JOE SOLOMON, APPELLEE, V. A. W. FARNEY, INC., APPELLANT.

FILED FEBRUARY 28, 1936. No. 29745.

Record examined, and *held* to support the judgment entered in the district court.

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

Story & Thomas, for appellant.

W. G. Kieck and *Clifford L. Rein, contra.*

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

EBERLY, J.

This is an action under the Nebraska compensation act brought by an injured employee, Joe Solomon, against A. W. Farney, Inc., the employer. There was a finding and judgment against the employer both before the compensation commissioner and upon appeal in the district court for Cass county. The determination was that, "as a result of said accident and injuries, the plaintiff has been ever since the date thereof and still is permanently and totally disabled." At the bar of this court, the employer, seeking a review, makes three contentions, viz.: (1) That the courts of Nebraska are without jurisdiction over the subject-matter of the action; (2) that the judgment is excessive; and (3) that the allowance of a $60 physician's fee is improper.

It is admitted that the employer is a Delaware corporation, having its principal place of business at Kansas City, Missouri. It appears that the place of contracting the work upon which the plaintiff was injured is located at Bridge Switch, Iowa; and that the formal contract of employment of the plaintiff by the defendant was entered into in the state of Iowa.

On this subject the plaintiff testifies as follows: "Q. Where were you employed? A. I got my card from the reemployment office here (Nebraska) and went across (to

Iowa) and registered with them. Q. That is where you were employed? A. Yes, sir."

But it is established that on or about December 4, 1934, plaintiff was in the employ of the defendant as a "lumber jack" and common laborer in Cass county, Nebraska, and while so employed on said date and while engaged in the performance of his duties in the course of the regular business of the defendant, the plaintiff sustained personal injuries in an accident arising out of and in the course of his aforesaid employment when he slipped and fell while carrying lumber and strained his abdomen in such a manner as to cause a double inguinal traumatic hernia; further, that as a result of said accident and injuries the plaintiff has been ever since the date thereof and still is permanently and totally disabled.

While the uncontradicted evidence is that plaintiff was in defendant's employ for more than thirteen months, there is no affirmative evidence in the record that any part of plaintiff's services was performed in the state of Iowa. Under the facts established, there is no evidence which negatives the conclusion that the industry in which the plaintiff was employed at the time he received his injuries had its situs for the purpose of the workmen's compensation law at any other place save in Nebraska. The laws of the state last referred to on this subject are therefore controlling in this case, and their effect may not be modified by the contracts of the parties in derogation thereof.

The character and extent of plaintiff's injuries are not in serious controversy. A careful reading and evaluation of the evidence in the record, on the subject of compensation received, sustains the conclusion that at the time of said accident and injuries plaintiff's wages were $15 a week and sufficient to entitle him to compensation at the rate of $10 a week for the first 300 weeks following the accident and $6.75 a week after the first 300 weeks for the remainder of plaintiff's life; that the plaintiff has been paid compensation by the defendant at the rate of $8.65 a week for a period of 12 weeks immediately following the date of said accident

and injuries; that there is due plaintiff for this period the sum of $1.35 a week, being the difference between the amount a week to which the plaintiff was entitled and the amount he received; and that the judgment rendered for these amounts in the district court for Cass county is not excessive.

The third contested proposition is the allowance of a claim to Dr. Smith for services rendered the plaintiff. Defendant contends that a charge for medical examination by a physician who appears as a witness for the employee is not a proper charge under the Nebraska compensation law, and cites section 48-120, Comp. St. 1929, in support of such contention.

It is true that, under the statutory provision referred to, this court has determined: "An employer who offers to furnish without charge to an injured employee the reasonable services of a competent physician and medicines as and when needed, and within the value and for the time contemplated by the act, cannot be held liable for such services procured by such employee, who has unreasonably refused such offer by the employer and has obtained such services and medicines elsewhere." *Radil v. Morris & Co.*, 103 Neb. 84, 170 N. W. 363.

The instant case was tried in the district court for Cass county on August 13, 1935. At that time, under the provisions of chapter 57, Laws 1935, enacted with an emergency clause and approved May 25, 1935, section 48-120, Comp. St. 1929, had been repealed, and reenacted in connection with section 6 and other provisions of the new law.

In this connection, Dr. Smith was allowed a fee of $60 for services as a physician rendered to plaintiff after the hearing of this case by the compensation commissioner and before the trial thereof in the district court on appeal. However, the evidence sustains the conclusion that the amount due Dr. Smith was incurred in order to determine whether another surgical operation on plaintiff, as demanded by defendant after rendition of the award by the compensation commissioner, would be reasonably safe and

beneficial to plaintiff. It is also apparent that the demanded surgical operation was unnecessary and dangerous, and that in view of defendant's demands Dr. Smith's services were reasonable and necessary, and his testimony thereafter adduced was essential to properly advise the district court of the facts in issue.

Expressly negativing any attempt to construe the provisions of the law of 1935, and without reference thereto, in view of the theory upon which the present case was tried and submitted, this court now determines that no error was committed by the trial court in its allowance of the claim of Dr. Smith.

It appearing, therefore, in this trial *de novo* that the judgment of the trial court in this case is, in all respects, supported by the evidence (and that the record discloses no reason for its modification or setting aside on appeal as contemplated by section 13, ch. 57, Laws 1935), the same is in all things affirmed, and a fee for plaintiff's attorney is allowed and taxed in the sum of $100.

AFFIRMED.

EDGAR L. BROWN, APPELLEE, V. KATHLEEN BROWN, APPELLANT.

FILED FEBRUARY 28, 1936. No. 29484.

1. Divorce: JURISDICTION. "Jurisdiction relative to divorce and alimony is given by statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist." *Cizek v. Cizek*, 69 Neb. 800, 99 N. W. 28; *id.* 76 Neb. 797, 107 N. W. 1012.
2. ———. A decree of divorce can only be granted for causes prescribed by the statutes.
3. ———: EXTREME CRUELTY. "Extreme cruelty, to justify a decree of divorce, where there is no physical injury or violence, must be of such a character as to destroy the peace of mind or seriously impair the bodily health of the unoffending party, or such as destroys the legitimate ends and objects of matrimony." *Chipperfield v. Chipperfield*, 121 Neb. 204, 236 N. W. 440.
4. ———: ———. An examination of the record reveals that

plaintiff's only allegation as a cause for divorce—extreme cruelty—is not supported by a preponderance of the evidence, and the petition is dismissed.

5. ———: DISMISSAL. The defendant's cross-petition for relief is dismissed for that the evidence in support thereof is insufficient.

APPEAL from the district court for Hall county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

Prince & Prince, for appellant.

Cleary, Suhr & Davis, contra.

Heard before GOOD, EBERLY and DAY, JJ., and RAPER and PROUDFIT, District Judges.

DAY, J.

Edgar L. Brown brought this suit to secure a decree of divorce. Kathleen Brown, the wife, contested the right of the plaintiff to such a decree. After a trial, the district court entered a decree of absolute divorce in favor of plaintiff, which also provided for a property settlement. The wife appeals from this decree.

The appellant contends that the evidence was not sufficient to justify a decree of divorce from the bonds of matrimony in favor of appellee. Divorce is a statutory remedy. "Jurisdiction relative to divorce and alimony is given by statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist." *Cizek v. Cizek*, 69 Neb. 800, 99 N. W. 28; *id.* 76 Neb. 797, 107 N. W. 1012.

The district courts of this state have no jurisdiction on the subject of divorce except such as is given them by statute. *Aldrich v. Steen*, 71 Neb. 57, 100 N. W. 311.

While in an early case, *Earle v. Earle*, 27 Neb. 277, 43 N. W. 118, it was held: "The law of the land having made it the legal duty of a husband to support his wife and children, courts of equity within this state have the power, in a suit by the wife for alimony and support, to enforce the discharge of such duty, without reference to whether the action is for a divorce or not." This rule has been followed

in a long line of cases. In the *Earle* case, it was sought to defeat the wife's suit because the proceeding was not recognized by our statute. She was permitted to recover because to deny her suit would have been to recognize a legal wrong without a remedy. But these cases are not applicable in the case at bar because the statutory remedy is ample and sufficient. A decree of divorce can only be granted for causes prescribed by the statutes. Without criticism of the rule first announced in the *Earle* case, that a court of equity has the power to enforce the obligations of marriages, it is clear that the reasoning of those cases does not apply to a suit to terminate the marriage relation. The marriage relation can only be destroyed for causes within the definition of the statute. *Perry v. Perry,* 199 Ia. 685, 202 N. W. 572.

Section 42-302, Comp. St. 1929, provides that a divorce may be decreed for the cause of extreme cruelty. The plaintiff's amended petition alleges as a cause of action that the defendant has committed continuous acts toward the plaintiff which constitute extreme cruelty. The defendant's answer denies these allegations.

This court is committed to the doctrine that a continuing course of conduct by either spouse which so grievously wounds the mental feelings or so utterly destroys the peace of mind as to seriously impair the bodily health and endanger the life or reason of the other or which nullifies the legitimate ends and objects of matrimony constitutes extreme cruelty within the meaning of the statute. *Kerker v. Kerker,* 113 Neb. 653, 204 N. W. 207; *Peckham v. Peckham,* 111 Neb. 340, 196 N. W. 628; *DeVore v. DeVore,* 104 Neb. 702, 178 N. W. 621, and numerous other cases announce this rule. Recently this court held: "Extreme cruelty, to justify a decree of divorce, where there is no physical injury or violence, must be of such a character as to destroy the peace of mind or seriously impair the bodily health of the unoffending party, or such as destroys the legitimate ends and objects of matrimony." *Chipperfield v. Chipperfield,* 121 Neb. 204, 236 N. W. 440.

It is therefore presented to this court as a question to determine the sufficiency of the evidence to require a decree. It would serve no useful purpose to delineate the testimony of the various witnesses. Our conclusions will suffice. The parties have been married more than 25 years. Much of the evidence partakes of the commonplace. Some of the incidents were arguments such as are not wholly unexpected between a strong-minded man and woman in the marriage relation. Of course, more courtesy on the part of each one toward the other would have prevented most of them. The parties are both possessed of high tempers and seemingly made no effort to control them. The result has been a somewhat stormy married life; but mere incompatibility of temper is not a ground for divorce in this state. Over a period of 25 years, there is only testimony as to a half dozen specific instances. One argument occurred in relation to a house the parties were building for a home. At another time, the plaintiff insisted on driving, while defendant insisted that an employee should drive the car. Again, the defendant is said to have worked in the garden and left the plaintiff to eat his dinner alone. Other arguments were over the plaintiff's drinking. Habitual drunkenness is a statutory ground for divorce, but the evidence falls far short of establishing that plaintiff was an habitual drunkard. *Howell v. Howell*, 89 Neb. 243, 131 N. W. 216. It appears that a moderate use of liquor was indulged in by both parties. Surely one spouse cannot complain of the other indulging in a practice while indulging in the same practice. An examination of the entire record reveals that the evidence to support the allegations of misconduct of the wife falls far short of that necessary to justify a decree. There is no substantial evidence of physical violence. The defendant did not engage in a continuous course of conduct of such a character as to destroy the peace of mind, seriously impair the bodily health of the plaintiff, or destroy the legitimate ends of matrimony. It is not for this court to attempt to do what is best for the parties. The relief which should be granted is that provided by the statute

upon the establishment of misconduct on the part of the defendant amounting to extreme cruelty. A decree of divorce from the bonds of matrimony should only be granted when the evidence bring the case within the definition of the statute providing for such relief. While it is apparent that the results of this marriage have at times been most unhappy, that is no sufficient cause named in the statutes for granting a decree of divorce. It is not the province of this court to grant such a decree for sociological reasons. The policy of the state relative to marriage is to be determined by the legislature.

A decree of divorce is not denied the plaintiff because we find the allegations of the defendant's cross-petition are established by a preponderance of the evidence. We do not so find. Very extravagant conclusions are drawn by appellant from the evidence as to plaintiff's drinking and his association with a woman who has been for years a close friend of both parties. The plaintiff's conduct has not been such as would entitle the defendant to a decree of divorce or to a decree for separate maintenance. The defendant is the wife of plaintiff and entitled to support. She may maintain a proper suit when and if he fails in his duty. But it does not appear that he has failed in this respect at the time of the commencement of this suit.

The judgment of the district court is reversed except as the amount awarded defendant as attorney fees. The petition of the plaintiff and the cross-petition of defendant are dismissed.

REVERSED AND REMANDED.

HELEN SHUMWAY ET AL., APPELLEES, V. DEPARTMENT OF BANKING, RECEIVER, APPELLANT.*

FILED FEBRUARY 28, 1936. No. 29464.

Banks and Banking: GUARANTY FUND: GENERAL CLAIMS. If the sureties on a depository bond are subrogated to the rights of a village to its deposit in an insolvent bank, and such sureties recoup part of their loss by the sale of bonds delivered to them

*Opinion withdrawn. See opinion, 131 Neb. p. ——.

by said bank to protect them against loss, they may file a claim with the receiver for the balance due them, and the same should be allowed as a general claim against the assets of said bank.

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

F. C. Radke, W. A. Crossland and *John A. Young,* for appellant.

I. D. Beynon and *Frederick L. Wolff, contra.*

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

PAINE, J.

Interveners filed claim for $9,571.12 against assets of the Farmers Bank of Lyons. The receiver thereof classified it as a general claim. Upon appeal to the district court, it was decreed to be a trust fund, payable as a first preferred lien out of the assets of the insolvent bank. The department of banking appealed.

The Farmers Bank of Lyons, Burt county, Nebraska, became insolvent and was taken over by the department of banking on January 7, 1933, and was then allowed to operate under restrictions until May 20, 1933, after which time the officers of the bank again operated the bank as a going concern until October 30, 1933, when it was finally taken over by the banking department, and declared to be insolvent in the district court.

Helen Shumway and Clara A. Christiansen, sureties on the depository bond, filed a petition in intervention on March 21, 1934, alleging that the village of Lyons wrongfully and unlawfully deposited funds of said village with said bank, and that said deposit was made contrary to the statutes and laws of Nebraska; that said bank did not apply for the privilege of becoming a depository, and that the village board did not designate nor approve said bank as a depository, and that it was therefore not a legal depository of the funds of said village, and that said bank paid no interest on such deposits, and that the village treasurer was

without authority to make a general deposit of funds of the village in said bank, and said bank wrongfully and illegally mingled the funds of the village with the bank's general assets, and thereby became trustee, and said funds became trust funds, and the said village had a preferred claim against the assets of the bank for such funds, amounting at the time of the failure of the bank to the sum of $16,771.12. That on May 12, 1933, the said village duly assigned to the interveners its claim against the bank, and they allege that the receiver erroneously refused to classify the claim of such interveners as a claim for trust funds, and erroneously classified it as a general claim for the sum of $9,571.12, and they ask that the action of the receiver be set aside and that they be given a valid preferred claim in the sum of $9,571.12. The superintendent of banks filed an answer thereto, and insists that said claim was properly classified as a general claim for the reason that it was a claim based upon a deposit which was otherwise secured under section 8-1,102, Comp. St. Supp. 1933, and alleges that on January 7, 1933, the said village of Lyons had on deposit in said bank a general checking account, which was secured by a bond, and that the principal on said depository bond was the bank, and the two sureties thereon were the two interveners herein, and that to protect said interveners as sureties on said bond the bank pledged for their protection certain foreign and domestic bonds, the face value thereof being some $13,000. That upon the failure of the bank the village resorted to this depository bond, and the interveners confessed liability thereon in the full amount of said deposit, and that when the collateral bonds which had been put up by the bank to protect the sureties were sold on the market the sureties realized therefrom only the amount of $7,199.33, which, upon being applied to the reduction of the deposit of the village in said bank, left a balance due the village from the sureties in the sum of $9,766.44, upon which amount two dividends of one per cent. have been paid to the sureties, leaving a net balance due thereon of $9,571.12.

The trial court decided against the banking department,

and decreed that the interveners had a claim for trust funds in the sum of $9,571.12, with interest at 6 per cent., and directed that the same was entitled to priority payment from the assets of the bank before the claims of unsecured depositors were paid, from which order an appeal was taken to this court. A number of errors are set out, but the errors in the findings of the district court that the bank was not legally appointed the village depository, and that said funds were unlawfully mingled with the general assets of said bank, and that the bank had become a trustee as to such deposits, are argued at length.

W. S. Newmyer testified that for many years he had been president of the bank, and that he was the father of the two interveners who had signed the bond as sureties for the bank. He further testified that for 25 years the bank had paid no interest to the village on its deposit in said bank, and that the village funds were mingled with the other assets of the bank; that the bank had agreed to collect the water and light bills for the village each month and render such collection service as an offset for the interest which should have been paid the village on its deposit, which deposit at times ran as high as $30,000.

The bank filed application to be appointed a depository, and, by resolution of the village board, was so selected. For the next year the resolution passed by the board was not signed by the chairman and clerk. However, the village, under section 77-2601, Comp. St. 1929, brought an action against the sureties who had given a bond to protect the deposit of the village in the bank.

The sureties did not contest this suit, but consented to judgment being entered against them on condition that execution on said judgment would be stayed if the sureties would make payments of $5,000 on September 1, 1933, $5,000 one year later, and the balance two years later. It was proper for the village clerk to identify the records and minutes of the village board, as he was responsible for their custody, and he definitely identified exhibit 12, being the unsigned resolution, as a part of the record of the

minutes of the meeting of June 7, 1932. The fact that the village board, in bringing suit to collect from the two sureties, proceeded on the record made by exhibit 12 is further proof that there is no question but what the resolution, exhibit 12, was a part of the record of the meeting of said village board on June 7, 1932.

In the opinion of this court, by the record made, this bank was legally designated as the depository bank for the village funds. Both the bank and the village acted on that understanding. The mere fact that the bank rendered a monthly service in the collection of light and water bills for the village instead of paying interest would not destroy the legal designation of the bank as a depository.

In *Bliss v. Mason,* 121 Neb. 484, 237 N. W. 581, it is provided that a state bank may pledge its assets to secure the repayment of county deposits in such depository bank, and, further, that a state bank designated as a depository may lawfully pledge its assets to protect sureties upon such depository bond for public funds, as was done in this case. It is unfortunate that the bonds upon being sold brought only the amount of $7,199.33. The interveners now seek to have their claim for the balance of $9,571.12 declared a trust fund and payable in full out of the assets of the bank.

We held in *State v. First State Bank,* 122 Neb. 109, 239 N. W. 646, that, when a city relied upon a bond, the balance of a deposit unprotected was only a general claim. See, also, *State v. South Omaha State Bank,* 128 Neb. 733, 260 N. W. 278; *State v. Bank of Campbell,* 125 Neb. 485, 251 N. W. 101. In the case at bar, these sureties could have demanded that the bank put up additional bonds for their protection, and the bank could legally have complied therewith, but the sureties did not protect themselves in this manner allowed under the law.

It is clear that the assets of the Farmers Bank of Lyons were depleted to a large amount by reason of the pledge of bonds of said bank, and that these sureties received the entire benefit from the sale of said bonds, and that this fact clearly brings this case within the law as set out in section

8-1,102, Comp. St. Supp. 1933, as a deposit otherwise secured.

The trial court held that the interveners were entitled to recover a claim of $9,571.12, with interest at 6 per cent., as trust funds, and that the same should be paid as a first, prior and preferred lien on all the assets of the Farmers Bank. Having determined in this opinion that the Farmers Bank had been duly appointed depository under a valid depository contract with the village of Lyons, and that the funds were deposited as ordinary deposits, and not trust funds, and that said deposits were secured by a depository bond, upon which these interveners were sureties, it is the opinion of the court, supported by the authorities herein cited, that it would be inequitable for said interveners to secure priority over all the other depositors of said bank when such interveners had received a deposit of bonds from the bank to protect them as such sureties, and therefore the decree of the district court is reversed and set aside, and it is hereby directed that the action of the receiver of said bank, in classifying the claim of the interveners as a general claim against the assets of said bank, was right, and the decree of the district court is hereby reversed.

REVERSED.

AUGUST BREI, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED FEBRUARY 28, 1936. No. 29534.

1. **Railroads: INJURY TO LIVE STOCK: LIABILITY.** Under the provisions of section 74-601, Comp. St. 1929, requiring railroad corporations to erect and maintain fences on the sides of their rights of way, and making a corporation which neglects to comply with this requirement liable for all damages done by their agents, engines or trains to any cattle, horses, sheep or hogs thereon, there must be some action on the part of the corporation, by its mechanical or other agents, producing the injury to create a liability. No liability is imposed for injuries to stock caused by themselves when straying upon the railroad right of way.

2. ———: ———: ———. Statutes requiring railroad corporations to fence their rights of way do not render them liable for injury to cattle by straying onto their rights of way because of the absence of a proper fence, and from there onto the private property of a third person where they are injured.

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

Hubka & Hubka, for appellant.

W. P. Loomis, J. W. Weingarten and *Jack & Vette, contra.*

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

CARTER, J.

In this case the plaintiff sued the Chicago, Burlington & Quincy Railroad Company to recover for damages to live stock caused by the negligence of the railroad company in failing to keep its right of way fences in proper repair. The trial court sustained a demurrer to the petition and dismissed the case. From the overruling of his motion for a new trial, plaintiff appeals.

The petition alleges that plaintiff was a tenant on a farm adjoining defendant's right of way, and that the land adjacent thereto was used as a pasture. Plaintiff was the owner of 11 head of cattle which passed through the right of way fence of the defendant company due to the fact that it was not properly maintained. The petition further alleges that the cattle strayed along said right of way and through another section of fence, which the defendant had failed to keep in proper repair, into a cane field in an adjoining field; that, as a result of grazing upon and eating the cane, the cattle became poisoned and died. Plaintiff prayed for judgment for the value of the cattle thus lost. Does the petition state a cause of action?

The liability of the railroad company for failure to maintain right of way fences, and for damages therefor, arises by virtue of section 74-601, Comp. St. 1929, which provides

in part as follows: "Every railroad corporation * * * shall * * * erect and thereafter maintain fences on the sides of their railroad * * * suitable and amply sufficient to prevent cattle * * * from getting on such railroad. * * * And when such fences * * * are not in sufficiently good repair * * * such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engines or trains of any such corporation * * * to any cattle * * * thereon." It will be noted from this section of the statute that, in order to recover, the railroad company not only must have been negligent in maintaining its right of way fences, but the damages must have been done by the agents, engines or trains.

In *Chicago, B. & Q. R. Co. v. Cox,* 51 Neb. 479, 71 N. W. 37, this court, in construing this statute, said: "It is negligence for a railroad corporation to fail to fence its track at a place where the law imposes a duty to fence, but such omission alone would not make the company liable for damages received by stock while on its right of way. But to create a liability, in addition to the failure to construct and maintain the fence, the injury must have been occasioned by an agent of the company, or some engine or train of cars. Should an animal which had strayed upon a right of way at a point required to be fenced inflict an injury upon itself, as by running into a bridge on the railroad, and no agent or servant of the company or locomotive or train is near or was in any manner responsible therefor, the corporation could not be made to respond in damages."

