay a specific claim. *State, ex rel. Sorensen, v. Bank of Otoe* 530
33. Equity of receiver of insolvent bank in deposit of corporation *held* superior to right of set-off of sole stockholder of corporation for money paid for benefit of corporation. *State, ex rel. Sorensen, v. Weston Bank* 612
34. War risk insurance and disability compensation payments received from the government by guardian of incompetent veteran and deposited in a bank *held* not entitled to priority on bank's insolvency as a "debt due the United States." *State, ex rel. Sorensen, v. Horace State Bank* 638
35. A bank becomes agent of depositor and holds deposit as trust fund when, with knowledge of the fact, it accepts a deposit made to pay a specific obligation. *State, ex rel. Sorensen, v. Farmers & Merchants Bank* 800
36. Prior to amendment of 1930, the constitutional liability of stockholders of insolvent bank could not be enforced until bank's assets had been exhausted and amount due judicially determined. *Luikart v. Bunz* 867
37. Receiver may sue to collect stockholders' constitutional liability. *Luikart v. Bunz* 867
38. Constitutional provision as to bank stockholders' liability is self-executing. *Luikart v. Bunz* 867
39. Knowledge of president and managing officer acting for a bank will be imputed to the bank. *State, ex rel. Sorensen, v. Citizens Bank* 882
40. A fund wrongfully placed in a bank by its president *held* to be a trust fund. *State, ex rel. Sorensen, v. Citizens Bank* 882

Bastards.

1. A child born during lawful wedlock is presumed to be legitimate, but slighter proof should be required to repel presumption of legitimacy where there is antenuptial conception. *In re Estate of McDermott* 179
2. A person should not be declared a bastard merely because no act of intercourse is proved between husband and wife at time of pregnancy; but the proof must show impossibility of access. *In re Estate of McDermott* 179

Bills and Notes.

1. "Good consideration" defined. *Farmers & Merchants State Bank v. Kuhn* 457
2. Payee suing on negotiable instrument is not required to prove it when the answer admits execution, delivery, and ownership of the instrument. *Case Co. v. Hrubesky* 588
3. Generally, one who signs an instrument without reading it cannot avoid the effect of his signature, but where the execution is obtained by fraud, sufficient to excuse the maker's failure to read it, it is not binding on him. *Case Co. v. Hrubesky* 588
4. Checks must be presented for payment with diligence. *Keenan v. McClure* 753
5. Payee is not guilty of such negligence as will shift loss to him on account of bank's insolvency, if he deposits a check so it may be forwarded by mail for presentment on the next secular day. *Keenan v. McClure* 753
6. Drawer of check assumes risk of drawee's insolvency during reasonable period for presentment. *Keenan v. McClure* 753

Brokers.

Brokerage contract must comply with statute. *O'Shea & Son v. Leavitt* 12

Carriers.

1. Street railways are common carriers. *Omaha & C. B. Street R. Co. v. City of Omaha* 825
2. The state railway commission has jurisdiction of bus service in cities. *Omaha & C. B. Street R. Co. v. City of Omaha* 825

Charities.

A charitable institution is liable to an invitee for injuries caused by negligent failure to keep its premises in a reasonably safe condition. *Wright v. Salvation Army* 216

Chattel Mortgages.

A chattel mortgage may be discharged by substituting in lieu thereof a real estate mortgage. *First Nat. Bank v. Guenther* 807

Compromise and Settlement.

A debt will not be extinguished by payment of less than amount due, unless based on a new consideration. *Jensen v. Lincoln Hail Ins. Co.* 87

Constitutional Law.

1. Constitutional provisions relating to the same subject-matter should be construed together, and effect given to each provision, if possible. *State, ex rel. Randall, v. Hall* 236
2. Constitutional provisions which may be enforced without violating each other are not repugnant. *State, ex rel. Randall, v. Hall* 236
3. The legislative, executive, and judicial governmental divisions each derives its power directly from the people. *State, ex rel. Randall, v. Hall* 236
4. The legislature may increase or decrease salaries of state officers only within constitutional limitations. *State, ex rel. Randall, v. Hall* 236
5. The constitutional prohibition against changing the salary of a state officer during his term is unambiguous. *State, ex rel. Randall, v. Hall* 236
6. Where a statute is susceptible of two constructions, one rendering it valid will be adopted in preference to one rendering it invalid. *State, ex rel. Sorensen, v. State Bank of Omaha* 492
7. Ordinance classifying barber shops *held* unconstitutional. *Ernesti v. City of Grand Island* 688
8. The constitutional right of appeal does not prevent the legislature from requiring the appellant to give an appeal bond. *In re Estate of Mathews* 737
9. Statute attempting to impose on counties and municipalities the duty of maintaining bridges over artificial waterways, other than irrigation ditches, which cross public highways, *held* broader than its title. *State, ex rel. County of Dawson, v. Dawson County Irrigation Co.* 836
10. Statute requiring counties and municipalities to maintain bridges over irrigation ditches, but not over other artificial waterways, *held* special legislation. *State, ex rel. County of Dawson, v. Dawson County Irrigation Co.* 836
11. The constitutional remedy to enforce liability of stockholders of insolvent bank applies, though such liability accrued prior to its adoption. *Luikart v. Bunz* 867
12. No vested rights are impaired by a statutory or constitutional provision which creates a remedy for an existing right. *Luikart v. Bunz* 867

Contracts.

1. Where evidence relating to ambiguities in a written instrument is conflicting, it presents a question for the jury to determine. *State v. Commercial Casualty Ins. Co.* 43
2. Where evidence relating to a technical term in a written contract is in conflict, its meaning is a question for the jury. *State v. Commercial Casualty Ins. Co*..... 43
3. Special provisions in a contract control general provisions. *State v. Commercial Casualty Ins. Co*..... 43
4. Contractor *held* not liable where he followed specifications prepared by the owner's engineers. *State v. Commercial Casualty Ins. Co*..... 43
5. When a contract prescribes materials chosen by the owner, there is no undertaking on part of contractor that materials will meet demands made upon them. *State v. Commercial Casualty Ins. Co*..... 43
6. Where a construction contract made the owner's engineers supervising agents to approve the work, the engineers' certificate of approval constitutes *prima facie* evidence that the work was properly performed. *State v. Commercial Casualty Ins. Co*..... 43
7. Under a contract to drill a well providing that the quality of water should be satisfactory to defendant, his decision as to quality of water must be made with good faith, and whether he so acts is a question for the jury. *Melson v. Turner*..... 603
8. Petition *held* to allege a direct promise and not a promise to answer for the debt or default of another. *Melson v. Turner* 603

Corporations.

1. One who contracts with a corporation, as such, is estopped to deny incorporation as a defense to an action on the contract. *Retail Merchants Service v. Bauer & Co.* 61
2. One who contracts with a corporation, not as such, but later recognizes and deals with it as such, is estopped to deny corporate existence. *Retail Merchants Service v. Bauer & Co*..... 61
3. Estoppel to deny corporate existence cannot be based on ambiguous facts which are as consistent with existence of a partnership or trade-name as with a corporation. *Retail Merchants Service v. Bauer & Co*..... 61
4. In action on contract in name of Retail Merchants Service, defendant *held* not estopped to deny corporate

existence of plaintiff. *Retail Merchants Service v. Bauer & Co.* 61
5. Creditors of an insolvent corporation cannot sue part of the stockholders for corporate debts unless they show that the others are nonresidents or cannot be reached by process. *Dempster v. Ashton* 535
6. The principle that a corporation and its individual stockholders are separate entities applies where all stock is owned by one person. *State, ex rel. Sorensen, v. Weston Bank* 612
7. A court of equity will disregard the separate entities of a corporation and its stockholders where necessary to prevent fraud or injustice. *State, ex rel. Sorensen, v. Weston Bank* 612

Counties and County Officers.

1. A county treasurer is not authorized to deposit county funds in a bank unless it has been designated as a depository and given bond. *Massachusetts Bonding & Ins. Co. v. Steele* 7
2. County treasurer and surety are liable for loss of county funds deposited in excess of bank's depository bond. *Massachusetts Bonding & Ins. Co. v. Steele* 7
3. The office of county treasurer is an office of trust and profit, and the treasurer is a collector and custodian of public money, within Constitution. *State, ex rel. Good, v. Marsh* 125
4. Evidence *held* to show intent to misappropriate county funds, rendering treasurer ineligible to hold office. *State, ex rel. Good, v. Marsh* 125
5. The county treasurer is a ministerial officer without judicial power to pass on the validity of acts of other officers. *Woods v. Brown County* 256
6. A county treasurer has no authority to liquidate claims against the county. *Woods v. Brown County* 256
7. Where a county treasurer undertook to pay unallowed salary claims against a county from the sinking funds without a warrant, he could not take assignments of the claims and recover thereon, unless the sinking funds were reimbursed. *Woods v. Brown County* 256
8. A county treasurer is without authority to loan public funds to individuals or to use such funds to purchase valid claims against the county and take assignments thereof. *Woods v. Brown County* 692
9. A county treasurer having loaned or invested public funds without authority may in his official capacity maintain an action to recover same. *Woods v. Brown County* 692

10. Claims against a county for earned official salaries may be assigned, and such an assignment is binding on the county when the county board is advised thereof. *Woods v. Brown County* 692
11. Where a county, sued by an assignee of salary claims, admits the salaries have been earned, are fixed by law, and have not been paid, and pleads no defense, the court should enter a judgment for the assignee. *Woods v. Brown County* 692
12. The office of district supervisor is distinct from the office of township supervisor. *Thompson v. James* 350
13. A county board's determination of sufficiency of remonstrance petition against continuation of farm bureau budget and qualifications of signers to petition is quasi judicial and not subject to collateral attack. *Everts v. Young* 562
14. A county board can contract with private landowners to give them an irrevocable license to use of a road across county property. *City of Omaha v. Douglas County* 640

Courts.

1. County courts have exclusive original jurisdiction of resident minors, guardianship, settlement of their accounts, and management of their property. *Stewart v. Herten* 210
2. District courts have no original jurisdiction of matters of which county courts have exclusive jurisdiction. *Stewart v. Herten* 210
3. The uniform declaratory judgments act *held* not to affect powers vested in county courts. *Stewart v. Herten* 210
4. The district court *held* without jurisdiction in proceedings for a declaratory judgment, involving guardianship of minors. *Stewart v. Herten* 210
5. Subject to constitutional and statutory limitations, a court has inherent power to make reasonable rules of practice. *Uerling v. State* 374
6. A rule of court fixing the time within which pleadings must be filed is not obligatory on the court, but may be enforced where its enforcement does not deny a litigant reasonable opportunity to exercise a legal right. *Uerling v. State* 374
7. On appeal from confirmation of a mortgage foreclosure sale, an application for a moratorium under the moratory act *held* not within the original jurisdiction of the supreme court. *Wallace v. Clements* 358

Lincoln Safe Deposit Co. v. Carlson 361
8. The district court may permit amendments to pleadings in cases appealed from municipal courts. *Melson v. Turner* 603
9. An action for infringement of a patent granted by the United States is one arising under the patent laws, and state courts have no jurisdiction of such an action. *Thimgan v. State* 696

Criminal Law.

1. Only confessions are admissible in evidence which are freely and voluntarily made and which are not induced by promise of benefit or fear of threat. *Morcumb v. State* 42
2. Accused's right to counsel may be waived. *Bordeau v. State* 133
3. Decision on question of fact submitted to trial court by affidavits will not be set aside unless clearly wrong. *Bordeau v. State* 133
4. In prosecution for receiving deposits while bank was insolvent, conduct of prosecutor *held* not prejudicial, in view of cautionary instruction. *Flannigan v. State* 163
5. Objection to question as calling for conclusion of witness *held* properly sustained. *Brown v. State* 287
6. Testimony tending to dispute testimony of accused as to a material fact is proper rebuttal testimony. *Brown v. State* 287
7. Voluntary statements of accused to officers while under arrest tending to show his connection with alleged crime are admissible. *Fields v. State* 290
8. Instruction that "malice" means a "wilful or corrupt intention of the mind" *held* not error. *Fields v. State* 290
9. Objection to impeaching evidence *held* not to raise question of sufficiency of foundation for its admission. *Froding v. State* 322
10. Misconduct of prosecuting attorney *held* not prejudicial to accused. *Froding v. State* 322
11. Where accused was identified solely by his voice, the probative value of such evidence was for the jury. *Froding v. State* 322
12. A witness who has sufficient knowledge and experience to form a correct opinion as to whether liquor is intoxicating may testify on that point. *Clarke v. State* 445
13. The venue of a criminal offense may be proved like any other fact. *Clarke v. State* 445
14. If the only rational conclusion from the facts in evidence is that the crime was committed in the county alleged, the proof of venue is sufficient. *Clarke v. State* 445

15. In a prosecution against a bank officer for receiving deposits knowing the bank to be insolvent, an instruction defining insolvency *held* not prejudicially erroneous. *Gutru v. State* 506
16. In a prosecution for receiving deposits knowing the bank to be insolvent, an assistant receiver *held* qualified to testify regarding value of notes held by the bank, where his knowledge of the financial condition of the makers is shown. *Gutru v. State* 506
17. Error cannot be predicated on failure to instruct without a request therefor, unless a statute or rule of law requires an instruction. *Gutru v. State* 506
18. In a prosecution for receiving deposits knowing the bank to be insolvent, failure to instruct that proposed sale of the bank was a strong circumstance tending to prove the bank's solvency and defendant's belief in its solvency *held* not error, in absence of request therefor. *Gutru v. State* 506
19. In a prosecution for receiving deposits knowing the bank to be insolvent, an instruction defining insolvency *held* not prejudicially erroneous. *Flannigan v. State* 519
20. In a prosecution for receiving deposits knowing a bank to be insolvent, an expert in banking may express an opinion as to the solvency of a bank, based on knowledge of its liabilites and on information disclosed by examination of assets. *Flannigan v. State* 519
21. Immaterial matter introduced by the state to counteract immaterial matter erroneously introduced by defendant does not entitle defendant to a reversal, in absence of prejudice. *Flannigan v. State* 519
22. Where there is no occasion for giving a requested instruction containing the maxim *Falsus in uno, falsus in omnibus*, the court may refuse to give it. *Flannigan v. State* 519
23. Misconduct of opposing counsel in directing abusive and unwarranted statements to each other *held* not ground for reversal of conviction, where the court promptly rebuked them and directed the jury to disregard the statements. *Flannigan v. State* 519
24. Where accused has been legally sentenced, the trial court cannot suspend sentence, but may suspend its execution to permit review of judgment by appellate court. *Moore v. State* 565
25. Order of district court purporting to suspend sentence for the purpose of placing defendant on probation is a nullity. *Moore v. State* 565

26. Offense of carrying concealed weapons is a felony. *Bright v. State* 817
27. The grade of an offense not designated is determined by the punishment. *Bright v. State* 817
28. Description of weapon in information *held* not at variance with proof. *Bright v. State* 817
29. A sentence imposed within statutory limits will not be disturbed in absence of abuse of discretion. *Bright v. State* 817

Damages.

1. The measure of damages for destruction of a growing crop is its value at the time and place of destruction. *Kern v. Frenchman Valley Irrigation District* 30
2. The measure of damages for injury to building from blasting is cost of restoring the building to its former condition. *Wendt v. Yant Construction Co.* 277
3. Damages for injury to automobile guest *held* not excessive. *Roh v. Opocensky* 551
4. In action by pedestrian against motorist for injury, evidence of condition of heart *held* admissible under allegation of petition that plaintiff's disability consisted in part of a weakened heart resulting from pneumonia contracted because of accident. *Reals v. Grazis* 877
5. In personal injury action, plaintiff may recover for pain and suffering. *Reals v. Grazis* 877

Deeds.