In *Knight v. New York, L. E. & W. R. Co.,* 99 N. Y. 25, 1 N. E. 108, the court said:

"The statute referred to requires railroad companies to erect and maintain fences on the sides of their roads, but it does not impose upon them a general liability for any consequences which may result from an omission to do so, nor does it leave the question open what liability to third parties they shall be subjected to for such omission, for it defines in express terms the consequences for which they shall be liable to owners of cattle and horses getting on the track.

The terms of the statute are that 'so long as such fences shall not be made, such railroad corporation and its agents shall be liable for damages which shall be done by the engines or agents of any such corporation to any cattle, horses, etc., thereon.'

"This language clearly requires some action on the part of the company to produce the injury, either by mechanical or other agents of its own, and, in our judgment, excludes the idea of liability for injuries which the cattle may do to themselves by straying on the track."

In *Ingalsbe v. St. Louis-San Francisco R. Co.*, 295 Mo. 177, 243 S. W. 323, 24 A. L. R. 1051, recovery was sought for the death of a cow after it had entered and escaped from the right of way of the defendant railroad company. The animal was running at large outside any inclosure when it entered the right of way of the company at a point where there was no fence. It wandered from the right of way through a fence which was out of repair, into a sorghum-cane field adjacent to the right of way, and ate so much of the cane that it died. The court in their opinion said: "There is nothing in the statute requiring railroads to fence their tracks which makes it their duty to construct fences to prevent animals, which stray onto their tracks, from leaving the right of way and going onto the land of another where they may be injured. So that where plaintiff's cow entered upon the unfenced right of way of defendant railroad company and passed from it into the field of a private citizen, where she 'was killed by reason of eating too much sorghum cane' then growing in said field, the railroad company is not liable in damages for the value of said cow."

We believe these cases to be controlling on this point and there can, therefore, be no recovery under the statute. Appellant contends, however, that the statute is cumulative and does not exclude the common-law right to recover. We cannot agree with this argument for the reason that there is no common-law duty that requires any one, including railroad companies, to fence against animals. The statute

quoted herein is in derogation of the common law and was intended to change the common law only as to the special instances mentioned expressly within the statute itself. We do not think that, because a plaintiff may bring an action for stock killed by a collision and make out his case by proving a failure to fence, it necessarily follows that a failure to fence will give a common-law action for all damages which may be traced, partially or remotely, to a failure to fence. The common-law action of an owner of live stock against a railroad company for negligently injuring his stock is not taken away by our statute, but the plaintiff in the case at bar, in the absence of the statute, had no right at common law against the railroad company for permitting his cattle to cross its right of way.

After a consideration of the authorities, we conclude that damages to live stock, sustained after they have escaped from the right of way of the railroad company, are not ordinarily a natural or probable consequence of a failure of the railroad company to construct or maintain proper fences. In the case at bar, the proximate cause of the damage to plaintiff's cattle was the eating of the cane, not defendant's negligence in failing to keep its fences in repair. The following cases support this view: *Bear v. Chicago Great Western R. Co.*, 141 Fed. 25; *Chicago, K. & N. R. Co. v. Hotz*, 47 Kan. 627, 28 Pac. 695; *Frisch v. Chicago Great Western R. Co.*, 95 Minn. 398, 104 N. W. 228.

We conclude therefore that plaintiff's petition does not state a cause of action and that the trial court properly sustained defendant's demurrer.

AFFIRMED.

BERTHA ROACH SMITH ET AL., APPELLEES, V. PACIFIC MUTUAL LIFE INSURANCE COMPANY: CLARA C. ROACH, APPELLANT.

FILED FEBRUARY 28, 1936. NO. 29456.

1. Gifts. Evidence examined, and *held* sufficient to constitute a gift *inter vivos*.
2. ———: INSURANCE. The essential elements of a gift *inter vivos* are the delivery of the actual property, or some evidence of its existence, with intention on the part of the donor to relinquish all further dominion over the same and transfer title thereto to the donee. The beneficial interest in a policy of life insurance may be transferred by gift *inter vivos*.
3. Insurance: POLICY: CHANGE OF BENEFICIARY. The statutes of Nebraska do not preclude a husband from legally transferring the beneficial interest in a life insurance policy to a person other than his wife.
4. ———: ———: ———. The provisions of a life insurance contract providing for the manner in which an assignment thereof, or change of beneficiary, is to be made is incorporated therein for the benefit of the insurer; if the insurer waives compliance with such provisions, the failure to comply therewith cannot be raised by third persons.
5. Witnesses: COMPETENCY. In an action to determine the title to the proceeds of a life insurance policy, where both parties claim such proceeds as beneficiaries, the testimony of either party as to transactions and conversations had with the deceased assured is admissible in evidence.

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

Robert G. Simmons and *W. B. Sadilek*, for appellant.

George I. Craven, contra.

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

CHASE, District Judge.

This is a suit in equity for the recovery of the proceeds of a life insurance policy, which is admitted by the parties to be the sum of $1,422.98. It was begun as an action at law. The insurance company, by way of interpleader, se-

cured an order making the defendant Clara C. Roach a party. The insurance company, by agreement of parties, paid the money into court, and the case was then transferred to the equity docket and tried as a suit in equity. So far as this proceeding is concerned, the interest of the insurance company is terminated and the controversy is now between the three daughters of the insured by a former marriage and his widow. Hereafter, for convenience, we shall refer to the daughters as plaintiffs, and to the widow as defendant.

The facts may be epitomized as follows: The insured, Roy V. Roach, by a former marriage, had three daughters, who are the plaintiffs, and the defendant is his second wife. The Pacific Mutual Life Insurance Company issued a policy of insurance upon the life of the assured. The policy is dated September 28, 1925, and one Estella Ann Roach, his wife, was made the beneficiary. Estella Ann Roach died and he subsequently married the defendant. On February 18, 1929, by proper indorsements on the policy, he substituted as joint beneficiary the plaintiffs and the defendant. On August 14, 1931, at the request of the assured, one James W. McKee, his son-in-law, was named as beneficiary, or, in the event of his death before the assured, then the intention was that the immediately previous beneficiaries were to receive the benefits under the policy. On January 18, 1932, upon written request of the insured, the company changed the beneficiary from James W. McKee to the defendant. The assured in his request therefor stated that he no longer owed his son-in-law anything and desired the change to be made. On February 6, 1932, the assured inquired of the company by letter if, in the event he and his wife should both (using his language) "get bumped off in a wreck," the insurance money as it was then fixed would be paid to his daughters or to his wife's sister. He stated further that, in case of his wife's death, he did not desire any of the proceeds to be paid to her people whom he had never seen. On March 11, 1932, at the request of the assured, by proper indorsements thereon, the beneficiary was

again changed to his three daughters, excluding his wife. In his letter to the company in which the change was sought, he directed the company not to mail the policy to Schuyler, where he lived, but to mail it to his daughter, Mrs. C. B. Yoder, at her address in Omaha, stating that he would get the mail and the policy from there. The policy, at the insured's direction, was delivered to Mrs. Yoder. About a year later the defendant, on behalf of the assured, wrote a letter to the company which the assured signed, making a request to change the beneficiary back to the defendant. This letter was followed by a formal application for change of beneficiary, dated May 20, 1933. Considerable correspondence followed between the assured and the company concerning the proposed change of beneficiary, most of which was written by the defendant, to which the assured merely attached his signature. The company at this time informed the assured that it was unable to comply with the request for the reason that he did not inclose the policy upon which to make the indorsement. In the meantime Mrs. Yoder had moved from Omaha to California and had delivered the policy to her sister, Mrs. Smith, who resided in Lincoln. On learning of the location of the policy the insured, whose health was then considerably impaired, was named as plaintiff in an action in replevin, in which the possession of the policy was sought. A writ of replevin followed and the policy thereunder was delivered to the plaintiff therein. When the policy was taken from Mrs. Smith under the writ of replevin, the company was notified in writing by the attorney for plaintiffs that they were the owners of the policy and if the company changed the beneficiary it would do so at its peril. The replevin action was never tried, and no further change of beneficiary was ever indorsed upon the policy. The assured died on October 19, 1933. The trial court found that the title to the policy and the proceeds involved herein were in the plaintiffs by virtue of a gift to them by the assured in his lifetime. From this ruling the defendant brings the case here for review.

Several assignments of error are urged for reversal.

The first to be considered is: Does the record show facts upon which to predicate a gift *inter vivos*?

The defendant claims that the evidence is not sufficient to constitute a gift of the policy; that the record shows the assured at all times intended to keep and retain the title thereto, and while he had such title, and in his lifetime, he undertook to change the beneficiary from the plaintiffs to her; that he was prevented from so doing by the plaintiffs holding possession thereof, and his death occurred while he retained such intention; that she is the owner of the equitable interest of the fund in question and is the real beneficiary under the policy and is entitled to the proceeds.

To establish a gift *inter vivos* two elements are necessary —an unconditional delivery of the property on the part of the donor, coupled with the intention to relinquish all further dominion over the same by him, and to vest full and complete title in the donee.

To determine the intention of the assured in this connection, an intensive study of the facts as shown by the record is necessary. It appears that the assured, shortly after his first wife's death, married the defendant, who was a spinster. The relationship between the second wife and the daughters was not exceptionally friendly, and, as the years passed, the ill feeling grew more pronounced. With this disagreeable situation confronting him, the assured felt an obligation to mollify the malcontents as far as he was able to do so, and to that end he admitted that he resorted to duplicity on several occasions as a nostrum for this unhappy domestic situation. When he was considering the change of the beneficiary from his wife to his daughters he informed the company by letter that he must be very careful how this is done as some one (using his words) "relays the mail." He also states that he is naming the daughters the beneficiary under the present policy since he has another policy of $2,000 which he has made payable to his wife. When the change of beneficiary is made to the daughters, he directs the company to keep the policy until he calls for it, or have it delivered to Mrs. Yoder; that he is contemplat-

ing a visit to Omaha. On March 2, 1932, he mails the policy to the company for the change of beneficiary, and in the letter accompanying it he uses the following statement: "Please do not mail the policy to Schuyler. Mail to 1335 South 36th c/o Mrs. C. B. Yoder. I will get the mail and policy from there." Upon receipt of this letter the company mailed the assured a beneficiary form for signature which the assured filled out, changing the beneficiary and returning the form, properly executed, to the company, and in the letter transmitting the form he again states: "Please be sure and mail policy to Mrs. C. B. Yoder, 1335 So. 36th, Omaha. Thanks." In accordance with the direction the policy was delivered to Mrs. Yoder.

Mrs. Yoder testified that the assured later visited at her home, where, in a conversation had with her, he informed her he had made the policy payable to the three girls, leaving his wife out; that he had made provision for the wife in another policy; that the policy in this suit would be delivered to the witness; and that the plaintiffs were to take and keep it; that it was for the girls, and the witness was not to give out any information concerning it; that if Clara knew she had been cut out she would (using his language) "raise hell" and try and have him get it back. Mrs. Yoder states that she told her father she would receive the policy; and which was later delivered to her, and she kept it and he never called for it again. Mrs. Yoder, in 1932, moved from Omaha to California, at which time she delivered the policy in question to her sister, Mrs. Smith, at Lincoln. Later Mrs. Yoder returned from California and had a conversation with her father at Schuyler in which she testified he informed her there was considerable trouble about the policy but it was all right the way it was and that there was no reason why his wife should have any of it. He wanted the plaintiffs to have it; stating further the second marriage had not been as felicitous as he had anticipated; that he was sorry he married the second time; that after the witness leaves his home his wife will spend half the night pumping him trying to find out what they talked about.

Mrs. Smith testifies, in a conversation had with her father after the policy had been delivered, he stated that the policy "belongs to you girls; it is in Omaha; you look after it and keep it and use it to look after the land. * * * Clara is not to know." Later he wrote a letter to Mrs. Smith, which is part of the record, in which he states the policy is made out to you girls and Clara does not know this, nor is she to know it; requesting that they do not give away the fact as to whom the policy is made out; that he had borrowed $250 on the policy before he made the change of beneficiary to the plaintiffs. He had an arrangement with his daughters whereby it was understood between them that, in the event any dispute or argument arose between the plaintiffs and the defendant, he was to take the wife's side, in order not to incur her displeasure, since he was the one who had to live with her after the daughters were gone.

We think the facts as presented by the record warrant the conclusion that it was the intention of the insured to make a gift of the policy in question to his three daughters; that such intention was consummated by a complete delivery of it to them; that upon such delivery his dominion and title over the policy and the proceeds arising thereunder ceased.

It is claimed that the title to a life insurance policy cannot be made the subject of transfer by way of gift *inter vivos* so as to vest the beneficial interest therein in the donee.

The law is well settled in cases of gifts *inter vivos* that the only delivery of the subject of the gift necessary is such as the nature of the property will reasonably admit. The rule applied to gifts *inter vivos* as expressed in the earlier decisions seems to have been somewhat relaxed in later years in order to keep pace with growing business conditions. In applying the more modern rule the courts inquire into the species of the property which is made the subject of the gift, as well as the manner in which the gift is executed. *Crook v. First Nat. Bank*, 83 Wis. 31, 52 N. W. 1131. Originally gifts *inter vivos* were limited with considerable

strictness to chattles that were the immediate subject of manual delivery. Influenced by the expansion of commercial activities the rule has been extended to cover securities, such as bank notes payable to bearer, lottery tickets, indorsed bonds and other choses in action represented by certificates where the equitable interest only could be assigned. This rule is supported by the theory that a bank note, security, or chose in action represents some valid and subsisting obligation for the payment of a given sum of money, and the giving and delivery of the evidence of the debt, or the instrument that shows its existence, is, in effect, a gift of the money. *Basket v. Hassell,* 107 U. S. 602, 27 L. Ed. 500; *Schollmier v. Schoendelen,* 78 Ia. 426, 43 N. W. 282.

No particular words are necessary to constitute such a gift, the essential ingredients being the intention of the donor, coupled with as effectual and complete a delivery as the species of the property will admit, intending thereby to relinquish all future dominion over the same. *Skobis v. Ferge,* 102 Wis. 122, 78 N. W. 426.

The more modern doctrine has been recognized by this court wherein it held that the mere delivery of a receipt to the donee for bonds which had been left by the donor for safe-keeping, with the intention of making a gift to the donee, is sufficient. *Kaufmann v. Parmele,* 99 Neb. 622, 157 N. W. 342.

The cases where life insurance policies are sought to be made the subject of gifts *inter vivos* are not so numerous. It has been held that one who takes a policy of insurance upon his life may make a valid gift of the proceeds to another by the delivery of the policy, even though the policy provides that an assignment of it must be made in writing and filed in the office of the insurer. *Opitz v. Karel,* 118 Wis. 527, 95 N. W. 948, 62 L. R. A. 982. If stocks, bonds, and other evidences of indebtedness are recognized by the courts as the proper subjects of gifts *inter vivos,* we can perceive of no logical reason why the doctrine cannot be extended to policies of life insurance. Like other evidences of indebtedness, it represents an existing contractual obli-

gation in force, wherein the insurer, for a valuable consideration, agrees to pay to a third person a certain sum, fixed by the contract, upon the happening of the event of death. The power to transfer the benefits under the policy in the manner designated by the contract would, in all reason, give the insured also the power to dispose of the same by gift, if such transfer meets all other requirements of gifts *inter vivos*, and the title to the fund would vest, at its maturity, in the donee in the same manner as gifts of other like species of property. *Travelers Ins. Co. v. Grant*, 54 N. J. Eq. 208, 33 Atl. 1060; *Hogue v. Minnesota Packing & Provision Co.*, 59 Minn. 39, 60 N. W. 812; *Marcus v. St. Louis Mutual Life Ins. Co.*, 68 N. Y. 625; *Crittenden v. Phoenix Mutual Life Ins. Co.*, 41 Mich. 442, 2 N. W. 657.

Another claim the defendant makes is that the husband cannot pass title to a life insurance policy, citing section 44-1118, Comp. St. 1929. It is claimed that under this section of the statute there can be no pledge or assignment of a policy of life insurance except as security for debt.

This statute merely provides that the insured may sell or surrender a policy to the company, or pledge or assign the same to the company, or assign the same as security for a debt, without the consent of the beneficiary, unless the appointment of such beneficiary is irrevocable.

We are unable to place any interpretation on this statute which would preclude the insured from making a gift of a life insurance policy. The fact that it provides that a policy may be assigned as security for debt does not, of itself, exclude any other method or reason for transferring title thereto. We are aware of no canon of statutory construction that would justify a court in placing such an interpretation on this statute.

Another claim made by the defendant is that the only manner in which an interest or title in an insurance policy can be assigned is by complying strictly with the terms of the policy. The rule is too well settled to admit of further argument that the provisions for the change of beneficiaries and assignment of insurance policies stipulated in the con-

tract are made primarily for the benefit of the insurer. If the insurer waives, or does not seek to raise a question of the method of assignment, it cannot be raised by beneficiaries. *Opitz v. Karel, supra; Hewins v. Baker,* 161 Mass. 320, 37 N. E. 441.

It is claimed by the defendant that a husband cannot make an assignment, even for collateral security, of a policy of life insurance payable to his wife, without her consent or knowledge, citing *Norfolk Nat. Bank v. Flynn,* 58 Neb. 253, 78 N. W. 505. This case holds that from the record it had before it the facts were not sufficient to constitute an assignment of the policy on behalf of the insured as security for a debt. The policy involved was one where the husband was the insured and the wife his beneficiary. The plaintiff contended that the husband made an assignment to it of the policy to secure a debt. In discussing the question of whether or not the evidence was sufficient to show assignment, the commissioner did digress into a discussion in which he seems to indicate that, before valid assignment of this policy could have been made to secure the debt, the wife's consent was required. Obviously this question was not necessarily before the court, and at most is mere dictum, since the court held that the evidence was insufficient to show that the husband had intended to make an assignment of the policy. If a husband cannot legally make any other person except his wife the beneficiary in a policy of insurance upon his life, and cannot assign the policy as security for debt without his wife's consent, then it would follow that the wife would be made the exclusive beneficiary of the husband's life insurance. This principle we cannot indorse as now being, or ever having been, the law of this state.

The trial court is charged with error for permitting the plaintiffs to testify relating to conversations and transactions had with the insured, who was deceased at the time of the trial, claiming that section 20-1202, Comp. St. 1929, excludes such testimony.

This statute provides that a person having a direct legal

interest in the result of a civil action or proceeding will not be permitted to testify to any transaction or conversation had with a deceased person, when the adverse party is a representative of such deceased person.

At the very outset it is apparent that the statute is not applicable to the situation presented here. It is true the plaintiffs have a direct legal interest in the controversy, but the defendant is not the representative of a deceased person within the meaning of the statute. Whatever interest the defendant may have in the subject of this litigation is not based upon her representation of a deceased person. Her rights are based on a written obligation which matured at his death, an obligation which the deceased never had in his lifetime, and never could have been enforced by him. It came into existence upon his death, as an original obligation. The cases cited by the defendant in support of her theory are not in point, as in both of these cases the rule applied is such that the statute only becomes applicable where one party is called upon to defend or assert title or interest in property, which the deceased person could have asserted, or defended, had he been living. This statute cannot be extended so as to apply to the testimony of plaintiffs. Were it of such a character as to come within the statute, at the time it was received the defendant made no objection thereto, and further, in presenting her side of the case, waived the right by offering testimony as to transactions and conversations had with the same deceased party.

From a careful examination of the entire record, we must conclude that the trial court reached the proper conclusions of fact and applied the proper rules of law thereto. The case is, in all respects

AFFIRMED.

MARIE E. KUHLMAN, ADMINISTRATRIX, APPELLEE, V. WILLIAM F. SCHACHT, APPELLANT.

FILED FEBRUARY 28, 1936. No. 29431.

1. **Infants**: GUARDIAN AD LITEM. Under the particular circumstances disclosed, the failure of the court to appoint a guardian *ad litem* for the minor defendant was not prejudicial error.
2. **Negligence**: PROOF. Evidence examined and *held* to prove that the death of Henry B. Kuhlman was caused by the negligence of the defendant.
3. **Trial**: INSTRUCTIONS. Where the court, in starting to give the issues in the first instruction, neglected to state that "the plaintiff alleges" or words of similar import, but states plaintiff's cause of action without such words, such omission may not be prejudicially erroneous when the whole instruction and others were such as to not mislead the jury into inferring that the court stated plaintiff's allegations as facts proved.

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

Tyler & Peterson and *Wear, Boland & Nye,* for appellant.

Thomas E. Dunbar, contra.

Heard before GOOD, DAY and PAINE, JJ., and RAPER and PROUDFIT, District Judges.

RAPER, District Judge.

The body of Henry B. Kuhlman was found on the paved highway about three and one-half miles south of Nebraska City on February 23, 1934, at about 7:30 p. m. His widow, Marie E. Kuhlman, was duly appointed administratrix of his estate and, as plaintiff, brought this action to recover damages from the defendant, William F. Schacht, a minor; she alleging that the negligence of the defendant caused the death of the said Henry B. Kuhlman. From a verdict and judgment for plaintiff, the defendant appeals.

On the night stated, the defendant and two young men companions drove a 1927 model Buick automobile southward from Nebraska City on highway 75, and at a place near where the body of the deceased was found struck some

object. The defendant and both companions admitted this, and they each testified that they did not see any person or object before the impact, or in the highway. The three were in the front seat, and the right lamp was broken and the right side of the hood on the top was dented as by some heavy object, the right side of the windshield shattered and radiator broken. No particular effort was made to stop, but one of the party said the speed was slackened some before the car reached the bottom of the hill. The road there inclined by about a three degree descent for about a half mile south of the place of the impact. The defendant drove his car about a mile south, and then turned at a cross-road, and drove back on highway 75 past the scene. His lights had gone out, and on his return he drove slowly without lights past the place and he and his companions said they looked for the object they had struck but were unable to see anything. They drove into Nebraska City, placed the automobile in a friend's yard, borrowed another car and drove past the scene of the accident. They saw an ambulance and a number of cars and saw an object covered by a white cloth, but did not stop. He drove about a mile south, then returned to Nebraska City by another route and went to his father's house until it was decided to notify the officers, which was done about three and a half hours afterwards.

The deceased, when last seen alive, was walking south on the highway. When found, the body was lying in a spillway on west edge of the highway and was badly mangled. There were smears of blood extending north on the pavement, 30 or 40 feet or more, and some glass fragments were picked up near 150 feet north of the body; one shoe and pocketbook found on the pavement some distance away. There is considerable variation in the evidence as to the condition of the lights on defendant's car. There is testimony that the defendant stated after the accident that his lights were dim and that they shone 35 or 40 feet ahead of the car, and there is some testimony that there was only one light on the car. The defendant testified that the lights

were in excellent condition, and there were two adjustments, but both gave bright light, one being set closer to the pavement, and his lights were on the low adjustment, and were brighter when set that way, and with that adjustment he could see approximately one-half block, 140 to 150 feet; that the brightest beams of the lamps would be on the pavement about 60 to 75 feet ahead of the car; that he had his eyes on the highway and saw nothing on the highway before the crash, and was driving 40 miles an hour. The battery and brakes were in good condition, he said. His two companions testified they were driving from 40 to 45 miles an hour, that they saw no object or person before the impact, and that the lights in condition that showed the highway about half a block ahead, but one of them, Ross Gerber, admitted that he might have said (the next day) that he could see around 30 to 35 feet ahead where the lights were brightest.