Deposit of deed by grantor with third person without power of revocation, with directions to record it after grantor's death, *held* sufficient delivery to pass title to grantee. *Kennedy v. Nelson* 185

Dismissal.

Dismissal for failure to comply with order requiring petition to be made more definite and certain *held* not abuse of discretion. *Northport Irrigation District v. Farmers Irrigation District* 607

Elections.

1. An election held without constitutional or statutory authority is a nullity. *Thompson v. James* 350
2. An election is void, if the proposition submitted is materially different from one authorized. *Thompson v. James* 350
3. The rule that, after election, election laws will be construed as directory to support the result does not permit such departure from provisions for submitting a proposition as to leave doubt as to whether such departure did not bring about a result that otherwise

would not have occurred. *Thompson v. James* 350

Eminent Domain.

1. The sheriff, and not the county judge, is authorized to select appraisers to appraise land condemned for road purposes. *State, ex rel. Ira, v. Adamson* 441
2. Award made by appraisers selected by county judge, in proceedings to condemn land for road purposes, *held* void. *State, ex rel. Ira, v. Adamson* 441

Estoppel.

1. Defendant pleading facts sufficient to constitute estoppel will be given benefit of defense, although not formally pleaded. *Retail Merchants Service v. Bauer & Co* 61
2. Estoppel need not be specially pleaded, where facts showing estoppel are within the issues. *Ross v. First American Ins. Co* 329
3. A party giving a reason for his decision and conduct touching anything in controversy is estopped, after litigation is instituted, from changing his reason. *Pittenger v. Salisbury & Almquist* 672

Evidence.

1. Trial court may properly sustain objection to question calling for a conclusion. *Campbell v. Columbia Casualty Co.* 1
2. To prevent wrong, extrinsic evidence is admissible to show understanding of parties to life insurance contract as to ambiguous terms. *Machurek v. Ohio Nat. Life Ins. Co* 35
3. Parol evidence *held* admissible to clarify ambiguous disability clause of insurance policy. *Machurek v. Ohio Nat. Life Ins. Co* 35
4. Parol evidence is admissible to show the meaning of technical terms in a written contract. *State v. Commercial Casualty Ins. Co* 43
5. Parol evidence is admissible to explain ambiguous language in a written contract. *State v. Commercial Casualty Ins. Co* 43
6. Evidence of tensile strength of materials similar to those whose tensile strength is in controversy is admissible. *State v. Commercial Casualty Ins. Co* 43
7. One is conclusively presumed to intend obvious and probable consequences of his voluntary act. *Peterson v. Wahlquist* 247
8. Evidence tending to establish separate oral agreement between parties to written contract as to matters on which the contract was incomplete is admissible if it does not vary or contradict the written contract. *Doran*

v. National Surety Co. ... 299
9. A promise not specifically included in written contract may be proved by parol where the contract was executed on faith of promise. *Doran v. National Surety Co.* ... 299
10. A fact, relation, or state of things once shown to exist may be presumed to continue until the contrary appears. *Lincoln Joint Stock Land Bank v. Bexten* ... 310
11. Facts reasonably inferable from facts and circumstances proved may be regarded as established. *Struve v. City of Fremont* ... 463
12. Statements of motorist at time of accident *held* admissible as *res gestæ*. *Roh v. Opocensky* ... 551
13. Medical authorities are not admissible as independent evidence of statements therein expressed, but a cross-examiner may use such authorities to contradict an expert medical witness. *Winters v. Rance* ... 577
14. Courts take judicial notice of the uses made of safe deposit boxes. *Orchard & Wilhelm Co. v. North* ... 723

Execution.

Where discovery of property of a judgment debtor is sought through evidence from others than a garnishee, the remedy is in equity or under specific statute. *Orchard & Wilhelm Co. v. North* ... 723

Executors and Administrators.

1. Coobligor on administrator's bond is necessary party to appeal from judgment against administrator. *Reilly v. Merten* ... 558
2. A claimant cannot rely on statements of a third person as to extension of time for filing claim against estate. *In re Estate of Yetter* ... 763
3. A claimant who is negligent cannot have time extended for filing claim against estate. *In re Estate of Yetter* ... 763
4. Executor's promise to pay *held* not to excuse claimant for not filing claim in time. *In re Estate of Yetter* ... 763

Explosives.

Owner of dwelling *held* entitled to damages arising from blasting in vicinity of dwelling. *Wendt v. Yant Construction Co.* ... 277

False Imprisonment.

1. To recover for false imprisonment, the burden is on plaintiff to prove unlawful restraint of liberty. *Dillon v. Sears-Roebuck Co.* ... 269
2. Right to recover for false imprisonment rests on unlawful interference with freedom of locomotion. *Dillon v. Sears-Roebuck Co.* ... 269

Forgery.

1. A written instrument, made the subject of forgery, may be forged on Sunday. *Uerling v. State* 374
2. Designation of instrument in an information for forgery is sufficient if embraced within instruments made the subject of forgery. *Uerling v. State* 374
3. In a prosecution for forgery, it is not necessary to allege or prove intent to defraud any particular person. *Uerling v. State* 374

Fraud.

1. Fraud is never presumed, and burden of proving it is on the party alleging it. *Case Co. v. Hrubesky* 588
2. Evidence in suit to rescind contract for purchase of land *held* insufficient to establish conspiracy between seller and person inducing contract. *Emerson v. Citizens State Bank* 632
3. Concealment of existence of incumbrance on property in sale *held* to constitute fraud. *Dickinson v. Lawson* 646

Fraudulent Conveyances.

1. The contingent liability of a stockholder *held* to make depositors "existing creditors" entitled to attack a voluntary conveyance as fraudulent. *Peterson v. Wahlquist* 247
2. Realty voluntarily conveyed by a bank stockholder to his wife when the bank was insolvent may be subjected to payment of the stockholder's contingent liability which became absolute after the transfer. *Peterson v. Wahlquist* 247
3. The holder of a claim arising out of a preexisting contract, although contingent, is a creditor whose rights are affected by the debtor's voluntary conveyance. *Peterson v. Wahlquist* 247
4. In a suit attacking a voluntary conveyance by judgment debtor to wife, the petition may be sufficient without charging fraudulent intent, or fraud, in literal terms, where facts pleaded are sufficient to show actual fraud. *Peterson v. Wahlquist* 247
5. Fraudulent intent may be established by proof of facts from which such inference may reasonably be drawn. *Peterson v. Wahlquist* 247

Garnishment.

1. In garnishment proceedings in aid of execution, only the answer or testimony of the garnishee may be considered. *Orchard & Wilhelm Co. v. North* 723
2. A leased safe deposit box is under the lessor's control when considered in garnishment proceedings in aid of execution, and the court may require the box to be

opened. *Orchard & Wilhelm Co. v. North* 723
3. Receipt for a copy of summons attached to summons when returned, *held* sufficient to confer jurisdiction on the court. *Scott v. McDonald* 803

Gifts.

1. A gift of property may be made directly to the donee, or to a third person for delivery after the donor's death. *Kennedy v. Nelson* 185
2. Delivery of property to a third person as trustee for donee *held* sufficient delivery to complete gift. *Kennedy v. Nelson* 185
3. Subsequent possession of subject of gift by donor *held* not necessarily incompatible with gift. *Kennedy v. Nelson* 185
4. Gift *held* made in contemplation of death. *Kennedy v. Nelson* 185

Highways.

1. The statute authorizing establishment of a public highway on affidavit of an isolated landowner *held* not inconsistent with general road law, and not exclusive. *Mlady v. Knox County* 191
2. Rights may be gained by prescription against a county or city. *City of Omaha v. Douglas County* 640
3. The right to use a road may be given to the public by dedication, by parol, conduct, or lapse of time. *City of Omaha v. Douglas County* 640

Homestead.

1. A mortgage on a homestead to which signature of wife was forged is void. *Bacon v. Western Securities Co* 812
2. Wife's failure to complain to mortgagee *held* not to estop her from claiming relief against invalid mortgage on homestead. *Bacon v. Western Securities Co* 812

Homicide.

1. Failure to submit question of manslaughter *held* not error, in view of the evidence. *Fields v. State* 290
2. Where two or more conspire to commit an unlawful act and in its prosecution one of the confederates commits homicide, the perpetrator of the homicide is the agent of his associates, and each is guilty of homicide. *Fields v. State* 290

Infants.

1. The father of one receiving mothers' pension *held* not liable for same. *Frontier County v. Palmer* 716
2. The mothers' pension act and the pauper statutes are distinct acts. *Frontier County v. Palmer* 716
3. Where an infant affirms his contract after attaining

majority, he cannot thereafter disaffirm it on the ground of infancy. *First Nat. Bank v. Guenther* 807

Injunction.

1. A contract of a city entered into without power, express or implied, is void, and its performance may be enjoined. *Interstate Power Co. v. City of Ainsworth* 419
2. Injunction does not lie to review county board's ruling on petition remonstrating against continuation of farm bureau budget; proceedings in error being adequate. *Everts v. Young* 562
3. Injunction should not be granted to enforce a negative agreement in a contract of employment unless enforcement will be equitable and will not work undue hardship. *Smith Baking Co. v. Behrens* 718
4. Generally, a negative covenant of a contract of employment will not be enforced by injunction at the suit of one who has first materially breached the contract. *Smith Baking Co. v. Behrens* 718

Insurance.

1. Statute requiring that accident policy must state time within which notice of accident must be given *held* part of the policy. *Campbell v. Columbia Casualty Co.* 1
2. Compliance with requirement of accident policy as to notice of claim, unless waived, is a condition precedent to validity of claim. *Campbell v. Columbia Casualty Co.* 1
3. Denial of liability under an accident policy *held* not a waiver of timely notice of claim. *Campbell v. Columbia Casualty Co* 1
4. A parol contract of insurance is valid. *Whitehall v. Commonwealth Casualty Co* 16
5. The scope of an insurance agent's authority is determined by the business which he is permitted to do in the insurer's name, or by its apparent consent. *Whitehall v. Commonwealth Casualty Co* 16
6. An oral contract of insurance may be binding on insurer, notwithstanding it violates private limitations on agent's authority of which insured had no knowledge. *Whitehall v. Commonwealth Casualty Co* 16
7. Requisites of valid parol contract of insurance stated. *Whitehall v. Commonwealth Casualty Co* 16
8. Ambiguous language in a contract for disability insurance, if open to different interpretations, may be construed against the insurer that drafted the instrument. *Machurek v. Ohio Nat. Life Ins. Co* 35
9. The premium for insurance should be designated in the

policy. *Machurek v. Ohio Nat. Life Ins. Co.* 35
10. Insurance corporations, stockholders and policyholders are entitled to proper disbursement of insurance funds. *Machurek v. Ohio Nat. Life Ins. Co.* 35
11. Insurance corporations and their officers may not apply insurance funds to unauthorized compensation of agents or others. *Machurek v. Ohio Nat. Life Ins. Co.* 35
12. In an action on a contract for disability insurance wherein a settlement in full was pleaded as a defense, insurer *held* entitled to credit for a payment which insured claimed as compensation for services. *Machurek v. Ohio Nat. Life Ins. Co.* 35
13. The statute, articles of incorporation, by-laws, application and policy constitute the contract between assured and defendant hail insurance company. *Jensen v. Lincoln Hail Ins. Co.* 87
14. Insurance policy will be construed more strongly against the party who drafted it. *Jensen v. Lincoln Hail Ins. Co.* 87
15. A policy for an aggregate sum, but further designating a specific amount on separate portions of the insured property, *held* to be a divisible contract. *Jensen v. Lincoln Hail Ins. Co.* 87
16. Where not required by contract, insurer cannot exact receipt in full on payment of loss. *Jensen v. Lincoln Hail Ins. Co.* 87
17. Deduction clause in hail policy on five fields of wheat *held* not applicable to property as a whole, but to apply to insurance provided for each tract. *Jensen v. Lincoln Hail Ins. Co.* 87
18. Whether party making adjustment of fire loss was insurer's agent *held* question for jury. *Goldfein v. Continental Ins. Co.* 112
19. "Bodily infirmity," as used in an accident policy, *held* an ailment of a somewhat settled character as distinguished from a temporary disorder. *Ross v. First American Ins. Co.* 329
20. Information given agent taking application *held* imputed to insurer. *Ross v. First American Ins. Co.* 329
21. Notice of disability given after time limit in policy *held* sufficient, in view of progressive nature of disability. *Ross v. First American Ins. Co.* 329
22. Failure to disclose in application name of physician and treatment for temporary ailment will not avoid policy. *Ross v. First American Ins. Co.* 329
23. Where a health and accident policy covered treatment

in a regularly incorporated hospital, recovery could not be had for treatment in an unincorporated hospital. *Ross v. First American Ins. Co*..... 329
24. Evidence *held* to show insured not in default for nonpayment of premium note. *Ross v. First American Ins. Co.* 329
25. Insurer having claimed liability on the ground of fraud cannot, after suit is brought, assert as a defense failure to give notice of loss within required time. *Ross v. First American Ins. Co*..... 329
26. One soliciting insurance and authorized to receive premiums *held* insurer's agent. *Malm v. State Farmers Ins. Co*..... 594
27. An insurance policy cannot be avoided for misrepresentation of facts material to the risk, where due to insurer's agent. *Malm v. State Farmers Ins. Co*..... 594
28. Payment of instalments of war risk insurance and disability compensation to guardian of incompetent veteran vests title in the ward and discharges obligation of United States in respect thereto. *State, ex rel. Sorensen, v. Horace State Bank*..... 638
29. Removal of property to a location not covered by policy *held* a breach of the policy, precluding recovery. *Johnson v. Caledonian Ins. Co*..... 759
30. Failure to pay assessment which was partially invalid *held* not ground for insurer's denial of liability. *Hobza v. State Farmers Ins. Co*..... 776

Intoxicating Liquors.

Where there is a personal defendant in a liquor case, no separate action need be brought against an automobile. *Clarke v. State*..... 445

Judges.

1. Suit for accounting by depositor against receiver of insolvent state bank *held* a proceeding in connection with liquidation of the bank, in which a district judge could perform official acts at chambers. *Morrill County v. Bliss* 97
2. In a prosecution for forgery, a judge is not disqualified on the ground of interest because he had purchased from defendant genuine instruments similar to the instrument alleged to have been forged. *Uerling v. State* 374

Judgment.

1. Plaintiff seeking vacation of judgment after term must allege and prove a valid cause of action. *Morrill County v. Bliss*..... 97
2. Vacation and reentry of judgment after term *held* not

an adjudication that plaintiff seeking vacation has a cause of action. *Morrill County v. Bliss* 97
3. A district court can vacate or modify its judgments after the term only in the manner prescribed by statute. *State, ex rel. Sorensen, v. Security State Bank* 516
4. In civil cases, a court of general jurisdiction has inherent power to vacate or modify its judgments at any time during the term. *Lyman v. Dunn* 770
5. After the term at which a judgment has been rendered, the court may vacate a judgment only for reasons stated and within time limited by statute. *Lyman v. Dunn* 770
6. Lack of diligence is not an "unavoidable casualty or misfortune" preventing a party from defending an action at a former term. *Lyman v. Dunn* 770

Judicial Sales.

A judicial sale of realty will not be set aside for inadequacy of price, unless it is so gross as to show fraud or mistake. *Hill v. Campbell* 585

Jury.