The deceased was a large man, six feet and three inches in height, weighing 225 pounds. His body was dragged on the pavement probably a hundred feet. There is nothing to indicate that he was negligent, and the jury were warranted in presuming that he was free from the charge of contributory negligence. The evidence as a whole is sufficient to establish that the death of Henry B. Kuhlman was caused by the negligence of the defendant. From the condition of the car and the mangled condition of the body and the distance it was dragged along the pavement, it is evident that the car was moving at a high rate of speed.

The defendant urges nine alleged errors. The first three relate to the failure of the court to appoint a guardian *ad litem* for the defendant, who was a minor 20 years of age. The proof shows that at the time of the accident and at time of trial and judgment he was a minor. He was born October 29, 1913, and motion for new trial was overruled and judgment entered on September 28, 1934. The petition states that defendant was a minor and service of summons was duly made on him as a minor and the court thereby acquired jurisdiction. The defendant did not ask for the

appointment of a guardian, nor did his father or mother who were present at the trial, or his attorneys. This objection was first called to the court's attention on September 29, 1934, when motion for new trial was filed. Defendant was married at Auburn in May, 1934, and made affidavit that he was then past 21 years of age; but, notwithstanding that, the evidence is quite conclusive that he was born October 29, 1913. Section 20-309, Comp. St. 1929, provides: "The defense of an infant must be by a guardian for the suit, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or by a county judge." Section 20-310, Comp. St. 1929, provides: "The appointment may be made upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after the return of the summons. If he be under the age of fourteen or neglect so to apply, the appointment may be made upon the application of any friend of the infant, or on that of plaintiff in the action."

Appellant insists that section 20-309, Comp. St. 1929, is mandatory and the failure to appoint a guardian *ad litem* is reversible error, irrespective of all other features of the case. If it be granted that the court was in error, it does not necessarily follow that such error is fatal to the judgment. Our statute provides, and this court many times has held, that an error that does not prejudice or injure a party is not ground for reversal. Some courts have held that, where a minor has not been represented by his legally appointed guardian or by a guardian *ad litem* appointed by the court, it is sufficient reason for reversal. In many of such cases it appears that the rights of the minor have not been properly protected in the trial. In such cases, of course, there can be no question of the justness of granting a new trial. In the case at bar the defendant was within a few weeks of his majority; was married; was carrying on his own business; was the owner of the car involved, on which he carried liability insurance; and able, experienced and alert counsel conducted his case with skill, energy and earnestness, and, as shown by the record, at every stage of

the litigation have developed and placed before the trial court and this court every possible fact and circumstance in the defense. The trial judge was under the impression that the defendant, although named as a minor in the petition, had reached his majority before the trial. None can doubt that, if such guardian *ad litem* had been appointed, he would not have conducted or assisted in conducting the defense in any way different than the course that was pursued.

This court in *Parker v. Starr*, 21 Neb. 680, 33 N. W. 424, held that, the court having acquired jurisdiction by due process, the failure to appoint a guardian *ad litem* for a minor does not render void a judgment against him, and this has been followed in *Manfull v. Graham*, 55 Neb. 645, 76 N. W. 19. The statute gives to a minor over fourteen years of age the right to apply for the appointment of the guardian, and this is a privilege, if, indeed, not a duty, that the defendant did not avail himself. The trial court was not apprised of the minority of defendant until after verdict had been returned against him. Considering all the circumstances, we hold that the failure to appoint a guardian does not entitle defendant to a new trial.

The fourth assignment is that the court erred in giving instruction No. 1. This instruction begins as follows:

"Gentlemen of the jury, you are instructed as follows:

"No. 1. That Henry B. Kuhlman died intestate while a resident of Otoe county, Nebraska, on February 23, 1934, and the plaintiff, Marie E. Kuhlman, was the duly appointed and qualified and acting administratrix of his estate; that on the 23d day of February, 1934, at about 7:30 p. m."—and then proceeds to set forth the allegations of negligence as pleaded in plaintiff's petition and that said acts caused the death of the deceased. Appellant urges that this instruction is error in that the court peremptorily instructed the jury that all the acts of negligence alleged in the petition were true, and was equivalent to instructing the jury to return a verdict for plaintiff. After stating the acts of negligence, the instruction then reads: "Plaintiff further

alleges that said acts resulting in injuries and death of the deceased were due solely and as the proximate cause of the negligence of said defendant," and then proceeds to set out six specific acts of negligence complained of.

Instruction No. 2 states: "The burden of proof * * * is upon the plaintiff to establish by a preponderance of evidence the following matters: (1) That the defendant was guilty of one or more of the several acts charged as negligence in the petition; (2) that the acts so proved constituted negligence as defined in these instructions; (3) that the negligence so proved was the proximate cause of the collision and consequent death of Henry B. Kuhlman; (4) * * * If the plaintiff has so established each and all of the four foregoing propositions * * * your verdict should be for the plaintiff. * * * If plaintiff failed to so establish each and all of said propositions * * * your verdict should be for the defendant." An instruction in the usual form was given on comparative negligence of the parties, if any.

We assume the jury were at least men of ordinary intelligence, and that alert and able counsel had stated and argued to the jury on whom was the burden of proof, and what plaintiff had or had not proved; so, even before the instructions were read, the jury had acquired the knowledge, in a general way, as to what plaintiff alleged in her petition and what she was under obligation to prove. The second part of instruction No. 1, where it states that "plaintiff further alleges," and instruction No. 2, which positively and unequivocally states what plaintiff must prove before she could recover, render it plain that the jury could not have been misled into the belief that the judge was stating the facts as having been proved.

Assignment of error No. 5 relates to the giving of instruction No. 15, in which it is stated that in determining the amount of plaintiff's recovery, if any, the jury should consider the earnings, habits, health, profits of his labor, if any, of the deceased, what he would have earned, if he had lived, for the support of those entitled to the recovery, and probable expectation of his life. In other instructions

it was stated that the recovery, if any, would be for the exclusive benefit of the widow and next of kin and the services the next of kin could reasonably expect would have been rendered in their behalf, and that plaintiff must prove the amount of the pecuniary loss to the wife and three children because of the death of Henry B. Kuhlman. Taking all the instructions into consideration, there is no prejudicial error in giving the instruction.

In assignment No. 6 it is claimed the court erred in giving instruction No. 17, in which the jury are told that in determining the amount of plaintiff's recovery, if any, they should consider only the earning power of deceased for the probable time of his life. While this instruction might well have been framed in more definite language, its evident purpose was to advise the jury that the grief and suffering of the plaintiff and the children should not be made an element of damage. The instruction as given was not prejudicial error. Defendant offered an instruction, his No. 3, which states that plaintiff was only entitled to recover pecuniary loss and the jury were not permitted to consider any grief and suffering of the next of kin, nor should the jury be influenced by sympathy for the bereaved. The refusal of the court to give this instruction is No. 7 in defendant's assigned errors. The instructions referred to above and taken as a whole fairly cover the elements in defendant's requested instruction No. 3, and the court's refusal to give same is not prejudicial.

A witness, T. E. Holmberg, was called by plaintiff and was permitted to testify that, on a 1927 Buick car such as the one involved, the bright lights of the car would give a vision on the highway to a distance of 100 to 150 feet, and it might be up to 200 feet, and dim lights show as far as 50 to 60 feet; and, on being asked if the car moving at the rate of 45 miles an hour at that place could be stopped within the range of vision of the dim lights, answered that it would be pretty hard to stop the car in the distance of the dim lights. Appellant asserts as error No. 9 that the witness was shown to have no knowledge of the lights of the car in

question and therefore had no foundation for his testimony, and it was irrelevant. The question as to the condition of the lights was only relevant in so far as they lighted the highway and would render visible any object or person thereon. The three occupants of the car testified they did not see the person or object which the car struck before the impact, so it was not a question of stopping or attempting to stop a car after observing some person or object ahead. But even if such condition existed the answer was so indefinite that it did no injury to defendant. There is not a great deal of difference between Holmberg's estimate and defendant's testimony as to the distance dim lights and bright lights would illuminate the highway, and such difference is not material because of the defendant's testimony that he did not see the deceased. The testimony of the witness Holmberg worked no advantage to the plaintiff nor prejudice to the defendant.

The last assignment of error No. 9 is the exclusion of the testimony of the witness Allen Arrison, called by defendant, proffered by an offer to prove which clearly shows that it called for hearsay testimony and same was properly excluded.

Appellant by way of argument, without having it assigned as error, alleges that the assessment of damages is grossly excessive. This claim, not having been alleged as ground of error, should not be considered here. Comp. St. 1929, sec. 20-1919; Supreme Court Rule 13; *Gorton v. Goodman*, 107 Neb. 671, 187 N. W. 45.

The judgment of the district court is

AFFIRMED.

ATLAS CORPORATION, APPELLEE, V. A. F. MAGDANZ, APPELLANT.

FILED FEBRUARY 28, 1936. No. 29509.

1. **Bills and Notes**: ACCOMMODATION MAKER: QUESTION FOR JURY. Where the evidence is conflicting or different inferences may be properly drawn therefrom, the question whether the signer of a note is an accommodation maker is a question for the jury.
2. **Trial**: DIRECTION OF VERDICT. Evidence examined, and *held* that the district court did not err in overruling defendant's motion for a directed verdict, and that the case was for the jury.
3. **Bills and Notes**: ESTOPPEL. Where a cashier of a bank by general indorsement transferred to the bank a note in which he was named as payee, and such cashier was the general manager of the bank having the custody and control of its notes, it was his duty to collect the note in question or notify the directors of default in payment thereof and request instructions. Instead of following that course, the cashier from time to time made payments of principal and interest and indorsed the same upon the note, and in three instances marked the note extended for two years each. *Held*, that, when sued upon his indorsement, he was estopped as against the bank or its assignee from pleading the statute of limitations within five years of the last extension, or the statute of frauds because he had not signed his name to the extension, or payment in accordance therewith was not to be made within one year.

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

Leamy & Leamy, for appellant.

Deutsch & Young, contra.

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

REDICK, District Judge.

Action by plaintiff upon a promissory note signed by the defendants Emil Altwine and Anna Altwine and indorsed generally by the defendant A. F. Magdanz, dated February 28, 1922, for the sum of $9,000, and assigned to plaintiff by the receiver of the Citizens State Bank of Pierce, Nebraska.

The petition alleges that said note was executed and indorsed as above stated, was due three years after date, and was payable to the defendant A. F. Magdanz, and that upon the date of its execution said note was duly sold, indorsed and delivered to the Citizens State Bank of Pierce by the said Magdanz, and that the bank thereupon became the owner and holder thereof; that a number of payments were made upon said note by Magdanz, the maturity of said note being extended for two years at the dates of said payments respectively and indorsed on the back of the note, the last indorsement being "Int. paid to February 28, 1929; note extended to February 28, 1931, at 6 per cent. per annum" in the handwriting of defendant Magdanz. The petition further alleges that at all times defendant Magdanz was the managing officer of said bank, and that said note was made and delivered by the defendants Altwine to the defendant Magdanz for his accommodation only, and that the Altwines received nothing for said note; and that they executed the same upon the express representation that defendant Magdanz was prohibited from borrowing from said bank; that all payments upon said note were made by defendant Magdanz and were indorsed thereon by him; that prior to October 6, 1930, Magdanz fraudulently and unlawfully wrote the words "without recourse" above his said indorsement. The petition further alleges that on October 6, 1930, the Citizens State Bank of Pierce was closed by the banking department and receiver took possession thereof on October 7, and relied upon the indorsement of the defendant Magdanz as being without recourse and did not discover that said words had been fraudulently added to the indorsement until August, 1934; that at the time of the execution of said notes the Altwines executed a real estate mortgage to Magdanz to secure the same, which the latter assigned and transferred to the bank, but said assignment was not placed of record, and on October 6, 1930, without any authority from said bank, for the purpose of defrauding said bank and its creditors and assignees, released said mortgage upon the margin of the record. The petition

further alleges that said note was duly sold and assigned to plaintiff's assignor by the receiver of said bank on the 16th day of May, 1934, by indorsement without recourse, and that plaintiff is now owner and holder of said note and there is now due thereon the sum of $4,500, together with interest from February 28, 1929, at 6 per cent. per annum, and plaintiff prays judgment for the sum of $5,982.75, with interest.

The defendant Altwine answered and admitted all the allegations of the petition, but alleged that said note was given by the Altwines to the defendant Magdanz without any consideration and solely for his accommodation and to provide the means of securing a loan from the Citizens State Bank by means of his indorsement to it; that said Magdanz received all of the consideration for said note from said bank, and that such note was loaned to the said defendant Magdanz without consideration and solely for his accommodation, and upon his promise to take up and pay the same, and that, as between these answering defendants and the said defendant Magdanz, the latter is primarily liable for said obligation and these answering defendants are liable only as sureties. The defendant Anna Altwine pleaded coverture and was dismissed from the action. Defendants prayed judgment that said Magdanz was primarily liable on said note and that the Altwines were secondarily liable.

Defendant Magdanz answered said petition, and denied every allegation thereof not specifically admitted, and alleged that the cause of action upon said note did not accrue within five years next before the commencement of this action (August 17, 1934); that the purported extensions of the time of payment of said note were not to be performed within one year, were not in writing or subscribed by defendant. Defendant, further answering, admits the execution of the note and the indorsement by him on the back thereof, but alleges that said note was executed to the Citizens State Bank in the name of defendant as an officer of said bank in accordance with the custom of said bank to

take notes secured by real estate mortgages in the name of an officer of the bank as a matter of convenience; that defendant was never the owner and holder of said note, and that his indorsement thereof was entirely without consideration and merely for the purpose of transferring the title to said bank; that said mortgage was executed to defendant solely as an officer of and for the benefit of said bank. Defendant further alleges that the several payments made and indorsed upon said note were made from the proceeds of the income of said mortgaged real estate; admits the execution of the release of the mortgage on the margin of the record, but alleges that said mortgage was of no value on account of prior liens.

Plaintiff replied to the answer of defendant Magdanz, putting in issue the allegations thereof and repeating, in substance, the allegations of the petition.

Trial was had to a jury, which resulted in a verdict for the plaintiff against the defendant Magdanz in the sum of $6,057.75, and a special finding that the note in question was an accommodation note. Judgment was thereupon entered for plaintiff against defendant Magdanz and Emil Altwine for $6,057.75, and that Emil Altwine was an accommodation maker, and that Magdanz was primarily and Altwine secondarily liable thereon. From an order overruling the motion for a new trial, defendant Magdanz appeals.

The question for determination is whether or not the evidence is sufficient to support the verdict of the jury, which arises on appellant's first assignment of error that the court erred in overruling the motion of defendant Magdanz for a directed verdict at the close of all the evidence.

It appears from the evidence without dispute that one Tonner was vice-president and defendant Magdanz cashier of the Citizens State Bank of Pierce from the time of its organization in 1914 until it failed October 6, 1930, and that they managed and controlled the affairs of the bank; that in 1920 Altwine purchased from Magdanz and Tonner a farm of 200 acres for the sum of $45,000 or $46,000, upon

which land there were two mortgages, one for $10,000 to the Federal Land Bank and one for $20,750 given by the defendant Magdanz to one Chilvers, the remainder being paid in cash by the liquidation of a mortgage on other land held by Altwine. In the fall of 1921 Altwine came to the conclusion that the encumbrances and expenses connected with the carrying on of the farm were beyond his ability and sought to arrange with Magdanz and the bank to take a conveyance of the land in satisfaction of his indebtedness to the bank represented by a note for $6,693.23 secured by a third mortgage upon the land, and two smaller notes, the entire indebtedness to the bank aggregating $7,714.84. As a result of negotiations to that end, on February 28, 1922, Altwine and his wife came to the bank at Pierce and there met Magdanz and Tonner, and Altwine and wife testified that it was thereupon agreed that the Altwines should execute a deed for the land in satisfaction of their indebtedness to the bank. The deed was executed to and delivered to Magdanz and three notes representing his entire indebtedness to the bank were delivered to Altwine. At the same time and as a part of the same transaction the Altwines executed to Magdanz the note in suit for $9,000, dated February 28, 1922, and due in three years, and a mortgage to secure the same upon the land. It is claimed by Altwine, and he so testifies, that this last note and mortgage were executed purely for the accommodation of Magdanz, who stated that he wanted to put the note in the bank to take the place of the land and that Altwine would never be called upon to pay it. The claim of Magdanz with reference to this transaction, and he so testifies, is that the note in question was given in renewal of the three notes delivered to Altwine, and that the deed to the land and the note in suit, together with the mortgage securing the same, were taken in the name of Magdanz merely as an officer of the bank and for convenience in accordance with a custom of the bank in dealing with notes secured by real estate mortgages. It further appears from the evidence that Altwine remained upon the land for a period of about seven

years as tenant of Magdanz under a written lease at a rental payable part in cash and part in a share of the crop, and that Altwine paid the rent in full, while he occupied the premises, to Magdanz. After the giving of the note and mortgage, Altwine transacted no business with the Citizens State Bank except to maintain a small checking account, but transferred his business to another bank in Pierce. Altwine never paid any payments upon the note in suit and never received any notice from the bank calling for the payment of interest or principal on the note, and considered that all his indebtedness to the bank had been satisfied by the conveyance. March 1, 1922, Magdanz credited upon the back of the note $1,285.16 which reduced the note from $9,000 to $7,714.84, the exact amount of principal and interest due the bank from Altwine on that date, and from time to time thereafter, from March 21, 1923, until April 24, 1928, made payments upon the note which were credited thereon by Magdanz in his own handwriting, which reduced the principal to $4,500. Magdanz testifies that these payments were all made from rentals received from Altwine. It appears, however, that the crops delivered on account of rent were delivered to Magdanz at his farm adjoining the Altwine place and the major portion thereof fed to Magdanz' stock. He testifies, however, that he made a fair accounting to the bank of the crop receipts and made more out of them than could have been secured by sale upon the market. The day or day before the bank failed, October 6, 1930, Magdanz inserted the words "without recourse" over his indorsement on the note in question, which he says was done at the suggestion of the bank examiner. After the bank closed and the receiver took possession, Magdanz made no further payments upon the note, the last indorsement being for interest to February 28, 1929, retained possession of the rents and profits of the farm, and finally conveyed the same to one Friederich in satisfaction of the note and mortgage which he (Magdanz) had given upon the land, the principal of which was $20,750, and of which Friederich had become the owner. If

the position now taken by Magdanz is correct—that the note in question and the mortgage securing it and the title to the land were taken in his name merely for convenience, the real ownership being in the bank—then he convicts himself of converting the assets of the bank to his own use and defrauding the bank and its creditors. The question presented to the jury was whether the note in question was given for the accommodation of Magdanz or in renewal of Altwine's debt to the bank. The evidence is in direct conflict and in our opinion was sufficient to support a finding either way. The jury found against the appellant.

The transcript of the evidence as contained in the bill of exceptions has been read with great care and we have no hesitation in announcing our conclusion that the questions involved entitled the plaintiff and appellee to the judgment of a jury under our system of judicature and that the verdict of the jury is sustained by sufficient evidence and ought not to be disturbed.

It is contended, however, by appellant that the action is barred by statute of limitations because not brought within five years from date of last payment upon the note, February 28, 1929, suit having been commenced August 17, 1934. The indorsement in question was in the handwriting of Magdanz and in these words: "Int. paid to Feb. 28, 1929; note extended to Feb. 28, 1931." Similar extensions in Magdanz' handwriting were made to February 28, 1927, and to February 28, 1929. The claim of appellant is that these extensions, not being signed by Magdanz, and not to be performed within one year, are void under the statute of frauds.

It was held in *Farmers Life Ins. Co. v. Wolters,* 10 S. W. (2d) (Tex. Com. App.) 698, that "Payee's indorsement on back of note extending time of payment, together with signature on face of instrument, constituted signed agreement for extension of maturity date so as to take case out of statute of frauds." Without deciding this point, we are of opinion that Magdanz is estopped as against the bank and its assignee to plead either the statute of frauds or limita-

tions. Magdanz was cashier and active manager of the bank. He had charge of the note as such officer and it was his duty to enforce payment when due, or report the situation to the board of directors for instructions. Instead of performing his duty, he made the indorsements and thereby concealed the fact that the note was due. He should not now be permitted to take advantage of his own wrong.

In *Harrisburg Bank v. Forster,* 8 Watts (Pa.) 12, it was held that a cashier of a bank was estopped to plead the statute of limitations in an action upon notes signed by him, unless it already appeared that he had performed all his duties in relation to the note in exhibiting the same as due and unpaid to the board of directors. So in *Livermore Falls Trust & Banking Co. v. Riley,* 108 Me. 17, 78 Atl. 980, the court held that a director was likewise estopped from setting up the statute of limitations in an action upon a note signed by him on account of his position as a trustee whose duty it was to collect the note at maturity. Further citation of authorities is unnecessary as the proposition of estoppel seems self-evident. Plaintiff pleaded that defendant Magdanz was estopped by the indorsements on the note to plead the statutes.

Appellant urges that the court erred in submitting the question whether the note was an accommodation note, asserting that the note in suit was executed for a consideration; but the theory of plaintiff is that Altwine executed the deed in payment of his debt to the bank, and the evidence tends to support that claim. If Altwine satisfied his debt by the conveyance, then there was no consideration moving to him for the note in suit. The question was properly submitted and the jury accepted plaintiff's theory.

Error is assigned because by instruction 10 the jury were told to find for plaintiff if they found from the evidence that Magdanz was the owner of the note and indorsed it to the bank for a consideration, for the reason that there was no evidence that Magdanz received any consideration from the bank. It is probable that this instruction placed upon plaintiff too great a burden, but of this appellant can-

not complain. If the note was signed for the accommodation of Magdanz, what he did with it was of no importance to Altwine as between him and Magdanz, although Altwine would be liable as surety to the bank which had surrendered his other notes. The evidence seems to establish the position as follows: Altwine deeded his equity in the land for his notes at the bank. The deed was taken in the name of Magdanz, and, to replace the notes and keep the real estate out of the bank, a new note was given by Altwine to Magdanz and indorsed by him to the bank. By this means Magdanz got title to the land and retained it, together with the rents and profits. True, he made payments on the note, but these payments were just as consistent with his liability as the accommodated payee as with any liability of Altwine. What was Altwine's position? He gave up title and possession of the land for the notes. Had he not made the deed he could have kept possession until foreclosed, perhaps one to three years; but, having deeded, he paid full rent. If now required to pay his notes, without recourse upon Magdanz, he will have gained nothing by the transaction but will have lost the value of the possession of the land for several years. What is Magdanz' position? He got title and possession of the land enabling him to reduce the note upon which he was indorser to $4,500; also the rents and profits from the land from February, 1929, to the date of his conveyance to Friederich, in September, 1931, whereby he got rid of an indebtedness of over $20,750. The only loser by the transaction is the bank or its assignee, unless recovery may be had against Magdanz.

A number of other errors are alleged and we have examined them but find no ground for reversal established.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE, EX REL. THOMAS J. O'CONNOR, APPELLANT, V. ANTON J. TUSA, ELECTION COMMISSIONER, APPELLEE.

FILED MARCH 2, 1936. No. 29808.

1. **Statutes:** CONSTITUTIONALITY. Sections 26-2001 to 26-2027, Comp. St. Supp. 1935, known as the county manager act, violate that part of section 14, art. III of the state Constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."
2. **Officers:** COUNTY MANAGER. The county manager to be appointed by the county board, under the provisions of section 26-2007, Comp. St. Supp. 1935, is a public officer within the purview of section 4, art. IX of the Constitution, which provides: "The legislature shall provide by law for the election of such county and township officers as may be necessary."
3. **Counties and County Officers:** REGISTER OF DEEDS. Sections 26-2001 to 26-2027, Comp. St. Supp. 1935, known as the county manager act, do not expressly or by implication abolish the office of register of deeds upon the adoption of the act by the electors of a county.
4. **Statutes:** CONSTITUTIONALITY. The provisions of section 26-2007, Comp. St. Supp. 1935, placing the appointment of officers of the county in the hands of the county manager, violate section 4, art. IX of the Constitution.
5. ———: ———. "Where valid and invalid parts of a legislative act are so intermingled that they cannot be separated in such a manner as to leave an enforceable statute expressing the legislative will, no part of the enactment can be enforced." *State v. Junkin*, 85 Neb. 1, 122 N. W. 473.

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

O'Sullivan & Southard, John P. Breen and *W. C. Dorsey*, for appellant.

James T. English and *L. J. Te Poel, contra.*

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

CARTER, J.

This is a suit to obtain the issuance of a writ of mandamus to compel Anton J. Tusa, election commissioner of

Douglas county, to accept relator's filing for the office of register of deeds of Douglas county. From an order denying the writ, relator appeals to this court.

The record discloses that on November 6, 1935, Thomas J. O'Connor, the relator herein, presented his application as a candidate for register of deeds of Douglas county to Anton J. Tusa, election commissioner of Douglas county, for the purpose of having his name placed on the ballot at the primary election to be held April 14, 1936. His filing was refused for the reason that the voters of Douglas county had, on November 6, 1934, adopted the county manager form of government provided for in sections 26-2001 to 26-2027, inclusive, Comp. St. Supp. 1935, and that, by reason thereof, there was not to be a register of deeds nominated at the primary election to be held on April 14, 1936.

In his petition for a writ of mandamus, relator contends that sections 26-2001 to 26-2027, Comp. St. Supp. 1935, are unconstitutional, void, and of no force and effect.

Prior to 1933, the statute provided for the election of a register of deeds in 1918, and every four years thereafter. Comp. St. 1929, sec. 32-209. In 1933, however, the statute was amended to provide for the election of a register of deeds in counties having a population of 150,000 or more in the year 1936, and every four years thereafter. Comp. St. Supp. 1933, sec. 32-209.

Relator contends that his right and authority to file for the office of register of deeds arises under and by virtue of the statute last cited, it having been adopted by the legislature and approved by the governor subsequent to the passage of the county manager act, and also subsequent to the adoption of the county manager act by the voters of Douglas county. Respondent contends that the county manager act, and the vote of the people of Douglas county in adopting it, suspended the election of a register of deeds in Douglas county in 1936, and until such time as the county managerial form of government shall have been legally abandoned, as provided by the act.

We conclude at the outset that the county manager act is cumulative in character and optional on the part of the voters of each county in the state. In other words, it purports to organize a new optional form of county government without in any way destroying or interfering with the former. Those counties which do not adopt the county manager form of government will continue to operate under the old law, as will those that may subsequently abandon the county manager plan. Certainly it cannot be said that, because the legislature saw fit to amend the old law at a date subsequent to the passage of the county manager act, it thereby repealed the county manager act. This is true even though Douglas county happens to be the only county falling within the class of cities specified in section 32-209, Comp. St. Supp. 1933, the amendatory act. It was clearly the intention of the legislature to provide two separate and distinct forms of county government, one of which was optional. Under this situation, the amendment of the act formulating one form could have no effect upon the operation of the other.

Relator contends that the act is broader than its title and is therefore void under the provision of section 14, art. III of the Constitution of Nebraska, which provides in part: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." The title to the act in question is as follows: "An act relating to county government and officers; to provide for the adoption of the managerial form of county government; and to provide penalties for the violation thereof." Laws 1933, ch. 35. It will be noted that this title provides for the adoption of *the managerial form* of county government without reference to any form or plan of county government that might be contained within the act itself. (Italics ours.) Without overstressing the meaning of the title unduly, one might well assume in reading it that the plan itself was not in the act and that the act provided for a form of managerial government to be derived from some other source. Respondent contends that the title is sufficient, and cites the case of *State v. Ure*,

91 Neb. 31, 135 N. W. 224, to sustain his contention. The title to the act involved in that case was as follows: "An act for the government of all cities having, according to the last preceding state or national census, five thousand or more population, and to enable such cities to adopt the provisions of this act called the 'Commission Plan of City Government.'" Laws 1911, ch. 24. We held in that case that the act was not broader than its title and we believe that the holding was correct. But, in that case the title to the act says, "and to enable such cities to adopt the provisions of *this* act *called* the 'Commission Plan of City Government.'" (Italics ours.) The reader of this title knows that the commission plan of city government mentioned is the plan contained in the act itself and this apprisal is such as to bring it within the requirements of the constitutional provision. This case does not, however, overcome the objection made to the title in the case at bar. The reader of the title is not apprised of the contents of the act sufficiently. The act contains more than the title infers and therefore falls within the constitutional prohibition contained in section 14, art. III of the Constitution.

Respondent also contends that certain existing offices of the county are abolished by the act and the duties to be performed in such offices are placed in the hands of the county manager. If the offices provided by previous statutes are not abolished by the act of the people of Douglas county in adopting the provisions of the county manager law under consideration in this case, then the further question arises as to whether such officers may be appointed by a county manager or selected in any way other than by election by the electors of Douglas county.

The title to the act, which we have hereinbefore quoted, makes no reference to an intent on the part of the legislature to abolish certain offices. We are not saying that such a statement in the title is necessary under the provisions of section 14, art. III of the Constitution, but it is a matter to be considered in determining the meaning of the statute under consideration. Neither is there an express statement

in the act abolishing any offices upon the adoption of the act by the electors of the county.

With reference to the exercise of governmental powers under the county manager act, and the methods to be followed in placing it in operation, the following sections of the law are pertinent:

"The powers of a county which adopts the county manager form of government, as a body politic and corporate, shall be vested in a board of county commissioners or county supervisors, which shall consist of five persons, who shall receive the sum of five dollars ($5.00) per day while said commissioners or supervisors are in session, and shall be exercised in the manner set forth in this act." Comp. St. Supp. 1935, sec. 26-2003.

"(a) The board of county commissioners or supervisors, hereinafter called the 'county board,' shall be the policy-determining body of the county, and except as otherwise provided by law, shall be vested with all the powers of the county, as provided by law, including power to levy taxes and to appropriate funds. * * * (d) The county board shall have power to put all officers of the county on a salary basis, and to require all fees to be accounted for and paid into the county treasury. (e) Whenever in any county, adopting this act, it is not clear what officer provided for thereby or under the authority thereof should exercise any power or perform any duty conferred upon or required of the county, or any officer thereof, by general law, then any such power shall be exercised or duty performed by that officer of the county designated by ordinance or resolution of the county board." Comp. St. Supp. 1935, sec. 26-2005.

"(a) The county board shall appoint a county manager and fix his compensation. He shall be the administrative head of the county government, and shall devote his full time to this work. He shall be appointed with regard to merit only, and he need not be a resident of the county at the time of his appointment. No members of the county board shall, during the time for which elected, be chosen manager, nor shall the managerial powers be given to a

person who at the same time is filling an elective office. (b) The manager shall not be appointed for a definite tenure, but shall be removable at the pleasure of the county board." Comp. St. Supp. 1935, sec. 26-2007.

"The manager shall be responsible to the county board for the proper administration of all the affairs of the county which the board has authority to control. To that end he shall appoint all officers and employees in the administrative service of the county, except as otherwise provided in this act, and except as he may authorize the head of a department or office responsible to him to appoint subordinates in such department or office." Comp. St. Supp. 1935, sec. 26-2008.

"(a) As the administrative head of the county government for the county board, the manager shall supervise the collection of all revenues, guard adequately all expenditures, secure proper accounting for all funds, look after the physical property of the county, exercise general supervision over all county institutions and agencies, and, with the approval of the county board, coordinate the various activities of the county and unify the management of its affairs. (b) He shall execute and enforce all resolutions and orders of the county board, and see that all laws of the state required to be enforced through the county board or other county officers subject to its control are faithfully executed." Comp. St. Supp. 1935, sec. 26-2012.

"(a) The county manager shall be responsible to the county board for the administration of the following activities: (1) The assessment of property for taxation and the preparation of the tax roll; (2) the collection of taxes, license fees, and other revenues of the county and its subdivisions; (3) the custody and accounting of all public funds belonging to or handled by the county; (4) the purchase of all supplies for the county except those specifically excepted in this act; (5) the care of all county buildings; (6) the care and custody of all the personal property of the county; (7) the recording of deeds, mortgages and other instruments, and the entry and preservation of such other

public records as the law requires; (8) the construction and maintenance of county highways and bridges; (9) the employment of prisoners of the county or of any of the governmental subdivisions in the county jail; all other powers, duties and responsibilities of the county sheriff shall remain with and be vested in the elected county sheriff as by law provided; (10) the care of the poor, the operation of county charitable and correctional institutions, and the other welfare activities; (11) public health work and the operation of the county hospitals; (12) any or all matters of property and business in connection with the administration of schools and other governmental units within the county which shall be delegated to him by these units with the approval of the county board; (13) such other activities of the county as are not specifically assigned to some other officer or agency by this act or by the laws of the state subsequently enacted. (b) These activities shall be distributed among the departments hereinafter described. There shall be a department of finance, a department of public works, and a department of public welfare; and the county board may, upon recommendation of the county manager, establish additional departments. Any activity which is unassigned by this act shall be assigned by the county board to an appropriate department, and any activity so assigned may, upon the recommendation of the county manager, be transferred by the board to another department. (c) The manager shall appoint a director for each department provided for or authorized by this section, and he may, with the consent of the county board, act as the director of one department himself or appoint one director for two or more departments. The subordinate officers and employees of each department shall be appointed or employed by the manager, unless he chooses to delegate this power in particular instances to a subordinate officer. The powers, duties and responsibilities of the clerk of the district court shall remain with and be vested in the elected clerk of the district court as by law provided." Comp. St. Supp. 1935, sec. 26-2013.

It will be observed that subdivision (7) of section 26-2013 contains the provision providing that the county manager should take over duties pertaining to the office of register of deeds. After the amendment of this section by the legislature in 1935, in which certain former county offices were excluded from the provisions of the county manager act, the register of deeds was still one of the offices falling under the provisions of the act. Laws 1935, ch. 51. While the provisions of subdivision (7) of section 26-2013 may have transferred the duties of the office of register of deeds to the county manager, yet it fell far short of abolishing the office of register of deeds. Such provision is as follows: "The county manager shall be responsible to the county board for the administration of the following activities: * * * (7) the recording of deeds, mortgages and other instruments, and the entry and preservation of such other public records as the law requires."

So far as the statute under consideration is concerned, the office of register of deeds remains in existence after the adoption of the county manager act, unless it can be said to be abolished by implication.

An office has been defined as follows: "An office is a public station or employment, conferred by the appointment of government; and embraces the ideas of tenure, duration, emolument, and duties." *United States v. Hartwell,* 6 Wall. (U. S.) 385, 18 L. Ed. 830.

"The words 'office' and 'officer' are terms of vague and variable import, the meaning of which necessarily varies with the connection in which they are used, and, to determine it correctly in a particular instance, regard must be had to the intention of the statute and the subject-matter in reference to which the terms are used." *State v. Kiichli,* 53 Minn. 147, 54 N. W. 1069.

It may be said that the almost universal rule is that, in order to indicate office, the duties must partake in some degree of the sovereign powers of the state. The rule is laid down in 22 R. C. L. 374, sec. 4, as follows: "One of the most important criteria of a public office is that the incum-

bent is vested with some of the functions pertinent to sovereignty, for it has been frequently decided that in order to be an office the position must be one to which a portion of the sovereignty of the state, either legislative, executive, or judicial, attaches for the time being." In this connection the supreme court of Ohio said: "The outstanding characteristic common to all definitions of an officer is the possession by him of some sovereign power." *Industrial Commission v. Rogers,* 122 Ohio St. 134, 171 N. E. 35. To like effect is the holding of this court in *Home Savings & Loan Ass'n v. Carrico,* 123 Neb. 25, 241 N. W. 763, wherein we said: "A public officer is an incumbent of a public office, which is the right, duty and authority conferred by law, by which for a given period, an individual is invested with some portion of the sovereign functions of government for the benefit of the public."

The Constitution of Nebraska provides: "The legislature shall provide by law for the election of such county and township officers as may be necessary." Const. art. IX, sec. 4.

There can be no question that, prior to the adoption of the county manager act, the register of deeds of Douglas county was an officer of the county. It is clear that provision was not made for the abolition of that office in the county manager act. Can its abolition be implied? We think not. One of the duties of the county manager under this act is to appoint all *officers,* agents and employees. (Italics ours.) In view of the use of the words "agents" and "employees," it clearly was the intent of the legislature, as determined from the act itself, that the word "officer" as used in the act before us should have the same meaning that it had in preexisting statutes and in the Constitution. This being true, the county manager act provides for the appointment of officers by the county manager contrary to section 4, art. IX of the Constitution.

The question immediately arises as to whether the county manager, under the act as drawn, is a public officer. In the first place, he is to appoint all officers, agents and employees.

The appointment of officers clearly is not within the powers of a strictly administrative head when we consider the constitutional inhibition hereinbefore discussed. The act provides that he, himself, may hold one or more of the designated offices. As the act is drawn he must be an officer to hold such a position. This necessarily would constitute him an officer within the purview of the Constitution. It might be said that the county manager might not attempt to hold the dual position of county manager and county officer. This cannot change the rule. It is not what is or may be done, but rather what can be done under a legislative act that determines its constitutionality. We are constrained to hold that, under the legislative enactment before us, the county manager is an officer of the county within the purview of section 4, art. IX of the Constitution.

Other points are made in the briefs questioning the constitutionality of this act which we will not discuss in view of the conclusions already reached. The contention is made that, even if the county manager act did not abolish the established county offices upon its adoption by the electors of Douglas county, the act as a whole would not be void and that the law could successfully be carried out with the elective county officers in office. It is clearly not the province of this court to substitute its judgment for that of the legislature or the electors of Douglas county on questions of political policy. However, it appears to us that, if the office of register of deeds was not abolished by the county manager act, as well as other offices mentioned therein, and that the Constitution prohibits the appointment of a county manager for the reason that he is constituted a public officer by the act, the purpose of the legislature in enacting the statute has been defeated. This court has held: "Where valid and invalid parts of a legislative act are so intermingled that they cannot be separated in such a manner as to leave an enforceable statute expressing the legislative will, no part of the enactment can be enforced." *State v. Junkin*, 85 Neb. 1, 122 N. W. 473. This rule clearly applies to the case at bar. In addition thereto, the act being

broader than its title, its subject is not clearly expressed in the title and the whole act must fail. We therefore hold that sections 26-2001 to 26-2027, Comp. St. Supp. 1935, are unconstitutional and void in the respects hereinbefore noted in this opinion.

The trial court was in error in denying the writ of mandamus as prayed. The writ ought to be and is hereby allowed.

WRIT ALLOWED.

GOSS, C. J., dissenting.

Without going much into details, I respectfully dissent from the opinion of the majority. I am authorized to say that Judge Paine joins in this dissent.

We do not think the title of the county manager act violates that part of section 14, art. III of the Constitution, providing that the subject of the act "shall be clearly expressed in the title." On this precise point this court, in an opinion written by Judge Letton, said: "The provisions of section 11 (now section 14), art. III of the Constitution, * * * are intended to prevent surreptitious legislation. The court will not be warranted in holding that an act of the legislature is void because more appropriate or a better arrangement of the language in the title might have been adopted, if the general purpose of the act is expressed and the matter contained in the body of the act is germane thereto." *State v. Ure*, 91 Neb. 31, 135 N. W. 224.

The title of the act under consideration is "An act relating to county government and officers; to provide for the adoption of the managerial form of county government; and to provide penalties for the violation thereof." Laws 1933, ch. 35. The body of the act answers every test that makes it "germane." If it actually provides for the adoption of a new form of county government, that answers the call of the title and the title plainly gave notice of whatever was "germane" in the act.

We do not claim that the act abolished the office of register of deeds, but that it suspended the election by the people of the "officer" who held that position, and, during

the period until the election of such officer should be restored by vote of the people, put that office, with all of the statutes affecting it, to be operated under an elective board of county commissioners, acting through their appointed county manager. We say, therefore, the county manager will not be a public officer. He is merely an agent of the county board with broad powers, whose agency, however, is terminable at the will of the board.

SAM SPAHR, APPELLEE, V. JOE J. GODFREY ET AL.: JOHN BRADY, APPELLANT.

FILED MARCH 6, 1936. No. 29573.

1. **Public Lands:** CONTRACT OF PURCHASE: CANCELATION. Holder of contract for purchase of state school lands may lose all rights under such contract if he permits interest payments to become delinquent for more than one year, and, after due notice and declaration of forfeiture, fails to redeem within the time provided by section 72-219, Comp. St. 1929, or to comply with the provisions of section 72-241, Comp. St. Supp. 1935.
2. ———: ———: NOTICE. Legislature may change the manner of serving notice of cancelation of school land contract for nonpayment of interest after contract has been executed, if such change does not affect the substantial rights of the contract holder.

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

Fred A. Nye, for appellant.

O. A. Drake, contra.

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

GOOD, J.

This is an action in ejectment, to recover possession of the south half of section 16, township 8, north, range 14, west, in Buffalo county, and for its rental value for the time possession was wrongfully withheld from plaintiff. De-

fendant Brady in his answer denied plaintiff's title and asserted title in himself. Defendants Godfrey disclaimed any interest in the land other than as tenants of Brady. Trial of the issues was had to the court without a jury, and resulted in a judgment for plaintiff for possession of the land and for $400 as rental value during the time it was withheld from plaintiff. Defendant Brady has appealed.

The land in question is a part of the state school lands. Plaintiff bases his right to possession on a lease issued to him March 1, 1934, by the commissioner of public lands and buildings, pursuant to an order of the board of educational lands and funds. Brady asserts title by virtue of three land purchase contracts from the state of Nebraska. Two of the contracts are dated in 1890 and cover the south half of the southwest quarter of said section 16. These contracts were originally issued to defendant Brady. In 1903 he assigned these contracts to Helen Brady, and in 1928 she assigned them to his brother, Edward Brady, of Seattle, Washington. The third contract was dated in 1905 and was originally issued to Helen Brady, and covered the southeast quarter and the north half of the southwest quarter of said section 16. In 1928 she assigned the contract to Edward Brady.

It appears that at the time each of these contracts was executed one-tenth of the purchase price was paid, and no part of the principal of the purchase price, other than such payment, has ever been paid. The maturity date of these contracts was from time to time extended, the last extension being in 1930 for a period of five years. It appears that the interest upon the deferred payments on the first two contracts was paid to the 1st of January, 1930, and the interest on the third contract was paid to the 1st of January, 1931.

By the provisions of section 72-219, Comp. St. 1929, if a purchaser of educational lands be in default for one year of the annual interest due the state, the commissioner of public lands and buildings shall cause notice to be given to such delinquent purchaser, and if such delinquency is not

paid within 90 days from the date of the service of such notice his sale contract will be declared forfeited by the board of educational lands and funds. Each of the contracts was subject to forfeiture after the 1st day of January, 1932.

In July, 1933, these several contracts were declared forfeited by the board of educational lands and funds because of default in the payment of principal and interest. In February, 1934, the lands were advertised for lease at public auction, pursuant to the provisions of section 72-219, Comp. St. 1929, at which plaintiff was the highest bidder and became entitled to a lease from the board of educational lands and funds. Pursuant to his bid, the lease was duly executed to him on the 1st of March, 1934.

In 1933 the legislature passed an act for the extension of time on delinquent school land leases, which act provided: "That past-due or delinquent payments on school land leases or sale contracts may be extended: Provided, the contract owner signs a note in amount of rental or interest delinquent on July 1, 1933, secured by assignment of lease or sale contract by contract owner to the school fund of the state of Nebraska, * * * which contract and assignment shall be deposited with the commissioner of public lands and buildings, with payment of rentals or interest on said contract for the last six months of 1933: Provided, said payment shall be made before it becomes delinquent. Said note shall mature on or before December 31, 1934, and draw interest at the rate of five per cent. payable annually. If said note and interest shall be paid on or before maturity, the assignment shall be null and void. In case of default in payment of the note or interest thereon at maturity, the assignment shall vest in the state of Nebraska, without further action or notice." Comp. St. Supp. 1935, sec. 72-241.

Defendant Brady asserts that he complied with this provision by executing, or having his brother Edward execute, a note and assignment of the contracts, and tendered payment of interest for the last half of 1933, which matured

on the 1st day of July, 1933. However, the record discloses that this payment was not made or tendered to the treasurer of Buffalo county until the 5th day of July, 1933. Clearly, defendant Brady did not comply with the provision of the statute to entitle him to the benefit of this legislative act. He was also entitled, under the law, to redeem at any time prior to the advertising of the lands for lease at public auction, by paying the delinquencies, fees and costs, as provided in section 72-219, Comp. St. 1929. This he failed to do.

Defendant Brady also contends that service of notice of cancelation of the contract by the commissioner of public lands and buildings was insufficient in that it did not comply with the statute in force at the time the first two contracts were entered into. The statute then in force provided: "In case the owner of such contract of sale * * * be a nonresident of this state, or his address be unknown, the notice herein contemplated shall be published three weeks in some newspaper published or in general circulation in the county where the land is situated" (Laws 1885, ch. 85, sec. 16), and that the notice given to Edward Brady was not given by publication, but was given to him by registered mail.

The present statute (Comp. St. 1929, sec. 72-219) provides: "The service of the notice herein contemplated to be made by registered letter. In case the post office address of the owner of such contract of sale or lease be unknown the notice herein contemplated shall be published three weeks in some newspaper published, or of general circulation, in the county where the land is situated." By the terms of the statute, it is made applicable to contracts of sale previously issued, as well as to those made thereafter. We are unable to perceive where defendant Brady or his brother Edward was in any wise prejudiced by failure to publish the notice for three weeks in a newspaper. The record discloses that Edward had actual notice by registered mail. We think that it was within the power of the legislature to change the manner of the giving of the notice.

The change effected by the statute was in no manner detrimental or injurious to the holder of the contract.