1. Overruling challenge to array which did not plead facts showing violation of statute regulating manner of drawing jury *held* not error. *Uerling v. State* 374
2. A juror who boarded a street car similar to one involved in testimony and made experiments and reached a conclusion thereon *held* disqualified as a juror. *Meyer v. Omaha & C. B. Street R. Co* 712

Landlord and Tenant.

1. Levy of landlord's attachment on personalty subject to lien for rent and contained within building on leased premises, accompanied by taking possession of the leased premises by the officer solely for the purpose of holding the attached property, does not, as a matter of law, constitute an eviction of the tenant. *Kimball v. Lincoln Theatre Corporation* 677
2. A tenant's voluntary surrender of key to leased premises to officer attaching personalty subject to lien for rent does not constitute surrender of the premises nor acceptance of surrender by the landlord. *Kimball v. Lincoln Theatre Corporation* 677
3. Whether acts of landlord constitute constructive eviction of tenant must be determined from facts and circumstances of particular case. *Kimball v. Lincoln Theatre Corporation* 677
4. Evidence *held* not to sustain finding that tenant had been constructively evicted as matter of law. *Kimball v. Lincoln Theatre Corporation* 677

5. An attachment lien on proceeds of sale of crops from leased premises *held* prior to lien of lessor under a lease requiring the lessee, on demand, to give a chattel mortgage on the crops to secure the rent. *Olcson v. Pumphrey* 708

Libel and Slander.

1. Defamatory words falsely spoken or written of a party which prejudice him in his occupation or trade are actionable *per se*. *McLaughlin v. Woolworth Co*..... 684
2. Any imputation on one's solvency or any suggestion that he is in pecuniary difficulties is actionable. *McLaughlin v. Woolworth Co*..... 684
3. Writing *held* not libelous *per se*. *McLaughlin v. Woolworth Co*..... 684

Limitation of Actions.

1. Payment of dividends to surety on county treasurer's bond by receiver of insolvent depository bank at request of treasurer *held* to arrest running of statute of limitations against claim of surety against treasurer. *Massachusetts Bonding & Ins. Co. v. Steele*..... 7
2. A proceeding to vacate a judgment for fraud against a person of unsound mind must be commenced within two years after the removal of disability. *Scott v. Scott* 32
3. The statute of limitations begins to run against a valid account stated when the parties to it agree upon the amount due, but does not bar an action thereon by continuing to run against original items of the indebtedness. *In re Estate of Black*..... 75
4. The statute of limitations on right to recover a void tax begins to run from time of payment of tax, and not from time illegality of the tax is judically determined. *Monteith v. Alpha High School District*..... 665

Mandamus.

1. Peremptory writ of mandamus will not be denied on unsupported claim that disorder and confusion will result therefrom. *State, ex rel. Brown, v. Taylor*..... 228
2. In mandamus proceedings, no pleading is authorized other than the writ and answer. *State, ex rel. Randall, v. Hall* 236
3. Where award of appraisers in condemnation proceedings was void because appraisers were selected by the county judge, mandamus does not lie to compel county judge to turn over the award to the landowners. *State, ex rel. Ira, v. Adamson*..... 441

Master and Servant.

1. Workmen's compensation cases are heard *de novo* on appeal. *Mullen v. City of Hastings* 172
2. The burden of proof is on claimant in compensation case. *Mullen v. City of Hastings* 172
3. Compensation cannot be based on possibilities or probabilities. *Mullen v. City of Hastings* 172
4. Where an employee dies suddenly while engaged in his work, the burden is on compensation claimant to prove that death was an accident arising out of employment. *Mullen v. City of Hastings* 172
5. Evidence *held* insufficient to prove that claimant's deceased suffered a compensable injury. *Mullen v. City of Hastings* 172
6. The burden is on the employee to establish compensable injury. *Parsons Oil Co. v. Schlitt* 223
7. Compensation claimant must show with reasonable certainty that injury to employee was caused by an accident arising out of and in course of employment. *Huffman v. Great Western Sugar Co* 302
8. Injury to employee struck by a missile intentionally thrown at him by another *held* to arise out of and in course of employment. *Good v. City of Omaha* 307
9. On appeal in a workmen's compensation case, transcript of the record containing the final order appealed from must be filed within 30 days from entry thereof. *Bradley v. Kalin* 363
10. The thirty days within which an appeal must be perfected in a compensation case commences to run on overruling of motion for new trial. *Saxton v. Sinclair Refining Co* 468
11. Appeal from award of compensation commissioner to district court will not lie unless notice of intention to appeal is filed with the commissioner within seven days following date of award, and the petition on appeal is filed within fourteen days from date of award. *Duering v. Village of Upland* 659
12. Notice of intention to appeal from award of compensation commissioner must be filed with the commissioner within seven days following date of award. *Swanson v. Village of Shickley* 664
13. An injury, to be compensable, must be caused by an accident arising out of and in the course of employment. *Hall v. Austin Western Road Machinery Co* 390
14. A compensable injury can only arise while the workman is engaged in, on, or about the premises where his

duties are being performed, or where his services require his presence. *Hall v. Austin Western Road Machinery Co*..... 390
15. A commuted award extends over the full period originally covered by the award. *Peterson v. Borden's Produce Co*..... 404
16. While a workman may receive concurrent compensation for two or more injuries, the combined amounts received may not exceed $15 a week. *Peterson v. Borden's Produce Co*..... 404
17. In a compensation case, the reviewing court must make independent findings and decree accordingly. *Peterson v. Borden's Produce Co*..... 404
18. Evidence *held* not to show compensable injury. *Peterson v. Borden's Produce Co*..... 404
19. Nebraska compensation law *held* applicable, where employee was injured while temporarily performing work in another state. *Penwell v. Anderson*..... 449
20. Compensation proceedings will not lie unless claim is filed within six months, or petition filed within one year, after employee's death. *Welton v. Swift & Co*..... 455
21. In the absence of fraud, employee's release for injury is binding on his dependents after his death. *Welton v. Swift & Co*..... 455
22. Where deceased employee could not have recovered additional compensation for injury occurring four years before his death, his dependents cannot recover therefor. *Welton v. Swift & Co*..... 455
23. An injury is received in course of employment, when sustained in work for which servant was employed or work incidental thereto. *Struve v. City of Fremont*..... 463
24. Technical refinements of interpretation will not be permitted to defeat the purpose of the compensation law. *Struve v. City of Fremont*..... 463
25. Death of city fireman caused by monoxide gas poisoning *held* to have occurred in course of employment. *Struve v. City of Fremont*..... 463
26. Compensation award must be based on evidence showing employee incurred disability arising out of and in course of employment. *Saxton v. Sinclair Refining Co*..... 468
27. The burden rests on the employee seeking compensation to establish that ailment was caused by injury. *Saxton v. Sinclair Refining Co*..... 468
28. Order of compensation commissioner denying compensation after a hearing on the merits is a bar to a subsequent suit on the same cause of action, except as

otherwise expressly provided in the compensation act. *Gray v. Burdin* 547
29. On appeal from award of compensation commissioner, pleading want of jurisdiction, with other defenses, in answer *held* not a waiver of filing notice of appeal. *Duering v. Village of Upland* 659
30. Parties to a written contract of employment may orally modify it, and generally the employee's continuance in employment after employer's reduction of wages implies consent to the reduction, but circumstances may be shown to controvert the implication of consent. *Smith Baking Co. v. Behrens* 718
31. Employee's unreasonable refusal to undergo a minor operation reasonably certain to effect a curé warrants suspension of compensation payments. *Simmerman v. Felthauser* 795
32. What constitutes unreasonable refusal of employee to submit to minor surgical operation is a question of fact; and the burden of proof to establish that the tendered operation is simple, safe, and reasonably certain to effect a cure is on employer. *Simmerman v. Felthauser* 795
33. Where medical experts disagree as to the probable success of an operation, the employee's refusal to submit thereto is not unreasonable. *Simmerman v. Felthauser* 795

Mechanics' Liens.