It seems clear from the record that the forfeiture declared by the board of educational lands and funds had become complete; that neither defendant John Brady nor his brother, Edward Brady, who held title by assignment of the contracts, has any title to the lands, and it also appears that the lease to plaintiff was valid and entitled him to possession of the land. No complaint is made as to the money judgment in the event plaintiff was entitled to the possession of the land.

It appears beyond question that the judgment rendered was in all respects in conformity with the law, and it is, therefore,

AFFIRMED.

O. H. COULTHARD, APPELLEE, V. BOARD OF ADJUSTMENT OF CITY OF NELIGH ET AL., APPELLANTS.

FILED MARCH 6, 1936. No. 29472.

1. **Trial.** Evidence tending to establish the fact in controversy must be received if competent.
2. **Municipal Corporations: ZONING ORDINANCES.** A city council, under a zoning ordinance, cannot restrict the use of property in an unreasonable or arbitrary manner.

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

Jackson & Rice, for appellants.

Ralph M. Kryger and *Webb Rice, contra.*

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

DAY, J.

The plaintiff commenced this proceeding by filing a petition in the district court under section 19-909, Comp. St. 1929, to reverse a decision of the board of adjustment of

Neligh, Nebraska, in denying him a permit to erect a filling station in a section of the city denominated residence district under the zoning ordinance. Upon a hearing, the district court reversed the decision of the board of adjustment. The city of Neligh appeals from this judgment.

The petition alleges that the action of the city council, sitting as a board of adjustment, in refusing to grant him a permit to erect a gasoline filling station on his property was illegal because: (1) Under the ordinance his property is classified in the residential district adjacent to a business district in which the city council shall authorize such structures as are in accord with the normal and continuous expansion of business into the residential district, and (2) the action of the council was discriminatory for that they issued a permit to another to build a gasoline filling station upon similarly located property.

The validity of the zoning ordinance adopted by the city of Neligh is not questioned. The application for a permit to construct a gasoline filling station was filed thereunder. The zoning ordinance of Neligh in so far as applicable provides: "No business building shall be erected in the residence district for store or other business purposes. * * * However, in those portions of the residential district adjacent to other districts herein provided for, the city council shall authorize such structure and uses as are in accord with the normal and continuous expansion of business structures into the adjacent residence district."

An application under this provision of the ordinance presents a question of fact to the city council for its consideration, and upon its determination the permit is granted or refused. The plaintiff's premises upon which he wishes to erect a gasoline filling station are, under the zoning ordinance, located in the residential district adjacent to the business zone. Whether, under the ordinance, the normal and continuous expansion was such as to require the council to grant a permit was a material fact in the case.

The city of Neligh complains that the trial court erroneously excluded evidence upon this question. The testimony

excluded was that of the mayor. The offer to prove was composed of conclusions and opinions. It was not a question for expert testimony. It was properly excluded for this reason. The appellants offered to prove that other sites were available for gasoline filling stations. This was not relevant to the question of the normal and continuous expansion of business into the residential district. It does not come within the rule that evidence tending to establish the fact in controversy must be received if competent. *Chamberlain v. Chamberlain Banking House,* 4 Neb. (Unof.) 278, 93 N. W. 1021; *Home Fire Ins. Co. v. Kuhlman,* 58 Neb. 488, 78 N. W. 936; *Taylor v. Northern States Power Co.,* 192 Minn. 415, 256 N. W. 674.

The other allegation of plaintiff's petition that the action of the council in the refusal of a permit was discriminatory now engages our attention. The plaintiff cites and relies upon *State v. Mayor,* 120 Neb. 413, 233 N. W. 4. There was no zoning ordinance involved in that case. The city of North Platte had an ordinance prescribing the manner and method of storing petroleum. The applicant there had complied with the ordinance in every particular. It was there held that the plaintiff having brought himself within the rules of the ordinance was entitled to a permit. *Kenney v. Village of Dorchester,* 101 Neb. 425, 163 N. W. 762, and *City of Pierce v. Schramm,* 116 Neb. 263, 216 N. W. 809, were cases where the plaintiff wanted to build curb gasoline pumps, as many others had done. There was no zoning ordinance involved. It was held in those cases that question was for the city council, but that such body could not act arbitrarily and deny to one citizen privileges which it grants to another under like conditions. In the instant case, the city council granted a permit to erect a filling station on a lot across the street. The trial court found that the city council, sitting as a board of adjustment, had discriminated against the plaintiff herein. The evidence does not disclose that the situation was materially different as to the two locations. They were both zoned as residential district adjacent to the business district. The other side

of the street was business district. They were divided by an intersecting street. The state highway, which made both locations desirable for filling stations, passed both properties. A city council, under a zoning ordinance, cannot restrict the use of property in an unreasonable or arbitrary manner. *Pettis v. Alpha Alpha Chapter of Phi Beta Pi,* 115 Neb. 525, 213 N. W. 835; *State v. Edgecomb,* 108 Neb. 859, 189 N. W. 617; *City of Lincoln v. Foss,* 119 Neb. 666, 230 N. W. 592. The refusal of the city council in the instant case to issue the plaintiff a permit to erect a filling station under the application and the facts was unreasonable and arbitrary.

The evidence supports the finding, and the judgment of the trial court is

AFFIRMED.

GEORGE LIDMILA, ADMINISTRATOR, APPELLEE, V. HELEN WENDT, APPELLANT.

FILED MARCH 6, 1936. No. 29560.

Appeal. The evidence examined and *held* to raise an issue of fact properly submitted to the jury.

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

A. R. Oleson, for appellant.

L. W. Ellis and *H. E. Siman, contra.*

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

DAY, J.

This replevin action was brought by the plaintiff as administrator of the estate of Charles Wendt, deceased, to secure possession of certain personal property. The issues are the ownership and right of possession of certain personal property. The verdict of the jury was in favor of plain-

tiff as to ownership and right of possession of the personal property, and assessed plaintiff's damages at one cent. The defendant appeals from the judgment entered on the verdict.

The only question presented by the record in this case is the sufficiency of the evidence to support the verdict. There is only one issue of fact and that is the ownership of the property at the time the action was commenced. It is stipulated that in 1932 the defendant and her husband moved on a farm owned by Charles Wendt, deceased. At that time, it is also stipulated, the personal property in question was owned by Charles Wendt. It appears that Helen Wendt and her husband, Henry Wendt, moved on the farm with Charles Wendt. Charles Wendt was the uncle of Henry Wendt. Charles Wendt continued to live on the farm with defendant, and there is testimony that he had the possession of his personal property until his death, March 1, 1933. This action was commenced August 6, 1934. The defendant asserted that the personal property belonged to her, and that she exercised exclusive dominion and possession of it for some time before the death of Charles Wendt. There was testimony that Charles Wendt, deceased, gave it to her. All this evidence raised an issue of fact, which was properly submitted to the jury. An examination of the instructions does not reveal that there was any prejudicial error which requires a reversal of the judgment.

AFFIRMED.

PERSONAL FINANCE COMPANY OF LINCOLN, APPELLANT, V. JOSEPH J. HYNES, APPELLEE.

FILED MARCH 6, 1936. No. 29747.

1. **Contracts:** RESTRICTION OF EMPLOYMENT. A contract restricting employment in a competitive business for one year within the city, or the environs or trade territory, imposes reasonable conditions and is valid and enforceable.
2. ———: ———. In such a case a court of equity has juris-

diction to protect the plaintiff's rights, notwithstanding the fact that the contract provides for liquidated damages.

3. ———: ALTERATION: PAROL AGREEMENT. "While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration." *Bowman v. Wright*, 65 Neb. 661, 91 N. W. 580.

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

Woods, Woods & Aitken, for appellant.

Max G. Towle, contra.

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

DAY, J.

The Personal Finance Company brought this suit in equity to enjoin Hynes, a former employee, from a continuing breach of a contract with it. The plaintiff appeals from a judgment in favor of defendant.

The plaintiff is engaged in the small loan business. The defendant was manager of its Lincoln office from December, 1931, until June, 1935. In July, 1935, defendant associated himself with another in the same kind of business. The contract under which plaintiff seeks relief contains a provision which reads: "That for a period of one year after the termination of my employment for any reason I will not engage in any way, directly or indirectly, in any business competitive with the employer's business, nor solicit or in any other way or manner work for or assist any competitive business, in any city or the environs or trade territory thereof in which I shall have been located or employed within one year prior to such termination." The defendant is now working as the active manager, in a business competitive with that of the plaintiff, in violation of the express term of the contract. A contract restricting employment in a competitive business for one year within the city, or the environs or trade territory, imposes reasonable condi-

tions and is valid and enforceable. *Dow v. Gotch,* 113 Neb. 60, 201 N. W. 655.

In such a case a court of equity has jurisdiction to protect the plaintiff's rights, notwithstanding the fact that the contract provides for liquidated damages. *Tarry v. Johnston,* 114 Neb. 496, 208 N. W. 615. The remedy at law thus provided is not adequate. The defendant, within the first year after the termination of his employment, is capable of doing irreparable damage. At that time, his relation with the customers of the plaintiff is close and unbroken. An action at law would furnish only partial relief.

However, the defendant asserts in his answer and evidence that prior to ending his employment with the plaintiff and before a breach of the restrictive provisions of the contract, he was released from its restriction in this particular. If the defendant's allegations are supported by the evidence, the contract was modified at a time when there had been no breach. T. E. Jeffries, field supervisor, and G. A. Weiant, supervision director of the plaintiff company, with broad general authority to act for the company, had several conversations with the defendant while he was in their employ relative to this provision. They had conversations also with Mr. Waller, the financial backer of the new loan company, for whom the defendant went to work as alleged in plaintiff's petition. These conversations were in the presence of third persons. The substance of the conversations was to the effect that it was all right with them for him to work for the new competitive concern, and that they would not rely upon the restrictive agreement in their contract. One of the officials of the plaintiff company, T. E. Jeffries, was the representative of the company who had negotiated and approved the contract for the company in the first instance. It was also accepted by another official, but it appears as a fair inference from the record that both Jeffries and Weiant were representatives of the company with general authority. The trial court so found, and the finding is entitled to consideration, since he observed the witnesses' demeanor on the witness-stand. The evidence is such that

such a finding is necessary here. The rule is well established in this jurisdiction as announced by Pound, C., in *Bowman v. Wright*, 65 Neb. 661, 91 N. W. 580: "While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration."

Prime v. Squier, 113 Neb. 507, 203 N. W. 582, and *Corcoran v. Leon's, Inc.*, 126 Neb. 149, 252 N. W. 819, are recent cases in which this rule has been cited, approved, and followed. The judgment of the trial court was, therefore, the correct one.

AFFIRMED.

WESTERN CHEMICAL COMPANY, APPELLANT, V. BOARD OF COUNTY COMMISSIONERS, LANCASTER COUNTY, APPELLEE.

FILED MARCH 6, 1936. No. 29558.

Counties and County Officers: CONTRACTS. A county is liable for the reasonable value of merchandise which it purchases, retains and uses, provided such county was clothed with power to purchase such merchandise, notwithstanding the fact that the contract of purchase is unenforceable because the power was irregularly exercised. *Omaha Road Equipment Co. v. Thurston County*, 122 Neb. 35, 238 N. W. 919, followed.

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

T. Clement Gaughan, for appellant.

Max G. Towle and *Farley Young, contra.*

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

CARTER, J.

This is an action brought by plaintiff against Lancaster county for the value of certain disinfectants and other chemicals sold and delivered to Lancaster county for use at the county poor farm. The district court found for defend-

ant and entered a judgment accordingly. From the overruling of its motion for a new trial, plaintiff appeals.

The record shows that on four different occasions in 1932 an agent of plaintiff secured orders for disinfectants and other chemicals, of the total value of $1,011.97, such orders being signed by T. J. Hensley, one of the county commissioners of Lancaster county. The record further shows that the merchandise was shipped to the Lancaster county poor farm by truck, a bill of lading for each shipment having been offered in evidence. The evidence further shows that one Garvey, a part owner of the Western Chemical Company, testified that he saw the drums and a part of the disinfectant at the county farm after that date. He further testified that county commissioner Hensley told him that the merchandise had been received and, with reference to the payment of the claims therefor, that he would "run them through" at some future meeting. Commissioner Hensley subsequently died. County commissioner Bennett and county clerk Morgan testified that they had no knowledge of the transaction. The only question to determine is whether the trial court properly dismissed the action.

The defendant county contends that the county commissioners are without authority to enter into contracts in relation to county business except at a regular session of the county board or one specially called according to law. That this is a correct statement of the law cannot be disputed. *Merrick County v. Batty,* 10 Neb. 176, 4 N. W. 959; *Morris v. Merrell,* 44 Neb. 423, 62 N. W. 865. The order given was not therefore a binding contract between the parties.

However, the evidence shows that the merchandise in question was received and used by Lancaster county. The attorney for the defendant admits this to be true in his brief, but contends that the order was not legally given and that the county was not therefore legally bound to pay. To this we cannot agree. There is no question that the board of county commissioners had the power to purchase the merchandise in question. The county subsequently received and used it. It has, by using the merchandise, placed itself

where a return of the goods cannot be had. The defendant county cannot retain the merchandise and use it for the benefit of the public and still defeat a claim for its reasonable value, notwithstanding the fact that the contract of purchase was unenforceable because the power was irregularly exercised. Such was the holding of this court in *Omaha Road Equipment Co. v. Thurston County*, 122 Neb. 35, 238 N. W. 919, wherein this court said: "In the present case the county is liable for the reasonable value of the road machinery which it purchased, retained, and used, where the county was clothed with power to purchase such machinery, notwithstanding the fact that the contract of purchase is unenforceable because the power was irregularly exercised. We think the county, in view of the facts, is estopped to deny liability in respect of the purchase of the machinery." See, also, *Scheschy v. Binkley*, 124 Neb. 87, 245 N. W. 267; *Tidd v. Kirkham*, 124 Neb. 605, 247 N. W. 594.

We therefore conclude that the trial court erred in dismissing plaintiff's claim. The judgment of the district court is reversed and the cause is remanded.

REVERSED.

ARTHUR LAWRENCE SMITH, APPELLEE, V. BANKERS NATIONAL LIFE INSURANCE COMPANY, APPELLANT.

FILED MARCH 6, 1936. No. 29446.

1. **Evidence.** Inferences which may be logically drawn from proved facts constitute a high grade of proof, and may overcome positive testimony.
2. **Corporations: DIRECTORS: EVIDENCE: ADMISSIONS.** Directors of a corporation, as such, have authority to bind it only when they act collectively as a board. They are not *ex officio* agents of such corporation and their individual declarations and admissions, when not acting as a board, are not binding on the corporation, nor admissible in evidence against it.
3. **Trial.** There can be no prejudicial error by receiving incompe-

tent evidence for the purpose of proving a fact which has already been sufficiently established by competent evidence.

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

Chambers & Holland, for appellant.

Baylor & Tou Velle and *George A. Healey, contra.*

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

CHASE, District Judge.

This is a suit in equity by which the appellee seeks to compel the appellant to reinstate a lapsed policy of life insurance. It appears that on February 1, 1923, the appellant issued a policy of life insurance to the appellee which it termed "Twenty Payment Nineteen Year Term Policy Participating," with an annual stipulated premium of $1,366.50, in which it agreed to pay to the beneficiaries of the appellee, on his death, and within 19 years from the date thereof, the sum of $50,000. The contract contained the further provisions: To allow the assured to exercise options at the end of 19 years from February 1, 1923, consisting of cash in the sum of $16,288.80, in addition to all dividends; or a paid-up participating life policy for $25,000; to allow the insured to convert the policy into any other form of whole life or endowment insurance, then issued by the company, at the regular premium rate of his then age, of the desired character of insurance; and to reinstate the policy, in case of default in the payment of any premium, at any time within 19 years from the date thereof, upon written application to the company at its home office, with evidence of insurability satisfactory to the company, upon the payment of all premiums that would have been paid in the intervening time of default, with interest thereon at the rate of 6 per cent. per annum from date of payment thereof, with a like amount of interest on any indebtedness existing at the time of default.

The appellee paid five annual premiums, but on February

1, 1928, and February 1, 1929, the appellee defaulted in the payment of his annual premiums. In May, 1929, while he was in default of the payment of premiums, he made a written application on the forms provided by appellant for reinstatement of the policy, and tendered in writing evidence of insurable interest and good health; and on May 27, 1929, the appellant refused to accept the tender of payment, and refused to reinstate said policy of insurance. Upon such refusal, appellee brought this action to compel the reinstatement under the terms of the policy. The trial court found generally in favor of the appellee and against the appellant, and that the appellee was entitled to reinstatement under this policy as of the date May 27, 1929. To effect a reversal of the findings of the trial court the appellant presents the record to this court for review.

In order to properly dispose of the issues presented, we must determine whether the appellee complied with his part of the contract sufficient to entitle him to reinstatement. It will be observed that the appellee, being in default in the payment of any premiums for a period less than 19 years, is required to do two things as a condition precedent to his reinstatement: First, to pay the premiums that are required to be paid during the time of default, and other dues and charges against him; and, second, to furnish, upon written application at the home office of the company, evidence of insurability satisfactory to the company.

The evidence shows that the appellee mailed to the company his check for the payment of the premiums accruing while in default, and that the company returned his check accompanied by the following letter:

"Bankers National Life Insurance Company,
"Kansas City, Mo. May 27, 1929.
"Dr. Arthur L. Smith,
"1001 Federal Trust Bldg.,
"Lincoln, Nebraska.
"Dear Dr. Smith:

"We regret very much that the Under-writing Committee has not acted favorably on your application for reinstate-

ment of Policy 1-B, and accordingly we are enclosing with this letter your check for $2,896.98.

"Very truly yours,
"E. H. Hardebeck,
"Secretary & Actuary."

No reasons for refusal to reinstate the appellee's policy are stated in the letter. The company having made no objection to the insufficiency of the check, either in amount or method of payment, we conclude that the evidence is sufficient to establish the proper tender of payment of premiums and other charges required by the policy.

Upon the question of whether the appellee tendered satisfactory evidence of insurability, the record discloses that the parties entered into a stipulation of fact in which it is agreed that in May, 1929, the appellee tendered to appellant in writing, upon forms furnished by appellant, evidence of appellee's insurable interest and good health, and that on May 27, 1929, the appellant refused to accept tender of payment, and refused to reinstate the policy. The terms of the policy require the appellee to furnish evidence of insurability. The stipulation agrees that he has furnished evidence of insurable interest and good health. The admission of fact that the appellant tendered evidence of his good health in his application for reinstatement is sufficient to satisfy the provision of the policy requiring the showing of insurability. Upon this point the evidence is corroborated by inferences of great evidentiary value that arise from the proved facts. The application for reinstatement was made in May, 1929. Nearly five years elapsed between the time of the application for reinstatement and the trial of the cause in the lower court. Appellee is a practicing physician, and the record shows that during all that period he carried on the general practice of his profession, and that he was in good health at the time of making the application and was in good health at the time of the trial. The logical inference to be drawn from these established facts is that he was in good health and possessed of insurability in May, 1929, when the application for reinstatement was made.

The decisions are numerous that logical inferences which may be drawn from existing proved facts possess a very strong evidentiary value, and oftentimes are allowed to overcome positive testimony. In the case of *Womack v. Horsley,* 178 Ia. 1079, in discussing the value of inferences, the court said: "Inferences are inevitable in all trials of disputed fact, and are usually important links in the chain of proof. It is earnestly argued that inference should never be permitted to overcome positive and direct testimony. No authority is cited for such rule. It is safe to say that there is no authority for it. Appropriate inferences from proved facts are not a low order of evidence. Whether they should be permitted to overcome positive and direct testimony or not depends, in every case, upon the relative strength of the one or the other. The very credibility of direct evidence may be destroyed by the force of irresistible inferences."

The proof is ample that the insured furnished evidence of his insurability at the time of his application for reinstatement. The appellant argues that if the court reinstated the policy it should have been reinstated as of the date of the decree instead of May 27, 1929, that the decree reinstating the policy was, in fact, an idle judicial gesture, and that when the reinstatement occurred the insured was still in default several premium instalments. Some force to this argument might be recognized, were it not for the fact that one of the company's agreements with the insured is to convert the policy into a different class of insurance by complying with the terms thereof at his then age. While any rights he may have under this provision of the policy are not presented on this appeal, and are not decided here, the fact that the policy contains such a provision sufficiently answers the argument as to the futility of the decree.

Appellant also contends that the trial court erred in allowing appellee until October 1, 1934, in which to tender to the appellant the amount which appellee was in arrears of premiums and other charges. It satisfactorily appears that the appellee tendered his check at the time he made his ap-

plication for reinstatement to the company, and the company refused the reinstatement, but made no claim that the check was insufficient as to the amount, or the method of payment. By the refusal to reinstate appellee's policy under such conditions, the company waived its rights to object for the sufficiency of the check constituting a tender of payment. *Bundy v. Wills*, 88 Neb. 554, 130 N. W. 273. The necessary steps to constitute sufficient tender are to be determined by the law and the facts of the particular case. The refusal to reinstate the policy, as shown by the record, made it unnecessary for the appellee to make any subsequent tender of payment, and the provision of the decree, in the light of the existing circumstances, fixing the time of payment is not unreasonable.

Complaint is made that the trial court erred in permitting the appellee to testify, over objection, as to a conversation had with one of the directors of the company outside the office of the company. The law is well settled that directors of a corporation, as such, have the authority to bind it only when they act collectively as a board. They are not *ex officio* agents of a corporation and their individual declarations and admissions, when not acting as a board, are not binding on the corporation, nor admissible in evidence against it. 3 Fletcher, Cyclopedia Corporations, sec. 2168. This testimony seems to have been received as evidence of waiver of the provision requiring proof of insurability. The record discloses the proof on this point to be ample outside of any testimony of the director; therefore, the reception of such evidence would be, at the most, error without prejudice.

The trial court having granted the appellee until October 1, 1934, within which to make payment of the premium of $2,896.98, which is the amount found by the court to have been due on May 27, 1929, when the application for reinstatement was rejected, the appellee is herein allowed 20 days after the time for rehearing has expired, in which to pay the sum of $2,896.98, and allowed 30 days thereafter

to exercise options provided for in the decree of the trial court.

We are convinced from a careful examination of the record that the decree of the trial court is correct, and it is, therefore,

AFFIRMED.

NORA MATTINGLY BURNHAM ET AL., APPELLEES, V. LENNETTIE E. BENNISON, EXECUTRIX, ET AL., APPELLANTS: ELIAS MATTINGLY, INTERVENER, APPELLEE.

FILED MARCH 6, 1936. No. 29697.

1. **Appeal**: LAW OF THE CASE. The appellate court may, on the second appeal between the same parties, if justice requires, review and reverse its former decision; but the parties are not entitled to such review as a matter of right; such practice will be resorted to sparingly, and only in cases where cogent reasons exist therefor.
2. ———: ———. The appellate court, on a second appeal between the same parties, will not ordinarily reexamine questions of law presented in the first appeal, as the matters decided therein come within the rule of *stare decisis*, and become the law of the case.
3. ———: ———. On a second appeal between the same parties in the same cause, where the second appeal merely seeks to relitigate questions settled by the opinion in the former appeal, this court will not inquire into the merits of its former opinion, where it appears that the second appellants sought a rehearing in the former appeal, which was denied, and the cause reversed and remanded, with directions to the lower court to render judgment in accordance with the opinion.

APPEAL from the district court for Butler county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Peterson & Devoe and *Coufal & Shaw*, for appellants.

James E. Brittain, Deutsch & Young, A. V. Thomas, Perry, Van Pelt & Marti and *L. B. Fuller, contra.*

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

CHASE, District Judge.

This is an appeal from the order of the trial court overruling appellants' application to file a supplemental answer. The facts involved in this appeal are by no means new, as this is the third time some phase of the case has been before this court for review. It was first disposed of on a question of pleading, and reversed and remanded on May 29, 1931. *Burnham v. Bennison,* 121 Neb. 291, 236 N. W. 745. Subsequently a trial upon the merits was had and it was again appealed to this court. On March 2, 1934, the judgment of the trial court was again reversed and the case was remanded, with specific directions to enter judgment in accordance with the opinion therein filed. *Burnham v. Bennison,* 126 Neb. 312, 253 N. W. 88. After the mandate following the second hearing reached the trial court, and before the court entered judgment in accordance with the opinion, these appellants, who are the same parties involved in the former hearing, appeared before the trial court and moved for permission to file a supplemental answer, which motion was overruled. Whereupon, the trial court entered judgment upon the mandate. From the overruling of the motion for permission to file a supplemental answer, the case is again brought here.

The supplemental answer tendered by appellants, if allowed, and a trial had thereon, would have had the effect of relitigating matters that appear to have been settled by the opinion on the former appeal.

But one question is involved in this appeal, and that is: Did the trial court commit error in refusing to allow the filing of the supplemental answer?

The appellants contend that a manifest injustice was committed by this court against them in the opinion by allowing a surcharge of interest on certain legacies, and that by considering the matters set forth in the supplemental answer this court should reconsider its views as set forth in the former opinion.

The appellants allege in the supplemental answer, which is a part of the transcript, that this court denied them a re-

hearing on the former appeal. That being the only reference to the matter in this record, we are unable to determine the exact ground upon which the rehearing was sought, but are perhaps justified in assuming that the same matters were urged in the motion for rehearing as are now urged in the supplemental answer. If this court denied rehearing when matters complained of in the opinion were directly attacked, and it now should sustain the views of the appellants, this court would be placed in the anomolous situation of allowing a collateral attack upon its decision, when it had refused, as it were, a direct attack by denying a rehearing. It will be further noted that appellants make no complaint that the trial court did not render its judgment upon the mandate in accordance with the express opinion rendered on the former appeal. The trial court is criticized by the appellants for doing that which this court directed it to do, and now seek a reversal because it did not ignore the provisions of the mandate.

Appellants argue that, where it appears that a manifest injustice has been done in a former decision, the court rendering such decision may review and reverse such former decision; but such review is not considered a matter of right but as merely a matter of grace, and will be exercised only in such cases as show cogent reasons therefor. 4 C. J. 1099, *et seq.*

The matters involved in this appeal have previously been before this court on several occasions, but we have been able to find but one case which we believe is directly in point. In the early case of *O'Donohue v. Hendrix*, 17 Neb. 287, 22 N. W. 548, this precise question appears to have been before the court. In that case, like this one, it was a second appeal. The judgment of the lower court was reversed and the case was remanded, with directions to enter a decree in conformity with the opinion, and when the case reached the court on the second appeal the court laid down this rule: "The first and third objections were considered on the former hearing and decided against the plaintiff. No motion for a rehearing was filed, nor was any objection

made to the decision of the court. Those questions therefore will not now be again considered," citing *Hiatt v. Brooks*, 17 Neb. 33, 22 N. W. 73, wherein the first paragraph of the syllabus lays down this rule: "A previous ruling by the appellate court, upon a point distinctly made, may be only authority in other cases, to be followed or affirmed, or to be modified or overruled, according to its intrinsic merits, but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves."

In *Chicago, B. & Q. R. Co. v. Hull*, 24 Neb. 740, 40 N. W. 280, this court held: "This point was distinctly presented in this case when it was first before this court, and distinctly decided. Under the well-known rule of *stare decisis*, that decision remains the law of this case."

Appellants seem to rely upon the case of *City of Hastings v. Foxworthy*, 45 Neb. 676, 63 N. W. 955. This case contains an exhaustive and elaborate discussion of a number of cases in which the rule of *stare decisis* was presented, and in a well-considered opinion it announced the following rule: "An appellate court, on a second appeal of a case, will not ordinarily reexamine questions of law presented by the first appeal, but where the case was on the first appeal remanded generally for a new trial and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal and may reexamine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect." It will be noted in the case above mentioned that the rule applied arose in a case where on the first appeal the case was reversed and remanded for new trial. Such is not the fact as presented by the record here. The case was reversed and remanded, not for new trial, but was remanded with specific directions to a trial court to enter judgment in accordance with the opinion.

Appellants also cite *Eccles v. Walker*, 75 Neb. 722, 106 N. W. 977, which merely reaffirms the holding in the case of *City of Hastings v. Foxworthy, supra.*

The record showing that the court on the former appeal denied a rehearing to the appellants, and the judgment complained of being in accordance with the directions of the mandate, we hold that the trial court committed no error in refusing to allow appellants to file a supplemental answer, and the judgment is therefore

AFFIRMED.

GOOD, J., dissents.

SECURITY STATE BANK OF NORFOLK, APPELLANT, V. JACKSON BROTHERS, BOESEL & COMPANY: WILLIAM C. JACKSON ET AL., APPELLEES.

FILED MARCH 13, 1936. No. 29532.

Appearance. The filing in the state court of a petition of removal to the federal court is not a general appearance but a special appearance only.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Kelsey & Kelsey and *Morsman & Maxwell,* for appellant.

Brogan, Ellick & Shoemaker, Moses, Kennedy, Stein & Bachrach and *Robert B. Hamer, contra.*

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

DAY, J.

This is an action brought by plaintiff to recover from defendant, a partnership, $168,935 as money had and received without consideration from an officer of plaintiff corporation in what are alleged to be gambling transactions. Summons was served on defendants in conformity to the provisions of the statute.

Thereafter, a petition was filed for the removal of the case to the United States district court on the ground of

diversity of citizenship. An order was entered removing the case to the federal court and staying proceedings in the state court. The petition was signed by the defendant, Jackson Brothers, Boesel & Company, and also by the individuals who compose the partnership. None of the individuals had been served with process. Subsequently, the case was remanded to the state court. After the remand, the plaintiff filed its motion for leave to amend its petition by naming and designating the individual partners as defendants in the case; for an order requiring said defendants to answer within a time to be fixed by the court, and for a default and judgment against said defendants if they fail to comply with the order. The trial court overruled plaintiff's motion, from which order the plaintiff has appealed.

At the outset, it seems well to determine whether or not one who joins in a petition for removal to the federal court has entered his appearance in the state court. Some federal courts and some state courts have held that the filing of a petition for removal constituted a general appearance and waived defects of service. But the rule supported by the greater weight of recent authorities is that the filing in the state court of a petition of removal to the federal court is not a general appearance but a special appearance only. *Goldey v. Morning News,* 156 U. S. 518; *Wabash Western Ry. v. Brow,* 164 U. S. 271; *Michigan Central R. Co. v. Mix,* 278 U. S. 492; *Hassler, Inc., v. Shaw,* 271 U. S. 195.

The appellant argues that one who intervenes in a case makes a general appearance. This, of course, assumes that the parties are interveners. The filing of the petition for removal is usually practically a matter of form. A state court rarely, if ever, refuses to order the removal. Such an order is not necessary to secure a removal. It is in effect an objection to the jurisdiction of the state court. We are satisfied to follow upon this question the authority of the more recent decisions of the supreme court of the United States.

It is at least a debatable question whether or not the order in this case was a final one, subject to review. Its

determination is rendered unnecessary for a decision because of our conclusion that a petition for removal is a special and not a general appearance.

AFFIRMED.

ALFRED W. TONGUE, APPELLANT, V. EDWARD E. PERRIGO, APPELLEE.

FILED MARCH 13, 1936. NO. 29542.

1. **Appeal.** An examination of the evidence in the record discloses that it is insufficient to establish defendant's sexual relations with plaintiff's daughter.
2. **Evidence: CIRCUMSTANTIAL EVIDENCE.** While a material fact may be established by circumstantial evidence, it must be such that reasonable and fair inferences therefrom produce moral certainty and conviction.
3. ———: **DYING DECLARATIONS.** To be admissible as a dying declaration, it must appear from declarant's statement or surrounding circumstances that the statement was made at a time when there was actual danger of death and no hope of life.
4. ———: **RES GESTAE.** A statement to be admissible as a part of the *res gestæ* must have been spontaneous and impulsive, and made at a time and under such circumstances as to induce the belief that it was not the result of reflection and premeditation.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Anson H. Bigelow, for appellant.

Johnsen, Gross & Crawford, contra.

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

DAY, J.

This is an action for damages brought by the father of a minor child for seduction resulting in an infection which caused death. At the close of plaintiff's testimony, the court sustained defendant's motion to discharge the jury and dismiss the cause. The plaintiff appeals.

The record presents two questions for our consideration. The first is the sufficiency of the evidence to establish defendant's sexual relations with plaintiff's daughter, the infection as a result thereof, and that said infection communicated by defendant was the cause of his daughter's death. The second relates to the alleged errors in the exclusion of certain testimony at the trial.

The defendant questions the right of the plaintiff to maintain this cause of action. The theory of plaintiff is that he is entitled to recover under any of three theories; either seduction, or debauchery, or sexual intercourse with attendant disease or death. It is unnecessary to determine which theory, under the law, if any, would permit the maintenance of such an action. Under any theory of this case, it would be necessary to establish that defendant had sexual relations with plaintiff's daughter. This is the basic foundation of any such action.

An examination of the evidence is necessary to determine its sufficiency on the question of sexual relations. In December, 1930, the plaintiff had three daughters; Dorothy, aged 19, Elizabeth, aged 17 years (the one involved in this action), and Roberta, aged 8 years. At that time they were members of dancing classes conducted by Miss Grace Abbott, and as such participated in a revue presented for one week at the Orpheum Theater during the Christmas season. It was upon this occasion that the girls became acquainted with the defendant, Edward E. Perrigo, who was then the director of the orchestra at the theater. During the winter and spring of 1931, Elizabeth, while a senior in Technical High School, worked at a ten-cent store after school until 6 o'clock. Some weeks after Elizabeth Tongue appeared in the revue at the Orpheum, she was employed by defendant to work two hours in the evening at the theater, sorting, repairing, and filing orchestra music and doing some typewriting. She went directly to the theater when she finished her work at the dime store. She usually worked from 6:30 to 8:30 in the evening in the defendant's office which was in a remote part of the building. But, after some time, she

frequently came home later than was required by her work. This seemed to occasion the plaintiff no unusual concern until one night just before Christmas in 1931. Elizabeth attended a party at the Elks Club and was taken to her work by her mother in a cab at about 10:30 at night. If she did the required two hours work that night, she would have finished at about 12:30 in the morning. Perrigo took her home in his car upon several occasions, and that night got her home between 1 and 1:30 in the morning. That time, Mr. Tongue went out to the car, and an argument occurred between him and the defendant. Since the plaintiff relies upon admissions made by the defendant in a conversation between the deceased, the defendant, and the plaintiff to establish the fact of sexual relations between the defendant and his daughter, Elizabeth, we set out the plaintiff's testimony as to this conversation, as follows:

"I stepped across the street and I said, 'What do you mean by keeping Elizabeth out to this hour of the night?' He answered, 'She has been a very sick girl.' I said, 'In that case why didn't you call me up on the 'phone and let me know or bring her right home.' He said, 'I took care of her at my office.' I said, 'Your office is no place for a sick girl at this time of night; her place is at home.' And he then said, 'I was giving her good care at my office.' And I said, 'She got through at 10:30, it is now 1:30; what else were you doing with her besides taking care of her?' And I turned to Elizabeth and said, 'What has this man been doing with you at the office? Has he been taking care of you down at that office of his?' And she said to me, 'Eddie is all right,' she said, 'We love each other.' I said, 'Love, what do you call love?' I said, 'Do you mean that this man has actually been taking advantage of you in the wrong way at that place there?' And then I turned to him and said, 'What have you done to her?' And she said to me, breaking into our conversation, she said, 'Eddie is all right, Daddy,' she said, 'We are going to be married.' That made me mad. I said, 'Married,' I said, 'He is already a married man,' I said, 'Don't be a little fool.' And I turned to him

and I said to him, out straight, 'She is not going to work at your office after tonight.' He said, 'Well, * * * we understand each other,' and he said, 'We know exactly what you mean, what seems wrong to you.' And then Elizabeth broke in again, and she says, 'Eddie is treating me right, we are going to be married.' * * * I said to her, I was angry, too, by this time, I said, 'This is the last time you will work down at that office; now,' I said, 'Get out of this car and damn quick,' * * * and I went around the other side where Elizabeth was sitting to get her out of the car, and when I got there Elizabeth said, 'There is no use yelling about this.' And he says, 'And don't you say no more to me, the damage is already done.' I said, 'Well, I will do some damage to you.' I says to Elizabeth, 'Get out of this car' * * * and took her across the street."

It is to be remembered that this is the plaintiff's testimony of what occurred that night. The language is that of the plaintiff. But, giving it the construction most favorable to the plaintiff, it falls far short of an admission by the defendant of illicit sexual relations with Elizabeth Tongue. It might furnish the material for one to moralize upon the propriety and conventionality of the defendant, a married man, making an engagement for a future marriage. His motives, judgment, and good sense might well be questioned, but that is insufficient to establish the cause of action pleaded in this case.

The conclusion the plaintiff now draws from this conversation is not persuasive with us. While he forbade Elizabeth working for defendant after that time, it seems she continued to do so with his knowledge until she left for Denver in March, 1932. Thereafter, her sister, Dorothy Tongue, knowing of this circumstance, took over the work formerly done by Elizabeth and continued to work for defendant for some five or six weeks. While the plaintiff states he did not know of this, Dorothy was living at home at the time, and this work required her to be absent from home until 8 o'clock in the evening. Under these circumstances, we are constrained to doubt that the Tongue family

concluded from this conversation or any other circumstances up to that time that the defendant had seduced, debauched, or had improper relations with Elizabeth.

From these circumstances, it seems more reasonable to suppose that Mr. Tongue very properly wanted to avoid an embarrassing entanglement of his daughter with a married man. There was more than a friendly attachment between the defendant and Elizabeth Tongue. Foolish and unwise as this affair must be admitted to be, still there is not one syllable of competent direct evidence establishing sexual relations between defendant and Elizabeth Tongue.

However, seduction, debauchment, or fornication are matters that may be established by circumstantial evidence. Are the circumstances, together with this conversation, sufficient that a jury might draw a reasonable inference that the defendant had sexual relations with Elizabeth Tongue. A material fact may be established by circumstantial evidence when it is such that reasonable and fair inferences therefrom produce moral certainty and conviction. *Sanborn v. Walters*, 145 Wis. 84, 129 N. W. 644.

It seems unnecessary to detail the circumstances of the entire acquaintance of defendant and Elizabeth Tongue. Elizabeth went to Denver in the spring of 1932 and, while there, was taken sick about May 15, was taken to a hospital, and died June 3, 1932, of acute ulcerative endocarditis. It is the contention of the plaintiff that, by reason of her sexual intercourse with defendant, she was infected with a venereal disease which caused her death. At common law, the gist of the action was loss of service, and the damage had to be the natural and direct result of the seduction. All the circumstances in this case are not such that a jury could reasonably and fairly infer that the defendant had sexual relations with Elizabeth Tongue. The trial court was not in error in dismissing the case with prejudice at the close of plaintiff's testimony.

Because of our foregoing conclusions, it ordinarily would not be necessary to discuss the testimony of the expert medical witnesses. However, since this opinion evidence

is contended to establish that the endocarditis which caused death was in turn the result of a gonorrheal infection, and is argued as one circumstance tending to prove sexual relations and infection by the defendant, it may well be noticed in this case. The expert testimony is not satisfactory. It contains highly argumentative statements of a medical advocate rather than scientific opinions designed to aid a court of justice. This attitude of the expert witness is disclosed in the answer of one to a question on cross-examination: "I think you know very little about it—not enough to question me expertly." Expert witnesses are called to assist courts and attorneys in the determination of questions of fact, and not as advocates of a scientific theory. The contention that gonorrheal infection was the cause of the endocarditis which caused the death of Elizabeth Tongue is only a theory, and all the witnesses admit that other things might have caused it. The conclusions of the medical experts are based upon suspicion, speculation, and conjecture. As stated above, it is not necessary for this court to determine whether the evidence on this question is sufficient to submit to a jury.

There are several assignments relative to the exclusion of evidence which was offered upon the trial. One exhibit was an affidavit signed by both Elizabeth Tongue and Susan Tongue, her stepmother, on May 26, 1932. This was eight days before her death. The only basis as to the circumstances surrounding this affidavit is contained in the affidavit itself. It is a peculiar instrument, a joint affidavit of the deceased girl and her stepmother. It appears from the evidence that the stepmother could have no personal knowledge of the material facts stated therein. The affidavit states that she had been attended by different doctors and had received no encouragement of the disease being curable. As a condition for the admission of a dying declaration, it must appear either from the statements of the declarant or from the circumstances of the case that he was in actual danger of death and had no hope of recovery at the time it was made. "The essential idea is that the belief

should be a positive and absolute one, not limited by doubts or reserves; so that no room is left for the operation of worldly motives." Wigmore, Evidence, sec. 1440. See *Shepard v. United States,* 290 U. S. 96. In *Ridenour v. Lewis,* 121 Neb. 823, 238 N. W. 745, this court discussed the previous decisions of this court and quoted the rule: "The trial court must be permitted to exercise its discretion, very largely, in determining whether the declarations were made under such circumstances as to permit the inference that they were genuine expressions, and the jury must be left to determine whether or not such inference shall be drawn."

Tested by these rules, the paper offered is not a dying declaration, because it does not appear from the declaration itself or from all the surrounding circumstances that the declaration therein was made under the expectation of impending death. If further dissertation is necessary, one may have an incurable disease, even one which will render one a helpless invalid, without a conscious sense of impending death. In most of the reported cases, where dying declarations have been received, death has followed within a few hours or a few days. Since this is not a dying declaration, it would not be admissible in any case.

It is, therefore, scarcely necessary to consider the contention of the appellant that this court has modified the rule of evidence which has long been recognized in this jurisdiction that the competency of dying declarations has been restricted to homicide cases. *State v. Lake,* 121 Neb. 331, 236 N. W. 762, is cited to support that contention. That was a statutory proceeding brought to secure the revocation of the license of the defendant to practice medicine. That was a review *de novo,* as a suit in equity, of a statutory administrative procedure. See *Munk v. Frink,* 81 Neb. 631, 116 N. W. 525; *Mathews v. Hedlund,* 82 Neb. 825, 119 N. W. 17. Furthermore, the declaration in that case was admissible as a part of the *res gestæ.*

In *Ridenour v. Lewis, supra,* the declaration was admitted in evidence by the trial court, in a workmen's com-

pensation case, as a part of the *res gestæ*. We are of the opinion that this court has not yet modified the rule by what was said *arguendo* by the justices preparing these opinions.

It is necessary for us to consider whether the profferred evidence should have been admitted here as a part of the *res gestæ*. The doctrine of *res gestæ* is somewhat obscure, but expressed in our language, and not in the abbreviated Latin phrase, its application to the admissibility of statements depends upon their being spontaneous and impulsive; the material inquiry being whether the statements offered as evidence were made at a time and under such circumstances as to induce the belief that they were not the result of reflection and premeditation. A distinct class, however, exists in the case of statements which themselves are facts constituting part of the transaction under investigation. 10 R. C. L. 976, sec. 159.

"To bring acts and declarations within the doctrine of *res gestæ*, they must be connected with, and grow out of, the act or transaction which is the subject-matter of inquiry so as to form one continuous transaction, and must, in some way, illustrate, elucidate, qualify, or characterize the act, and, in a legal sense, be a part of it." 10 R. C. L. 977, sec. 160.

In *Ridenour v. Lewis, supra,* we quoted with approval from *Insurance Co. v. Mosley,* 8 Wall. (U. S.) 397, as follows: "The *res gestæ* are the statements of the cause (of bodily injury) made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress." The statement to be admissible must be under such circumstances as to import probable verity and to exclude the probability of being idle gossip or premeditated falsehood. In *Edwards v. State,* 113 Neb. 698, 204 N. W. 780, *Fields v. State,* 107 Neb. 91, 185 N. W. 400, was referred to as follows: "The *Fields* case has to do with a homicide which grew out of a like unlawful operation as that involved here. It is there disclosed that a letter was

written by the young woman to her lover several days before the operation was performed. As a result of the operation she died shortly afterward. It was held that the letter was properly submitted to the jury on the ground that the statements therein were relevant, and, being so, clearly a part of the *res gestæ*." There the letter was written before and concerning the illegal operation. It discussed the cost of the operation and the means of paying for it.

We have in this case an unusual affidavit executed from five to fifteen months after the alleged seduction could have taken place. It contains conclusions and not statements of fact and is not couched in the natural and spontaneous language of an eighteen-year old girl. A statement to be admissible as a part of the *res gestæ* must have been spontaneous and impulsive, and made at a time and under such circumstances as to induce the belief that it was not the result of reflection and premeditation. The proffered affidavit meets none of the requirements of the rule. The same applies to a proffered letter. It was not made in contemplation of death. It was not a part of the *res gestæ*.

Certain other exhibits were excluded from evidence. Some holiday and other greeting cards, photographs and telegrams, which at most could only be cumulative as showing the unusually friendly relation between defendant and Elizabeth. Even if they were admissible (we think they were not), it was error without prejudice, because they do not tend to establish any fact, unless it was the friendly relation mentioned above, which is abundantly established without them.

The entire cumbersome record in this case has been examined with usual thoroughness, and we conclude that the evidence was not sufficient to establish plaintiff's cause of action, and that the trial court did not err in the exclusion of certain exhibits offered in evidence.

AFFIRMED.

PAINE, J., dissenting.

I respectfully dissent in this case.

To summarize briefly the amended petition, it was there charged that some time during April, 1931, the defendant enticed Elizabeth to his office or room in the theater building and there seduced her and did repeatedly have further acts of unlawful intercourse with her, and that she was under the age of 18 years and previously not unchaste, and that defendant did infect and inoculate her with gonorrhea, which injured her health, and through a lesion in the membrane caused pyogenic organisms to be introduced into her blood stream, which developed growths on the valves of her heart, from which she died June 3, 1932. That such seduction was accomplished by reason of her tender age, by his fraudulent and artful wiles, and by engaging her for a small weekly wage in a pretended employment, and by false promises to make her his future wife, all continued for about three months prior to the accomplishment of his design.