Where there is a contract for a specified sum to furnish labor and material for repair of building, proof of a detailed account is not necessary to establish right to a mechanic's lien. *Green v. Fiester* 874

Mortgages. SEE COURTS, 7.

1. Objections to confirmation of foreclosure sale, unsupported by evidence, will not be sustained on appeal. *Carlson v. Nelson* 5
2. Mortgagor *held* not entitled to possession of land after confirmation of foreclosure sale for the purpose of harvesting a crop. *Carlson v. Nelson* 5
3. Act relating to deficiency judgments *held* not applicable to proceedings prior to its passage. *First Trust Co. v. Glendale Realty Co* 283
4. Where the holder of a note and mortgage as collateral security acquires title to the premises, *held* that the mortgaged realty remained subject to redemption. *Lincoln Joint Stock Land Bank v. Bexten* 310
5. Mere inadequacy of price will not preclude confirmation of foreclosure sale, unless the inadequacy is so great

as to evidence fraud. *Lincoln Safe Deposit Co. v. Carlson* 361
Omaha Loan & Bldg. Ass'n v. Clarke 497
6. In a suit to foreclose mortgages and for appointment of a receiver, appointing a receiver on final hearing before institution of appeal or application for stay *held* error. *Aurora Bldg. & Loan Ass'n v. Grand Island Culvert & Metal Works* 561
7. Mere surplusage in notice of sale will not prevent confirmation. *Hill v. Campbell* 585
8. Where the evidence does not show that a resale would produce a better price, an order confirming a foreclosure sale will not be set aside for inadequacy of price, unless so gross as to evidence fraud. *Commerce Trust Co. v. Bradley* 593
9. One holding an interest in the proceeds of sale by reason of rights possessed in the mortgage is a necessary party to a foreclosure suit. *Pitman v. Henkens* 621

Municipal Corporations.

1. District courts, independently of statute, have power to determine whether agricultural lands should be disconnected from a city. *Witham v. City of Lincoln* 366
2. A village treasurer is not authorized to deposit village funds in a bank not designated by the board of trustees as a depository. *State, ex rel. Sorensen, v. Bank of Otoe* 383
3. Treasurer of city of second class is not authorized to deposit city funds in a bank not designated by the city council as a depository. *City of South Sioux City v. Mullins* 410
4. Treasurer of city of second class and surety on his official bond are liable for loss of city funds deposited by him in a bank not designated as a depository. *City of South Sioux City v. Mullins* 410
5. A municipal corporation has only powers conferred by its charter or other applicable laws. *Interstate Power Co. v. City of Ainsworth* 419
6. A municipal corporation may exercise powers expressly granted, or fairly implied, and those essential to the declared objects and purposes of the municipality. *Interstate Power Co. v. City of Ainsworth* 419
7. Where power is conferred on a municipal corporation and the method of its exercise is prescribed, such method constitutes the measure of the power. *Interstate Power Co. v. City of Ainsworth* 419
8. Cities are not authorized to purchase electric light and

power plants and pledge future net earnings in payment. *Interstate Power Co. v. City of Ainsworth* 419
9. A city is not ordinarily liable for injuries to a person using instrumentalities provided for the public in a city park. *Toft v. City of Lincoln* 498
10. City *held* not liable for death by drowning in an artificial lake in a public park. *Toft v. City of Lincoln* 498
11. A city ordinance may reasonably classify persons and occupations to be governed by its rules. *Ernesti v. City of Grand Island* 688

Negligence.

1. "Proximate cause" defined. *Kudrna v. Sarpy County* 83
2. Where reasonable minds cannot find from the evidence that plaintiff's contributory negligence is slight and defendant's negligence gross in comparison therewith, it is not error to discharge the jury. *Kudrna v. Sarpy County* 83
3. When invitee exceeds limitation of invitation, liability of property owner is only that of abstaining from acts wilfully injurious. *Wright v. Salvation Army* 216
4. Invitee walking into an open elevator shaft on premises with which he was familiar *held* guilty of gross contributory negligence. *Wright v. Salvation Army* 216
5. Plaintiff cannot recover in a personal injury action by proving a mere possibility that his injury resulted from defendant's negligence. *Mischnick v. Iowa-Nebraska Light & Power Co* 598
6. Invitee suing owner of building for damages resulting from fall on steps at public entrance has burden of establishing dangerous condition as proximate cause of accident. *Wendell v. Roberts* 619
7. Existence of gross negligence must be determined from circumstances in each case. *Gilbert v. Bryant* 731
Swengil v. Martin 745
8. Gross negligence is question for jury. *Swengil v. Martin* 745
9. Where the evidence shows beyond reasonable dispute that plaintiff motorist's negligence was more than slight in comparison with defendant's negligence, the jury should be instructed to find for defendant. *Anderson v. Altschuler* 853
10. Where the evidence conflicts, question of comparative negligence is for jury. *McDonald v. Wright* 871

New Trial.

1. A new trial will not be granted for newly discovered evidence unless it probably would have produced a different result. *Morrill County v. Bliss* 573

2. Application for a new trial for newly discovered evidence is addressed to the discretion of the court, and its action thereon will not be disturbed in absence of abuse of discretion. *Morrill County v. Bliss* 573
3. A litigant proceeding to trial without objection because of absence of witnesses cannot complain in motion for new trial that he was prejudiced because the trial took place when his witnesses were absent. *Dickinson v. Lawson* 646
4. Denial of new trial for newly discovered evidence of impeaching character *held* not error. *Pittenger v. Salisbury & Almquist* 672
5. Error in instruction is not ground for a new trial unless prejudicial to complaining party. *First Nat. Bank v. Guenther* 807

Parties.

1. Intervention will be denied to one not having a direct legal interest in the subject-matter of the litigation. *State, ex rel. Randall, v. Hall* 236
2. Intervention is the creature of statute. *Geis v. Geis* 394
3. While statutes allowing intervention are to be liberally construed they must be substantially followed. *Geis v. Geis* 394
4. To authorize a party to intervene, he must have an interest in the subject-matter of the suit of such character that he will gain or lose by the legal operation of the judgment. *City of Omaha v. Douglas County* 640
5. An assignee of a chose in action may maintain an action thereon in his own name. *Woods v. Brown County* 692

Patents.

The unauthorized manufacture, sale, or use of an invention protected by letters patent constitutes "infringement." *Thimgan v. State* 696

Physicians and Surgeons.

In a malpractice case, plaintiff must prove negligence in treatment as alleged, and that such negligence was the proximate cause of the injury complained of. *Winters v. Rance* 577

Pleading. SEE APPEAL, 30, 31. COURTS, 8.

1. Ordinarily, when no action has been taken on a demurrer, the court may give defendant leave to withdraw the demurrer and to move to make the petition more definite. *Scott v. Scott* 32
2. Sufficiency of petition cannot be raised by incorporating demurrer in answer. *Peterson v. Wahlquist* 247
3. A petition will be liberally construed where its suffi-

ciency is first attacked by objection to introduction of evidence. *Peterson v. Wahlquist* 247
4. The rule that pleadings should be construed liberally applies only to ordinary actions, and petition for an extraordinary writ will receive a strict construction. *Northport Irrigation District v. Farmers Irrigation District* 607
5. Petition to foreclose land contract need not allege whether proceedings have been had at law for recovery of the debt or whether the debt has been paid. *Connecticut General Life Ins. Co. v. Leahy* 644
6. A demurrer *ore tenus* is permissible, and evidence is inadmissible under a totally defective pleading. *Dickinson v. Lawson* 646
7. Questions relating to the sufficiency of the petition should be determined before trial. *Dickinson v. Lawson* 646
8. Where objection that petition does not state cause of action is interposed for first time during trial or after verdict, the pleading will be liberally construed, and, if possible, sustained. *Dickinson v. Lawson* 646
9. The trial court should render judgment in favor of party where the pleadings entitle him thereto. *Woods v. Brown County* 692

Principal and Agent.

1. Facts constituting agency stated. *Goldfein v. Continental Ins. Co.* 112
2. Agency may arise by implication from acts done by agent with consent or acquiescence of principal. *Goldfein v. Continental Ins. Co.* 112
3. The scope of an agent's authority may be determined from acts done by agent. *Goldfein v. Continental Ins. Co.* 112
4. Generally, one dealing with agent of undisclosed principal may, after disclosure, sue either or both, though the statute of frauds may require the contract to be in writing. *Lincoln Joint Stock Land Bank v. Bexten* 310
5. Ostensible authority to act as agent may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an apparent agency. *Bliss v. Falke* 400
6. That the party collecting a mortgage note is not in possession thereof may be considered but is not conclusive on the question of authority to act as mortgagee's agent. *Bliss v. Falke* 400
7. Agency may be established by parol. *Bliss v. Falke* 400

Principal and Surety.

1. Evidence in suit to foreclose mortgage *held* to entitle plaintiff to deficiency judgment against surety. *First Trust Co. v. Glendale Realty Co* 283
2. Evidence in action on contractor's bond *held* to sustain finding for contractor's surety. *Doran v. National Surety Co* 299

Process.

Authority to summon a defendant in another county depends on right to recover against resident defendant. *Hoerler v. Prey* 822

Quo Warranto.

1. *Quo warranto* lies only against one in possession and user of an office. *State, ex rel. Good, v. Marsh* 125
2. *Quo warranto* lies only to test the right to office; but under statute an officer may be ousted for misconduct. *State, ex rel. Good, v. Marsh* 125
3. *Quo warranto* lies on relation of a township supervisor whose office is invaded by one claiming election as district supervisor and abolition of relator's office by an election, though the validity of such election and existence of the office of district supervisor are drawn in question. *Thompson v. James* 350
4. Where rights of two or more persons to separate offices depend on the same questions of law and fact, they may join as relators in *quo warranto* to try the title to such offices. *Thompson v. James* 350
5. Two or more persons may be joined as respondents in *quo warranto* when the complaint against each is based upon their joint action as a board. *Thompson v. James* 350

Railroads.

1. Statute prescribing crew for passenger train *held* not to apply to motor car. *Moredick v. Chicago & N. W. R. Co.* 864
2. Ordér of railway commission requiring railroad to operate motor car with full train crew *held* erroneous. *Moredick v. Chicago & N. W. R. Co* 864

Rape.

1. Where the testimony of the prosecutrix and the accused is contradictory, the testimony of prosecutrix must be corroborated. *Hogsett v. State* 769
2. Evidence *held* insufficient to establish previous chastity of prosecutrix. *Larson v. State* 789

Receivers.

Reasonable fees are allowable for necessary services of attorneys for receiver of an insolvent state bank. *State, ex rel. Sorensen, v. Ralston State Bank* 245

Robbery.

Positive testimony of one credible witness of accused as perpetrators of robbery from the person may sustain conviction. *Froding v. State* 322

Sales.

1. Where an offer to purchase is rejected, the offer lapses. *State, ex rel. Sorensen, v. Wisner State Bank* 345
2. Where an offer to purchase is rejected, it cannot thereafter be accepted so as to create a contract of sale, unless the bidder renews the offer or consents to a subsequent acceptance. *State, ex rel. Sorensen, v. Wisner State Bank* 345
3. Transaction *held* to be a "sale." *Dickinson v. Lawson* .. 646
4. Seller's affirmation of fact or promise which tends to induce buyer to purchase is an express warranty. *Lentz v. Omar Baking Co* 861
5. In action to recover damages for breach of warranty that a horse is gentle and suitable for buyer's known use, it is not necessary to establish seller's knowledge that horse has evil propensities. *Lentz v. Omar Baking Co.* 861

Schools and School Districts.

1. Note for tuition in a commercial school *held* void for failure to furnish makers with a copy of the note. *Mergenthaler Linotype Co. v. McNamee* 71
2. Boards of education are vested with power to adopt reasonable regulations for conduct of public schools. *Richardson v. Braham* 142
3. Power and reasonableness of action, and not motives, are proper tests of validity of regulations enacted by a board of education for conduct of public schools. *Richardson v. Braham* 142
4. A regulation of a school board will not be held to invade private rights, unless evidence thereof is clear. *Richardson v. Braham* 142
5. During school hours, control of pupils as to health, surroundings, discipline, and morals is vested in school authorities. *Richardson v. Braham* 142
6. A board of education may provide for one school session daily and forbid pupils to leave the campus during school hours. *Richardson v. Braham* 142

7. A school district treasurer is not authorized to deposit school funds in a bank not designated by the school board as a depository. *State, ex rel. Sorensen, v. Bank of Otoe* 414
8. Authority for deposit of school funds in banks is statutory, and the statutes must be complied with by the school district treasurer and those who deal with him with reference to such funds. *State, ex rel. Sorensen, v. Bank of Otoe* 414

Set-Off and Counterclaim.

1. Sole owner of stock of corporation could not have corporation deposit set off against his note to a bank, on bank's insolvency. *State, ex rel. Sorensen, v. Weston Bank* 612
2. Insolvency which will justify an equitable set-off is not insolvency of a third party, but of debtor of party seeking the relief. *State, ex rel. Sorensen, v. Weston Bank* 612

States.

The statute purporting to change the salary of state railway commissioner during his term of office *held* unconstitutional. *State, ex rel. Randall, v. Hall* 236

Statute of Frauds.

1. In action for broker's commission, evidence *held* insufficient to establish agency authorized in writing. *O'Shea & Son v. Leavitt* 12
2. An oral agreement is not void under the statute unless its terms indicate that it is not to be performed within one year. *Johnson v. First Trust Co* 26
3. An oral agreement wholly performed by one of the parties within a year is not void under the statute of frauds. *In re Estate of Black* 75

Statutes. SEE CONSTITUTIONAL LAW.

1. A statute is not repealed by implication unless repugnance is clear. *Morrill County v. Bliss* 97
2. Statutes relating to same subject should be construed together. *Morrill County v. Bliss* 97
3. The legislative intention must primarily be determined from the language used in a statute. *Mlady v. Knox County* 191
4. A statute may adopt part or all of another statute by specific reference thereto. *In re Estate of Mathews* 737

Stipulations.

In cases involving general public interests, litigants may stipulate as to facts, but not as to law. *North Platte Lodge, B. P. O. E., v. Board of Equalization* 841

Street Railways.

1. The state railway commission has jurisdiction over street railways. *Omaha & C. B. Street R. Co. v. City of Omaha* 825
2. A home rule charter cannot give a city jurisdiction over a street railway except in matters of strictly municipal concern. *Omaha & C. B. Street R. Co. v. City of Omaha* 825

Taxation.