As I view the evidence of the plaintiff in this case, the jury would have been amply justified in finding the following state of facts: Perrigo, a married man, and the father, by a former marriage, of a daughter about the same age as Elizabeth Tongue, first made the acquaintance of Elizabeth, a high school girl, while she was taking part in an amateur revue, called Kidnite Follies, at the Orpheum Theater, during the holidays of 1930. He was leader of the Orpheum orchestra. The evidence discloses that in January, 1931, he arranged for her to sort the music for the orchestra and file it away in alphabetical order and typewrite some of the titles on the outside, in his private rooms far up under the roof of the Orpheum Theater for two hours each evening. For spending this two hours sorting his music, he paid her $5 a week. She was never an employee of the theater company. He gradually won her entire confidence. At first the time she spent in his rooms was from 6:30 to 8:30 in the evening, and her stepmother testified she would reach home before 9 o'clock, and that she always kept her supper warm for her. After some months she would often come home much later, and several times the stepmother observed that

Perrigo brought her home in his car, and would park awhile a short way from their home, and finally one night they reached her home at 1:30 in the morning. Her father, who always waited up, went out to the car and found them in the car with their arms around each other, and upbraided them, and said: "She is not going to work at your office after tonight." Perrigo, in the heated conversation between the three, as testified by her father, said: "Well, there is no use exploding about it, * * * we settled all this last April, * * * we understand each other." Finally Perrigo, according to the testimony of her father, attempted to close the argument by brazenly saying to him, "And don't you say no more to me, the damage is already done." Her father took her in the house, and he testified that she told him the entire story.

The jury would have been justified in finding from the plaintiff's evidence, together with the facts which might reasonably be inferred therefrom, that Perrigo began to have intercourse with her in April after employing her in January; that, as a result, she contracted gonorrhea from Perrigo, and died from acute ulcerative endocarditis from the gonorrheal infection spreading to her blood stream.

The motion of the defendant for a directed verdict at the close of the plaintiff's evidence must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiff, and all proper inferences to be drawn therefrom.

The terms "inference," "probability," and "presumption" have substantially the same meaning. When one fact is proved, another, its uniform concomitant, is universally and safely presumed. Many inferences may be considered conclusive when they have been found to be general and uniform.

The inference which the jury are entitled to draw from the evidence is a permissible deduction or conclusion which is founded on common experience, and which natural reason draws from the facts which are proved. 10 R. C. L. 867, sec. 10; *Puget Sound Electric Ry. v. Benson*, 253 Fed. 710;

Glowacki v. Northwestern Ohio R. & P. Co., 116 Ohio St. 451, 157 N. E. 21.

In *Perry v. Johnson Fruit Co.*, 123 Neb. 558, 243 N. W. 655, this court held: "In a civil action, when a fact may be fairly and reasonably inferred from other and all the facts and circumstances proved, it may be taken as established."

When the defendant makes a motion for a directed verdict at the close of the plaintiff's evidence, the trial court must assume the existence of every material fact which the plaintiff's evidence tends to establish, and, in addition, give to the plaintiff the benefit of all logical deductions therefrom.

In *Bainter v. Appel*, 124 Neb. 40, 245 N. W. 16, this court said: "If there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him." So the trial court is not justified in withdrawing a case from a jury if there is competent evidence from which the alleged facts may be reasonably inferred. *Wheeler v. Abbott*, 89 Neb. 455, 131 N. W. 942; *Oleson v. Oleson*, 90 Neb. 738, 134 N. W. 648; *Curtice Co. v. Estate of Jones*, 111 Neb. 166, 195 N. W. 930; *Rhoads v. Columbia Fire Underwriters Agency*, 128 Neb. 710, 260 N. W. 174; *Weiner v. Aetna Ins. Co.*, 127 Neb. 572, 256 N. W. 71.

In my opinion it was error for the trial court to withdraw this case from the jury upon motion of the defendant for a directed verdict. Under the evidence of the plaintiff, in my opinion this case should have been submitted to the jury, and not arbitrarily dismissed by the court.

EUGENE FIELDING, APPELLEE, V. PUBLIX CARS, INC., ET AL., APPELLANTS.

FILED MARCH 13, 1936. No. 29514.

1. Trial: INCOMPETENT TESTIMONY. In an action against a taxicab company for injuries to a passenger, it is reversible error for the trial court to permit plaintiff on his case in chief to show that defendant is indemnified from loss by an insurance company, where such proffered evidence is not relevant to any material issue in the case.
2. ———: RULE OF PRACTICE REVOKED. The rule of practice promulgated in *Jessup v. Davis*, 115 Neb. 1, 211 N. W. 190, and heretofore followed by this court, to the effect that plaintiff may, in a personal injury action, by appropriate interrogatories on cross-examination, establish that defendant is indemnified from loss by an insurance company is hereby revoked, such revocation to be effective 20 days from the date of the release of this opinion.

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

Wear, Boland & Nye, for appellants.

Gaines, McGilton, McLaughlin & Gaines, L. Q. Hills and *Bernard R. Stone, contra.*

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

CARTER, J.

In this action the plaintiff sued the defendants for damages for personal injuries sustained while riding in a cab belonging to the Publix Cars, Inc. The jury returned a verdict for $5,000 and judgment was entered thereon. From the overruling of their motion for a new trial, defendants bring the case to this court on appeal.

The evidence of the plaintiff was to the effect that he hired the cab to take him to his home, and, while so doing, the cab driver suddenly and without warning applied his brakes and caused plaintiff to be thrown forward against the front seat of the cab. The evidence further shows that

plaintiff suffered a broken jaw and complications as a result thereof that necessitated many operations, much pain and suffering, and a scarred and misshapen face and jaw.

Defendants complain of the action of the trial court in permitting the plaintiff to show by the president of Publix Cars, Inc., on direct examination, that Publix Cars, Inc., carried liability insurance. The record discloses that plaintiff called Guy Thomas, president of Publix Cars, Inc., as a witness and adduced the following testimony: "Q. Do you carry a policy of automobile insurance protecting your company against accidents to persons driving and riding in your cabs for fare? Do you carry such a policy of insurance? * * * A. Yes; we carry a five-thousand dollar policy." The defendants objected to this question before the answer was given, for the reason that it was incompetent, immaterial and irrelevant, and not within the method of procedure laid down by the supreme court in similar cases. The overruling of this objection is assigned as reversible error.

It is the contention of plaintiff that the evidence was admissible to prove ownership of the cab and that the relation of master and servant existed. The plaintiff alleges in his petition, however, that one Reynolds was the owner of the cab in which the accident occurred, so that the evidence could not have been properly admitted for that purpose. We agree with plaintiff's counsel that evidence that defendant carried liability insurance is admissible to prove the relation of master and servant, or any other relation upon which liability can be predicated, where, as in the case at bar, it is an issue under the pleadings. *Biggins v. Wagner,* 60 S. Dak. 581, 245 N. W. 385; *Burns v. Getty,* 53 Idaho, 347, 24 Pac. (2d) 31; *Gayheart v. Smith,* 240 Ky. 596, 42 S. W. (2d) 877. But, in the case at bar, the form in which the question was asked precludes this argument because it shows on its face that it did not tend to prove any such issue. The question asked made no reference to the cab in which plaintiff was riding at the time of the accident and was clearly offered for the purpose of informing the jury

that an insurance company, and not the defendants, would pay any judgment they might render. Plaintiff also contends that the evidence that defendants carried liability insurance was admissible under the rule of practice adopted in the case of *Jessup v. Davis,* 115 Neb. 1, 211 N. W. 190, and cites *Nichols v. Owens Motor Co.,* 121 Neb. 105, 236 N. W. 169, and *Combs v. Owens Motor Co.,* 121 Neb. 5, 235 N. W. 682, to sustain his contention. It is true that in those cases it was held that it was not prejudicially erroneous for plaintiff to show on his case in chief that defendant carried liability insurance, but in those cases it was not contended that the judgments were excessive, and the error of the trial court in permitting it to be shown could not have been prejudicial to the defendant. But such is not the situation in the case at bar. We hold that the evidence in question did not fall within the rule of practice set out in *Jessup v. Davis, supra,* such rule being as follows: "Where a plaintiff in a personal injury action seeks by appropriate interrogatories on the cross-examination to discover whether the defendant is indemnified from loss by an insurance company, it is error for the court to sustain an objection to interrogatories which tend to develop the fact on that question." See *Miller v. Central Taxi Co.,* 110 Neb. 306, 193 N. W. 919. We therefore hold that the admission of the evidence relative to liability insurance was prejudicially erroneous.

Defendants contend that the rule of practice promulgated by this court in the case of *Jessup v. Davis, supra,* is unsound and not sustained by legal authority, and request a reconsideration of the rule by this court. The question whether the plaintiff has a right to show that the defendant carries liability insurance first came before this court in the case of *Egner v. Curtis, Towle & Paine Co.,* 96 Neb. 18, 146 N. W. 1032. In that case the court announced the following rule: "Where a defendant, in a personal injury action, is indemnified by an employers' casualty insurance company, it is proper for plaintiff's counsel to show such fact when impaneling the jury, and to inquire of each juror

upon his *voir dire* if he is a stockholder or agent, or in any manner interested in such company." This rule was followed in *Koran v. Cudahy Packing Co.*, 100 Neb. 693, 161 N. W. 245, and *Penhansky v. Drake Realty Construction Co.*, 109 Neb. 120, 190 N. W. 265. The right of counsel to interrogate jurors on their *voir dire* examination in order to determine whether it is expedient to challenge any of them peremptorily, within proper limits, cannot be denied. The authorities differ on this question on the method of interrogation to be employed rather than on the right. We are impressed with the method approved by the Michigan court in the case of *Holman v. Cole*, 242 Mich. 402, 218 N. W. 795, wherein the court say: "In the case before us, the inquiry referred to a foreign corporation. We feel forced to the conclusion that the purpose of counsel in asking each one of the jurors called if he was interested as a stockholder in such company was not for the purpose of obtaining information, but to impress upon their minds that the defendant was protected by insurance and would not be personally liable for any judgment entered in the case. If information alone was sought, it might easily have been obtained by asking the jury collectively if any of them were stockholders in any corporation, and, if they were, to have asked the kind of a corporation they were interested in." We can conceive of situations even under the foregoing rule where it would be necessary to go into the question further and bring out the name of the insurance company involved. We cannot say, therefore, that the rule heretofore announced with reference to the interrogation of juries on *voir dire* on this subject is unsound. The limits to which counsel may go in interrogating the jury must rest largely in the discretion of the trial court, viewed in the light of the situation as it comes before it.

But, where the plaintiff shows that defendant carries liability insurance, when it is not relevant to some issue in the case, we have come to the conclusion that it is inadmissible. Such evidence can have no relevancy to the question of negligence. It cannot be disputed that there are cases

where liability insurance may be the subject of evidence, or the object of interrogatories, if the fact of insurance bears upon an issue in the case. In other words, if the evidence is properly admissible for any purpose, it cannot be excluded for the reason that it tends to prejudice the defendant because it shows or tends to show that he carries liability insurance. We have examined with care the opinion in the case of *Jessup v. Davis, supra,* as well as the opinions of the court of appeals of the District of Columbia, three circuit courts of appeal and the courts of last resort in 40 sister states, all holding to the contrary. We will not take the space to quote from each of these holdings. A discussion of a large number of cases contrary to *Jessup v. Davis, supra,* and supporting the rule we now believe to be the correct one, will accomplish no good purpose. We will, however, cite a few authorities that we believe state the better rule.

In dealing with this question, the court in *James Stewart & Co. v. Newby* (C. C. A. 4th Circuit) 266 Fed. 287, said: "This court must take cognizance of the general recognition among the members of the bar, as well as by the courts, of the harmful effect upon the minds of jurors of such testimony as was here sought to be introduced. The only purpose for which such evidence is presented is to prejudice the jury, and the poison is of such character that, once being injected into the mind, it is difficult of eradication. Where it is allowed to remain during the whole course of a trial, and by persistent unrebuked references is allowed to influence the jurors' consideration of all the other evidence during the trial, the antidote of a final instruction to disregard the testimony is ineffective. The removal of the fly does not restore an appetite for the food into which it has fallen. * * * Verdicts cannot be relieved of the danger of criticism as long as there is a basis for the opinion that they have been rendered through the influence of prejudice."

In *Brown v. Walter* (C. C. A. 2d Circuit) 62 Fed. (2d) 798, Judge Learned Hand, speaking for the court in a case involving this question, said: "There can be no rational

excuse, except the flimsy one that a man is more likely to be careless if insured. That is at most the merest guess, much more than outweighed by the probability that the real issues will be obscured. * * * In the case at bar, save for the cross-examination of the doctor, there was no excuse for even an intimation that the defendant was insured; if that witness is not called upon the next trial, there will be none whatever, and unless the insurance is scrupulously kept from the jury, a mistrial should be declared. The prevalent knowledge that in such cases insurance is usually taken, is a hard enough handicap at best; it is difficult in any event to get a decision on the real issues."

In *Edwards v. Laurel Branch Coal Co.,* 133 Va. 534, 114 S. E. 108, the court said: "It is clear, both upon reason and authority, that the court was right in refusing to permit the question to be answered. That the company carried liability insurance was wholly irrelevant, and that the protection thus afforded may have tended to render them less careful than they would otherwise have been was likewise wholly irrelevant, because the question of liability depended upon the fact of negligence, and not upon the motives or influences which may have brought it about."

In *Patterson v. Surpless,* 107 N. J. Law, 305, 151 Atl. 754, the court said:

"To propound to the jurors a question as to their stockholdings in the insurance company named could have had but one purpose and effect, viz., to prejudice the jurors against the defendants in the trial of the case. It would at once instill in their minds the thought that the defendant would ultimately not be called upon to pay any verdict that the jury might render, but that this burden would fall upon an insurance company which had been paid to take the risk. The prejudicial effects of such an impression are obvious and can scarcely be magnified.

"Courts exist for the judicial determination of the rights of litigants and for the administration of justice, and it is the duty of those presiding, as far as humanly possible, to see that the setting of each individual case shall be such

that an impartial and just deliverance shall be had between the parties, and when counsel deliberately seeks to inject into a cause an element which has, and is designed to have, the effect of prejudicing the rights of one or the other of the litigants, it is the duty of the judge to guard against such effect, either by arresting the trial *in limine,* as was requested in the present case, or by guarding against the pernicious results through proper instruction to the jury as was clearly indicated in the opinion cited above."

In *Brooke v. Croson,* 58 Fed. (2d) 885, the court said: "It is established by the overwhelming weight of authority that as a general rule it is reversible error in the trial of an action for damages for personal injuries suffered in an automobile accident to permit the plaintiff to introduce evidence to show that the defendant is protected by liability insurance against such accidents. It is held that such evidence is not relevant to the issue of negligence, and can have no effect but to induce a verdict based on the fact that an insurance company, and not the defendant, must pay the award."

In *George A. Fuller Co. v. Darragh,* 101 Ill. App. 664, the court said:

"None of the learned counsel for appellee will gravely contend that whether appellant had procured insurance against liability for accidents or whether the suit under consideration was being defended by an insurance company or its attorney, could possibly throw any light upon the question of whether the injury to appellee had been occasioned by actionable negligence of appellant.

"Why, then, should the jury be told that the defense was made by a casualty insurance company? If this can be done, why may not a jury be told that the action is prosecuted by a corporation created to hunt up and prosecute accident cases, or by an attorney for a contingent fee; and that one-half of any verdict rendered for the plaintiff will go to such corporation or to his attorney?

"It is urged that this statement was made for the purpose of selecting a disinterested jury.

"Jurors may be asked if they know certain persons or have business or other relations with them, but under the guise of obtaining a fair jury, information calculated to prejudice jurors against either party cannot be given, and the trial court should not only prevent this, but if satisfied that despite its rulings jurors have thus been swerved in the considerations, should set aside verdicts so obtained."

In *Citti v. Bava,* 204 Cal. 136, 266 Pac. 954, it was held: "The natural tendency of a line of examination that suggests to the jury that the defendant is indemnified against any judgment for damages against him is highly prejudicial to his rights, especially in a closely balanced case where the evidence otherwise would be easily sufficient on appeal to support a verdict either for the plaintiff or for the defendant. Such attempts on the part of counsel have frequently been held to be improper and prejudicial."

In *Blue Bar Taxicab & Transfer Co. v. Hudspeth,* 25 Ariz. 287, 216 Pac. 246, the court said: "The effect of these questions, together with the answer of the first question, made the fact known, and impressed upon the jury, that back of defendant's liability stood some sort of insurance. This information was not wholly inadvertent, so far as plaintiff was concerned, nor was it a necessary incident of any legitimate evidence. No instruction was given to the jury to cure the effect of it. The consequence of such information is well known, and is sufficient to require a new trial. It is useless for counsel to talk of the innocuous character of this evidence, when they at the same time, in order to get the information before the jury, are willing to imperil any verdict which might be rendered. All lawyers know the rule in regard to such evidence, and they must not expect the court to establish a rule, and then wink at its violation."

In *Horsford v. Carolina Glass Co.,* 92 S. Car. 236, 75 S. E. 533, the court said: "There can be no doubt on the bench or at the bar that in an action by an employee against his employer to recover damages for personal injury both reason and authority forbid bringing into the evidence or argument the fact that defendant is protected by employer's liability

insurance. Such evidence or argument has a manifest and strong tendency to carry the jury away from the real issue and to lead them to regard carelessly the legal rights of the defendant on the ground that some one else will have to pay the verdict. This is the only reason that can be assigned for attempting to use such testimony and argument. One of the most manifest and pressing duties not only of courts but of lawyers is to prevent influences of this kind from finding their way into the administration of justice. In the discharge of this duty the entire commonwealth is deeply concerned, for the use in evidence and argument of such influences produces injustice, and waste of time and labor of courts and juries at great public cost."

To quote from all the authorities from other jurisdictions on this question would be a work of supererogation. Cases from jurisdictions not hereinbefore cited, which support the rule announced in this opinion, are: *Jupollo Public Service Co. v. Grant* (C. C. A. 4th Circuit) 42 Fed. (2d) 18; *New Aetna Portland Cement Co. v. Hatt* (C. C. A. 6th Circuit) 231 Fed. 611; *Dempsey v. Goldstein Bros. Amusement Co.*, 231 Mass. 461, 121 N. E. 429; *Sawyer v. Arnold Shoe Co.*, 90 Me. 369, 38 Atl. 333; *Rodzborski v. American Sugar Refining Co.*, 210 N. Y. 262, 104 N. E. 616; *Coe v. Van Why*, 33 Colo. 315, 80 Pac. 894; *Steele-Smith Dry Goods Co. v. Blythe*, 208 Ala. 288, 94 So. 281; *Goss v. Williams*, 196 N. Car. 213, 145 S. E. 169; *Holloway v. Telfer*, 136 Kan. 80, 12 Pac. (2d) 826; *Herrin, Lambert & Co. v. Daly*, 80 Miss. 340, 31 So. 790; *Northwestern Fuel Co. v. Minneapolis Street R. Co.*, 134 Minn. 378, 159 N. W. 832; *Prewitt-Spurr Mfg. Co. v. Woodall*, 115 Tenn. 605, 90 S. W. 623; *Smith v. Yellow Cab Co.*, 173 Wis. 33, 180 N. W. 125; *Fakes & Co. v. Fort Worth Gas Co.*, 280 S. W. (Tex. Civ. App.) 234; *Walters v. Appalachian Power Co.*, 75 W. Va. 676, 84 S. E. 617; *Ronan v. Turnbull Co.*, 99 Vt. 280, 131 Atl. 788; *Curran v. Lorch*, 243 Pa. St. 247, 90 Atl. 62; *Deffenbaugh v. Inter-State Motor Freight Corporation*, 254 Mich. 180, 235 N. W. 896; *Wilson v. Wesler*, 27 Ohio App. 386, 160 N. E. 863; *Terry Dairy Co. v. Parker*, 144 Ark. 401, 223 S. W. 6;

Walker v. New Haven Hotel Co., 95 Conn. 231, 111 Atl. 59; *Miller v. Harrison Construction Co.*, 298 S. W. (Mo. App.) 259; *Mithen v. Jeffery*, 259 Ill. 372, 102 N. E. 778; *Stoskoff v. Wicklund*, 49 N. Dak. 708, 193 N. W. 312; *Taggart v. Keebler*, 198 Ind. 633, 154 N. E. 485; *Danville Light, Power & Traction Co. v. Baldwin*, 178 Ky. 184, 198 S. W. 713; *Chielinsky v. Hoopes & Townsend Co.*, 1 Marv. (Del.) 273, 40 Atl. 1127; *Wilson v. Blair*, 65 Mont. 155, 211 Pac. 289; *Ryan v. Trenkle*, 199 Ia. 636, 200 N. W. 318; *Frank v. Corcoran*, 25 Ohio App. 356, 158 N. E. 501; *Wilson v. St. Joe Boom Co.*, 34 Idaho, 253, 200 Pac. 884; *Aderhold v. Bishop*, 94 Okla. 203, 221 Pac. 752; *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020; *Hall v. Trimble*, 104 Md. 317, 64 Atl. 1026; *Bennett v. City of Portland*, 124 Or. 691, 265 Pac. 433; *Gerry v. Neugebauer*, 83 N. H. 23, 136 Atl. 751; *St. Jean v. Lippitt Woolen Co.*, 69 Atl. (R. I.) 604.

Against this array of authority, we have failed to find a single case supporting the rule announced by our court in *Miller v. Central Taxi Co., supra,* and *Jessup v. Davis, supra.* The authorities are unanimous in supporting a contrary view. In addition to the great weight of authority being against the rule heretofore existent in Nebraska, we feel that reason and logic also support the majority view.

It is therefore ordered that the rule of practice promulgated in *Jessup v. Davis, supra,* and heretofore followed by this court, is revoked, such revocation to be effective in all cases tried after 20 days from the date of the release of this opinion, and that on and after said date, this rule and the holdings of this court based thereon shall cease to be authoritative.

For the reasons herein stated, the judgment of the trial court is reversed, and the cause is remanded.

REVERSED.

EBERLY, J., dissenting.

I respectfully dissent from the judgment of reversal in this case. The sole reason for this court's action is fairly disclosed by the following extract from the majority opin-

ion: "We agree with plaintiff's counsel that evidence that defendant carried liability insurance is admissible to prove the relation of master and servant, or any other relation upon which liability can be predicated, where, as in the case at bar, it is an issue under the pleadings. * * * But, in the case at bar, the form in which the question was asked precludes this argument because it shows on its face that it did not tend to prove any such issue. The question asked made no reference to the cab in which plaintiff was riding at the time of the accident and was clearly offered for the purpose of informing the jury that an insurance company, and not the defendants, would pay any judgment they might render."

This also appears as the sole reason for reversal, as stated in the first paragraph of the syllabus.

It may be said in passing that the motion of appellants for a new trial, filed in the trial court, contains as an assignment of error no charge of misconduct of plaintiff's attorney during the trial. But, without reference to questions, upon which the case is by the majority opinion made to turn, having been properly raised in the trial court, we are impressed by the view that the opinion proceeds on an assumption of facts which the record does not support; that it ignores the scope and effect of the real issue presented by the record; and expresses a conclusion which, in view of the actual issue to which it is by the majority opinion applied, is wholly without support of the opinions which are relied upon to sustain it.