1. There is a clear distinction between "taxes" and "special assessments." *Harlan County v. Thompson* 65
2. An action cannot be brought to enforce collection of special assessments under statute imposing liability for "taxes" on one tearing down a building on land subject to delinquent taxes. *Harlan County v. Thompson* 65
3. Matters embraced in a foreclosure decree will not afford basis of motion to vacate or of objections to sale after lapse of two years from entry of decree. *Douglas County v. Barker Co* 253
4. Statute authorizing county to foreclose lien for taxes delinquent three years *held* constitutional. *Douglas County v. Barker Co* 253
5. Liability of county to refund money paid by purchaser of tax sale certificate where title has failed is statutory. *Speidel v. Scotts Bluff County* 431
6. To render county liable for refund to tax certificate purchaser, it must appear that taxes were not due, that description was erroneous, or that sale was adjudged void. *Speidel v. Scotts Bluff County* 431
7. Where a tax sale certificate has been held valid and a decree of foreclosure entered, the purchaser is not entitled to a refund. *Speidel v. Scotts Bluff County* 431
8. Purchaser of tax sale certificate adjudged invalid may call upon the county to reimburse him. *Farm Investment Co. v. Scotts Bluff County* 582
9. A foreclosure action need not be begun nor a deed be demanded on a void tax sale certificate before instituting proceedings before the board of county commissioners for reimbursement, but the proceedings must be begun within five years from date of certificate. *Farm Investment Co. v. Scotts Bluff County* 582
10. One invoking the statutory right to recover from a county or school district a tax voluntarily paid must show substantial compliance with the statute. *Monteith v. Alpha High School District* 665
11. A rural high school district annual tax levy based on an estimate adopted by school electors at a meeting on

the second Monday instead of the first Monday of June is void. *Monteith v. Alpha High School District* 665
12. A taxpayer cannot maintain suit for himself and others similarly situated to recover void taxes, but each must sue in his own behalf. *Monteith v. Alpha High School District* 665
13. In absence of statute, taxes voluntarily paid cannot be recovered back, and an original action may be brought to recover an illegal tax only by virtue of statutory or constitutional authority. *Monteith v. Alpha High School District* 665
14. Technically, taxes can be paid only in lawful money, but checks take the place of actual cash. *Keenan v. McClure* 753
15. Where bank, located in place other than where check was given, failed on day following issuance of check for taxes, county's lien *held* not satisfied. *Keenan v. McClure* 753
16. Proceeds of a county tax foreclosure sale should be applied first to payment of costs, then to general taxes of state, county, school district, and other governmental subdivisions, and the remainder should be prorated equitably on all special assessments. *Douglas County v. Shannon* 783
17. Evidence *held* insufficient to sustain judgment regarding exemption of property from taxation. *North Platte Lodge, B. P. O. E., v. Board of Equalization* 841
18. Intangible tax returns must be filed with assessor of county in which taxpayer is domiciled. *Joyce Lumber Co. v. Anderson* 886

Theaters and Shows.

1. That patrons of a theater come and go when lights are down must be considered in determining the care required of the owner. *Emery v. Midwest Amusement & Realty Co* 54
2. Negligence of theater operator and contributory negligence of patron *held* questions for jury. *Emery v. Midwest Amusement & Realty Co* 54
3. While an operator of a public place of amusement is not an insurer of the safety of patrons, he is held to a stricter accountability than owners of private premises. *Emery v. Midwest Amusement & Realty Co* 54
4. The proprietor of a public place of amusement must use ordinary care to keep the premises in a reasonably safe condition. *Emery v. Midwest Amusement & Realty Co.* 54

Torts.

1. The wrong-doer is liable for a tort which is the proximate cause of injury to another. *Dickinson v. Lawson* 646
2. All who instigate, promote, encourage, advise, countenance, aid, or abet commission of an actionable wrong by another are liable as principals. *Dickinson v. Lawson* 646

Trial. SEE APPEAL. CRIMINAL LAW.

1. Where the evidence is insufficient to sustain verdict for plaintiff, the trial court may give a peremptory instruction for defendant or enter a nonsuit. *Campbell v. Columbia Casualty Co.* 1
2. Requested instructions not given to the court until immediately before the court began reading instructions to the jury *held* properly refused. *Whitehall v. Commonwealth Casualty Co.* 16
3. Requested instructions must be submitted not later than at close of evidence. *Whitehall v. Commonwealth Casualty Co.* 16
4. The right to reopen a case after both sides have rested is within the court's discretion. *Harlan County v. Thompson* 65
5. Court's refusal to reopen a case 17 days after both sides have rested and joined in motion for directed verdict is not abuse of discretion. *Harlan County v. Thompson* 65
6. Nonsuit is proper, where the evidence is insufficient to support a verdict for plaintiff. *Adamek v. Tilford* 139
7. The trial court should amend the verdict or include interest in the judgment, where plaintiff is entitled to interest omitted from verdict. *Bank of Axtell v. Johnson* 154
8. Trial judge need not submit case to jury, where the evidence will not support a verdict. *In re Estate of McDermott* 179
9. Action on accident policy *held* a law action. *Ross v. First American Ins. Co.* 329
10. Where different conclusions cannot honestly be reached from undisputed facts, without reasoning irrationally, the trial court may properly withdraw the case from the jury. *Farmers & Merchants State Bank v. Kuhn* 457
11. A party to an action is entitled to instructions as to his theory of the case as presented by the pleadings and supported by evidence. *Roh v. Opocensky* 551
12. Limiting the jury to determination of one disputed question as made by the pleadings and evidence, on

which a verdict, if recovered, would be allowed to stand, *held* not error. *Winters v. Rance* 577
13. The party who is required to first produce evidence is entitled to open and conclude argument to jury. *Case Co. v. Hrubesky* 588
14. Where the facts are disputed, the case must be submitted to the jury. *Melson v. Turner* 603
15. Defendant's motion for a directed verdict should be denied where there is competent evidence from which the truth of material facts alleged in plaintiff's petition may be reasonably inferred. *Meyer v. Omaha & C. B. Street R. Co.* 712
16. A litigant is entitled to instruction on his theory of the case as presented by the pleadings and supported by evidence. *Swengil v. Martin* 745

Usury.

Usury must be pleaded with certainty to be available as a defense. *Pitman v. Henkens* 621

Vendor and Purchaser.

1. Notice to bidder of an increased offer for property by another bidder *held* a rejection of the first bid. *State, ex rel. Sorensen, v. Wisner State Bank* 345
2. Order confirming sale of realty sustained, where plaintiff bid amount of decree, which exceeded value of land. *Trampe v. Tilley* 587

Waters.

1. Refinancing bonds of an irrigation district *held* payable in order of presentment, if funds are available. *State, ex rel. Brown, v. Taylor* 228
2. Where holders present refinancing bonds of an irrigation district for payment, which is refused for want of funds, such presentment is not a continuing demand entitling demandants to priority of payment over holders subsequently presenting bonds. *State, ex rel. Brown, v. Taylor* 228

Wills.

1. The term "distribution of an estate" ordinarily has reference to personalty and not to realty. *Grand Island Trust Co. v. Snell* 148
2. The word "bequeath" is ordinarily used in reference to personalty. *Grand Island Trust Co. v. Snell* 148
3. Testator's intent to restrict power of devisee to alien or incumber devised realty must be clearly expressed in the will, and courts will not resort to unnatural construction to create such restriction. *Grand Island Trust Co. v. Snell* 148

4. A legatee or devisee seeking probate of a will must allege and prove testamentary capacity, and legal form of the will. *In re Estate of Slattery* 194
5. If the evidence is insufficient to sustain a verdict for contestant on the issues of testamentary capacity and undue influence, the court should direct a verdict for proponent. *In re Estate of Slattery* 194
6. Bequest to son's "heirs at law" *held* not to include son's adopted daughter. *In re Estate of Clarke* 625
7. A county court has jurisdiction to construe a will when necessary for the executor's benefit in carrying out the will, but not to determine rights of beneficiaries as between themselves, and where an executor can assign the property without a construction of the will and does not request it, the court has no authority to bind heirs or legatees by a construction. *Merrill v. Pardun* 701
8. Where a will makes an apparently absolute bequest followed by a further bequest of the remainder after the death of the first legatee, the first legatee takes a life estate with power of disposition, and the second an estate in remainder of the portion unexpended by the first legatee. *Merrill v. Pardun* 701
9. The word "request" in a testametary disposition limiting an apparently absolute bequest *held* to be a dispositive direction. *Merrill v. Pardun* 701

Witnesses.

1. Permitting a stenographer, who recorded voluntary statements of accused in shorthand, to read the shorthand notes from witness-stand *held* not error. *Fields v. State* 290
2. Former verified statements of a witness at variance with his testimony may be admitted to impeach his credibility. *Flannigan v. State* 519