The transaction in suit is one which the police power of this state has expressly regulated, and the incidents which compose it must be viewed in the light of the duties our statutes enjoin. These are expressed in chapter 147, Laws 1929. They were enacted by the legislature of that year, approved April 6, 1929, and in force and effect on September 1, 1933, the date of the accident which forms the subject of the present action.

The act is entitled: "An act relating to taxicabs and public cars and providing for the filing of insurance policies,

surety bonds or securities with the state railway commission for the protection of the public; and to provide penalties for the violation thereof."

This act contains four sections.

Section 1 defines the terms "taxicab" and "public car."

Section 2 provides: "No person, firm, association or corporation shall operate or use any taxicab in any manner as above defined in the state of Nebraska until there has been filed or deposited with the Nebraska state railway commission either a liability insurance policy or a surety bond with an approved surety company as surety or negotiable and salable securities at the option of such person, firm, association, or corporation but which shall be approved by the commission, in such sum and with such other terms and provisions and on such conditions as the commission may deem necessary adequately to protect the interest of the public having due regard for the number of persons and amount of property affected."

Section 3 relates to the application of the terms of the act to public cars, and section 4 constitutes the provisions for penalties for a violation thereof.

It will be noted that by the terms of this act certain regulatory powers are expressly vested in the Nebraska state railway commission. This is an agency of the state, constitutionally created, and endowed with certain powers in their nature both executive and legislative. It is therefore within the reason of the rule which declares that the public official acts and proceedings of the legislative and executive departments of the state and national governments may be noticed judicially. 7 Ency. of Evidence, 983.

So, also, "Where a statute authorizes executive officers to make general rules for the conduct of public business, and such rules are duly made and published, the courts will take judicial notice of them." 7 Ency. of Evidence, 990.

In *Larson v. First Nat. Bank of Pender,* 66 Neb. 595, 72 N. W. 729, this court was committed to the view: "Where a statute authorizes executive officers to make general rules for the conduct of public business, and such rules are duly

made and published, the courts will take judicial notice of them."

It, therefore, follows that, in a proper case, it is the duty of this court to judicially notice that prior to the 1st day of September, 1933, after due notice to all persons interested, an open public hearing by the Nebraska state railway commission was had and held, and regulations, provisions, and conditions contemplated by section 2, ch. 147, Laws 1929, were by it then duly made, adopted, prescribed, approved, and published as necessary to adequately protect the interest of the public, having due regard for the number of persons and amount of property affected, and have ever since such adoption remained and continued in force and effect. That, by the directions and requirements of the state railway commission, the following, so adopted and approved, constitute a part of all liability insurance policies filed under the provisions of said act:

"1. In consideration of the premium stated in the policy and determined in accordance with the provisions of the policy and/or indorsements attached thereto, *the company hereby waives a description of the automobiles to be insured thereunder, and agrees to pay,* subject to the limits of liability set forth in the policy, *any final judgment for personal injury, including death resulting therefrom, sustained by any person other than an employee of the assured* (while engaged in the maintenance or operation of the assured's automobile) *caused by any and all passenger carrying automobiles operated by the assured.* The named assured states by acceptance of this indorsement that the list of passenger carrying vehicles contained in said policy is a complete list of all passenger carrying vehicles owned by him at the inception of said policy, and the assured agrees to immediately notify the company and the Nebraska state railway commission of any additional passenger carrying vehicles placed in service."

Further, "9. It is understood and agreed that this policy is accepted and approved by the Nebraska state railway commission under the express promise and condition on the

part of the company, that nothing in the policy to which this indorsement is attached or in any indorsement already attached or which may hereafter be attached, which is inconsistent with the terms of this indorsement, shall in any manner affect the validity of this indorsement."

These provisions, if valid, have the full force and effect of law, and, in view of their contractual nature, could hardly be questioned in this proceeding.

Issues in legal controversies are made up of two essential elements, viz., the facts, and the law applicable to the same.

In the first paragraph of plaintiff's petition, in addition to formal matters, it is alleged: "The defendant, Publix Cars, Inc., is a corporation organized under and existing by virtue of the laws of the state of Nebraska for the purpose of conducting, operating and maintaining taxicabs for hire as common carriers in the aforesaid city of Omaha, Douglas county, Nebraska; that defendants, Elmer Denson and B. J. Reynolds, are citizens of the state of Nebraska, residing in the said city of Omaha, county and state aforesaid."

The second paragraph of plaintiff's petition contains the following: "That on or about the first day of September, 1933, at about the hour of 9:15 o'clock p. m., plaintiff approached a taxicab stand operated by the defendant, Publix Cars, Inc., at Twenty-fourth and Cuming streets in said city of Omaha, intending to become a passenger for hire of said defendant, and requested that he be taken to his home at 1002 No. Forty-ninth street in said city of Omaha; that he was told to enter a cab operated by and bearing the name of the defendant, Publix Cars, Inc.; that the defendant, Elmer Denson, was the driver of said cab, and at said time the said defendant, B. J. Reynolds, was the owner of said cab, and that the same was being used and operated by the defendant, Elmer Denson, in the taxicab business of the defendants, Publix Cars, Inc., and B. J. Reynolds, and that the said Elmer Denson was legally using and operating the same under their direction and with their permission."

Plaintiff's petition then sets out the details as to the happening of the accident, the specific acts of negligence on

part of defendants, the injuries sustained by plaintiff, and closes with a prayer for the amount of damages alleged to have been suffered.

The answer of defendants admits the allegations of paragraph 1 of plaintiff's petition. In paragraph 2 of the answer, defendants admit that "on or about the date mentioned in plaintiff's petition, while riding in a taxicab, plaintiff sustained some slight injuries, the exact nature of which is not known to defendants, but which defendants allege are not of the character nor as serious as set forth in plaintiff's petition." Paragraph 3 of the answer reads as follows: "Further answering defendants deny all and singular the allegations of plaintiff's petition not herein admitted." Paragraph 4 of the answer sets out the alleged contributory negligence of the plaintiff and prays that plaintiff's petition be dismissed at plaintiff's costs.

It is manifest that the relationship of the Publix Cars, Inc., and its legal responsibility for the cab driver operating the cab at the time of the accident in which plaintiff was injured is squarely put in issue by these pleadings. The case was tried on the theory that new matter alleged in the answer was denied.

At the close of the trial, the motion of counsel for the Publix Cars, Inc., for a directed verdict was as follows: "Now, at the close of all of the evidence, the defendant, the Publix Cars, Inc., moves the court to direct the jury to return a verdict in favor of the said defendant, or to dismiss the jury and enter judgment in favor of the defendant, for the following reasons, and each of them, to wit: 1. That the evidence was insufficient to sustain a verdict in the plaintiff's favor and against the defendant. 2. The evidence wholly fails to establish a relationship of master and servant between the said defendant and the defendant, Denson, the driver of the cab. 3. The evidence wholly fails to show that the defendant had any control or direction over the movements and operation of the taxicab involved in this accident."

At the same time, in open court, the Commercial Stand-

ard Insurance Company, without objection on part of defendants, and by and through defendants' attorney, intervened and presented the following motion: "Now, at the close of all of the evidence, the defendant, Commercial Standard Insurance Company, moves the court to direct the jury to return a verdict in favor of the said defendant, or to dismiss the jury and enter judgment in favor of the defendant, Commercial Standard Insurance Company, for the following reason, to wit: 1. That the evidence was insufficient to sustain a verdict in the plaintiff's favor and against the defendant, Commercial Standard Insurance Company."

Both of these motions were overruled. The insurance company filed no motion for a new trial. But that it became in fact a party to the proceeding is recognized by the trial court in the bill of exceptions settled.

In view of the admissions of the answer, it is plain that we have in this case a transaction squarely within the provisions of chapter 147, Laws 1929, and the terms employed in the pleadings are presumptively used in the sense defined by that act.

Under the issues made by the pleadings, it is plain that the actual relation of the Publix Cars, Inc., to the offending vehicle is vital. The real question presented is: Was the taxicab in which the plaintiff received his injuries then employed in the business for which the Publix Cars, Inc., was admittedly organized to transact, and which it was alleged that corporation was then carrying on in conjunction with other defendants? While the rights alleged to have been possessed by the Publix Cars, Inc., are, in places in the record, referred to as "ownership," ownership is recognized by the authorities as an elastic term. Thus, it is said: "The word 'owner,' when used in connection with personal property, does not mean necessarily the absolute legal owner only, but it may also apply to any person having the possession and control of the property. It may include one having the general property, or a special property, or even one in possession by virtue of a lien." 28 Am. & Eng. Ency. of Law (2d ed.) 237. So, also, it includes one who

has power of disposition, care, control and management of a chattel; also, any one who has an interest under a special title. 50 C. J. 776.

In view of the policy of the controlling statute, in the instant case it would include any one who, by virtue of contract or agreement, possessed rights in and to the taxicab in its employment in the business of the Publix Cars, Inc. The relation of the offending taxicab to the defendant corporation was challenged and expressly made an issue. The source of proof was confined to the defendants. Under these circumstances plaintiff was relegated to circumstantial evidence. The unquestioned rule on the subject is: "Circumstances that are the ordinary *indicia* of ownership, or that tend to indicate ownership, are admissible as evidence thereof." 9 Ency. of Evidence, 263. In support of this text, the following are among the cases cited: "The payment of taxes, procuring a policy of insurance, describing the premises and naming the person to be insured, the act of giving a promissory note to secure against losses, and the payment of assessments to meet losses, are all proper tests of ownership, not conclusive, but competent to be submitted and weighed by the jury." *Hodgdon v. Shannon,* 44 N. H. 572. "Insuring of property in one's name is admissible in evidence to show that the insured managed and controlled it as her own." *Bettes v. Magoon,* 85 Mo. 580. "The fact that a man applied for a license to keep a dog is competent evidence that he was the owner or keeper of the dog." *Commonwealth v. Gorman,* 16 Gray (Mass.) 601. The principles upon which these decisions are based have been expressly approved in this jurisdiction. *Fruide v. State,* 66 Neb. 244, 92 N. W. 320; *Schiek v. Sanders,* 53 Neb. 664, 74 N. W. 39.

It is also undoubtedly true that, even in the jurisdictions which are cited in the majority opinion, with exceedingly few exceptions, the rule is generally applied that, though evidence may tend to establish that the defendant carried liability insurance, it will not be rendered incompetent or inadmissible on that account where it tends to establish the

necessary facts that the defendant is the owner or controller of the instrumentality involved; for instance, a truck; or participated in the business in which the offending instrumentality was engaged when the litigable injuries were inflicted. See, *Gayheart v. Smith*, 240 Ky. 596, 42 S. W. (2d) 877; *Hoover v. Turner*, 42 Ohio. App. 528, 182 N. E. 598; *O'Connor v. Sioux Falls Motor Co.*, 57 S. Dak. 397, 232 N. W. 904; *Biggins v. Wagner*, 60 S. Dak. 581, 245 N. W. 385; *Perkins v. Rice*, 187 Mass. 28, 72 N. E. 323.

In summarizing the evidence, it will be remembered that the allegations contained in the first paragraph of plaintiff's petition, as hereinbefore quoted, were expressly admitted. The facts alleged in the second paragraph of plaintiff's petition, though formally denied by pleading, were fully established by plaintiff's proof, and their existence is not even seriously challenged by defendants' evidence. The proof also establishes that the defendant Publix Cars, Inc., is engaged in the taxicab business; that there is a fleet of cars on the streets of Omaha, each of which is owned by an individual other than the Publix Cars, Inc.; that each of these cars bears the name of the Publix Cars, and is operated as a Publix Car taxicab by the owner thereof, and such owner pays the Publix Cars, Inc., a certain amount for the right to operate such car as a Publix Car, and without payment of this "stated" fee no car could be operated by its owner as a Publix Car taxicab. It also appears that the Publix Cars, Inc., carried advertising for the Publix Cars, which was of course for the equal benefit of all cars in service. Further, telephone service for all cars of the fleet is also furnished by the Publix Cars, Inc., and the testimony is explicit that each individual cab owner of the fleet pays his contribution for the service the company renders him each day in the way of taxicab passengers or the business he may get. It also appears that the taxicab responsible for the accident in suit was, at that time, owned by Reynolds, but was a member of the Publix Cars, Inc., taxicab fleet in Omaha, and was being operated as a part thereof, making the same contributions and receiving the same

benefits as were received by the owners of other cars in the fleet. There is no evidence that the Publix Cars, Inc., was the absolute owner of any car bearing its name or which was under its direction and control. Under these facts, in view of the issues presented for determination, practically all authorities agree that evidence that the defendant carried insurance, liability or other kind, on the instrumentality involved, is properly receivable to establish, in connection with other facts established by proof, that such defendant is the owner or responsible controller of the property so insured.

The question addressed to the president of the Publix Cars, Inc., which the majority opinion quotes and condemns, is certainly one which seeks to develop from an unwilling witness the existence, at the time of the infliction of the injuries in suit, of an automobile insurance policy covering results of accidents "to persons driving and riding in your cabs for fare." Obviously, it must be admitted that by "your cabs" all cabs in the fleet then operated by the company of this witness were included. The affirmative answer, which necessarily affirmed the fact that this company maintained insurance on the entire fleet, was, in view of other proof in the record, incontrovertible evidence which disclosed that the company carried insurance on defendant's cab in suit. The form of the policy referred to is not suggested in the majority opinion, nor, in fact, is it disclosed by the evidence. If we suppose it to be a "blanket" policy covering all cars of the fleet, and that the car in suit was only insured as a member of this fleet, what possible valid reason supports the rule announced in this opinion? If such there be, we respectfully suggest the great importance of advising the profession how the important fact of insurance on a single car may be properly elicited under such conditions, without committing the unforgivable error of disclosing that other cars of the defendant, in no wise connected with the accident or with the lawsuit arising therefrom, were also insured. Is a "blanket" insurance policy an unsurmountable legal barrier to ascertaining, in a proper

case, that a single car embraced therein is thereby insured?

But we gather from the majority opinion (including the authorities cited in support thereof) that it is wholly premised on the assumption that they are dealing with liability insurance, in the form repeatedly before this court, wherein the private owner of an automobile is indemnified and protected by private contract against the result of his own wrongs. That is not our present case. Here, we are dealing with a public agency in its exercise and discharge of public duties, as to which the public policy of the state exacts prescribed compliance. This includes the nature and forms of insurance it is required to have and maintain. The ordinary presumption, in the absence of clear and direct evidence to the contrary, supports the conclusion that the insurance which the Publix Cars, Inc., had and possessed at the time of the accident was such as is required by chapter 147, Laws 1929, and regulations pursuant thereto, as a condition precedent to the commencement of the business it was organized to carry on and to its continuance therein.

On this basis, in the instant case we are not concerned with questions arising out of a private contract for indemnity protecting a tort-feasor from the results of a private wrong by him inflicted. Here, we have for consideration, in effect, a police regulation established primarily for the protection of the public. In legal effect, it provides protection to the public (and those who compose it) for injuries suffered by imposing a positive duty on one engaged in carrying and transporting passengers in taxicabs for hire to comply with the terms of the controlling statute and regulations pursuant thereto by providing and maintaining in force contracts of insurance wherein the positive obligation is imposed on and accepted by the insurer (as to such injuries within the limits of his liability set forth in such policy or contract), to promptly pay and discharge "any final judgment for personal injury, including death resulting therefrom, sustained by any person * * * caused by any and all passenger carrying automobiles operated by the assured."

As to the identity of the offending car, these rules and conditions thus prescribed by the commission, in effect, provide that the insurer shall waive a description of the automobiles to be insured by his contract, and, in addition thereto, shall agree to pay any final judgment for all deaths and personal injuries caused by any and all passenger carrying automobiles operated by the assured.

It will be noted that under the above provisions recovery for damages suffered is in no manner predicated on the identity of the offending car, but is established by proof of the existence of public insurance protecting the carrier and proof of damages inflicted by any or all of the passenger carrying automobiles operated by the assured. In connection with other facts in the record the inference is unavoidable that Publix Cars, Inc., in its taxicab business, at the time of the accident in suit, carried insurance on all of its taxicabs, which constituted its fleet, and of which the offending taxicab was a member, and that the plaintiff was injured by a taxicab operated by said Publix Cars, Inc.

I submit that, by these facts, the existence of insurance secured and maintained by this taxicab company was properly established, and its relation to the instrumentalities covered by this insurance properly shown.

It follows that the rule of exclusion of evidence announced in the majority opinion, as applied to the actual facts in the present case, is wholly unjustified, and is not sustained by logic, reason, nor any of the authorities cited in the opinion.

I am not in accord with the action of this court in revoking the rule as to cross-examination promulgated in *Jessup v. Davis*, 115 Neb. 1, 211 N. W. 190. The reasons which were thought controlling at the time of its adoption appear in that opinion.

It will be noted in passing that cases approved and cited in the majority opinion, in support thereof, are not wholly in harmony with each other. Indeed, for example, *Gerry v. Neugebauer*, 83 N. H. 23, 136 Atl. 751, is as repugnant to the doctrine announced by the writer of the majority opinion in the instant case as it is to the rule revoked.

During the past year within this nation, as the result of accidents from various causes, there have occurred 99,000 fatalities, 365,000 cases of permanent disability, and 9,100,000 cases of temporary disability. Of these, Nebraska has had her due proportionate share. It is commonly admitted that in many instances actions for legal redress by these unfortunates have furnished the occasion for manifest abuse of legal process and improper practice of law in connection therewith.

The evidence adduced at an investigation ordered by the appellate division of the supreme court of New York on February 7, 1928, certainly sustains the conclusion stated, and an article appearing in the bound volume of the American Law Review for 1927, at page 77, entitled, "Why Do Courts Coddle Automobile Indemnity Companies," suggests the necessity of the rule as heretofore announced by this court, to prevent evils which the action now taken by the majority opinion will necessarily conceal. This action creates a regrettable uncertainty in this class of actions in this state in procedure. The rule is revoked, and nothing replaces it. Where are trial courts to find authoritative directions for procedure?

The facts in the instant case in no manner involved the application of the rule of cross-examination. The language of the opinion on this subject was selected with the express intention of announcing no rule of court on the subject. Improper cross-examination not being in any manner involved in the record here before us, the language of the opinion relating thereto may not be considered as other than *obiter dicta,* and without binding force and effect. It is obvious that the situation created by the action of this court will continue as an appeal to court or legislature for relief from uncertainty in procedure, to the end that the rights of unfortunate victims of accidents in this state may be properly safeguarded and not imperiled by dangers wholly unconnected with the merits of their claims.

DAY, J., dissenting.

Unable to concur in the majority opinion, my reasons are

respectfully submitted. (1) The rule of practice previously promulgated by this court in *Jessup v. Davis*, 115 Neb. 1, 211 N. W. 190, is not involved here. (2) Even if it were, a judgment is not to be reversed where a trial court follows a rule of practice promulgated by this court under its constitutional powers. The majority opinion takes cognizance of the rule by revoking the rule as of a future date. (3) The evidence as to public liability insurance was admissible here, irrespective of the rule, to show the relation between the various defendants.

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

FILED MARCH 13, 1936. NO. 29551.

1. **Municipal Corporations: POWERS: EXTENSION OF ELECTRIC PLANT.** Where a village has acquired an electric light plant and distribution system, the board of trustees thereof may, by virtue of section 70-603, Comp. St. Supp. 1931, contract to enlarge and extend the same and issue warrants pledging the future earnings of the plant, without liability upon the village for their payment, as a consideration therefor.
2. ———: ———: COURTS. The ordinary business affairs of a municipality are committed to the corporate authorities, and the courts will not interfere except in a clear case of mismanagement or fraud.

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

B. F. Napheys, Jr., W. O. Baldwin and *F. H. Stubbs*, for appellant.

Perry, Van Pelt & Marti and *Anan Raymond, contra.*

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

CARTER, J.

This is an action for an injunction against the village of Deshler and its officials, Fairbanks, Morse & Company

and Fairbanks, Morse Construction Company to enjoin the performance of contracts for the enlargement and extension of an electric light plant and distribution system in the village of Deshler, to be paid for out of the future net earnings of the plant. The lower court denied the injunction and dismissed the suit. Plaintiff brings the case to this court on appeal.

Plaintiff alleges that it is a taxpayer in the village of Deshler and the assignee of a franchise granting the right to construct and operate a light plant and distribution system within the village. It further alleges that the village does not have express or implied power to purchase an entire new light and distribution system by a combination of bonds and warrants, the warrants pledging the future earnings of the plant without liability upon the village for their payment. Plaintiff further alleges that the village is without authority to let a contract for public works by the express terms of which a cash bid will not be considered or accepted and that payment is to be made only with warrants pledging the future earnings of the plant, where the elimination of the cash bidder results in a material increase in the cost. It further contends that the contract sought to be enjoined differs materially from the specifications for the work given to bidders by the complete omission of all engine specifications from the contract. Plaintiff further alleges that there was such collusion between the bidders and village officials that the contracts subsequently entered into are illegal and void.

Defendants first contend that plaintiff has not sufficient interest in the litigation to maintain the action for the reason that it has no franchise to operate an electric plant and distribution system in the village, and that it is not injured as a taxpayer for the reason that there is no obligation upon the village to pay under the contracts in question, payment being made solely by warrants pledging the future earnings of the plant. In view of the fact that a finding upon these contentions is not necessary to a decision of this case, we will assume for the purposes of this appeal, without passing

thereon, that plaintiff does have sufficient legal interest to maintain the action.

The record in this case shows that in September, 1933, the village of Deshler employed a special engineer with reference to the matter of establishing a municipal light plant and distribution system. At that time the engineer estimated that it would cost $65,000 to establish the light plant and distribution system required by the village. In February, 1934, a new estimate was prepared by the engineer in which the cost was estimated at $77,300. In April, 1934, a special election was held in which the voters of the village authorized the issuance of bonds in the amount of $29,500 for the construction of the first unit of the light plant and distribution system. A contract was let on May 24, 1934, to the Fairbanks, Morse Construction Company, in which a Fairbanks, Morse & Company engine was specified. Subsequent to the letting of this contract, the engine house was constructed, the engine installed, and light and power service established. The evidence is quite conclusive that, after the completion of this contract, a complete plant and distribution system were established and in operation. The established system, however, did not provide 24-hour service, which the officials thought was necessary to meet the needs of the consumers of electrical energy in that community. On December 27, 1934, another contract was let to Fairbanks, Morse & Company for the purchase of another Diesel engine and the enlargement of the light plant and distribution system already constructed. The amount of this contract was $53,786, all of which was to be paid out of the future earnings of the plant. It is the execution of this contract that plaintiff now seeks to enjoin.

Section 70-603, Comp. St. Supp. 1931, provides in part as follows: "Any * * * village * * * shall have the power and authority * * * to provide for or to secure the payment of the cost or expenses of purchasing, constructing, or otherwise acquiring, extending and improving, any real or personal property necessary or useful in its operation of any electric light and power plant, distribution system,

and/or transmission lines, by pledging, assigning, or otherwise hypothecating, the net earnings or profits of such * * * village, derived, or to be derived, from the operation of such electric light and power plant, distribution system, and/or transmission lines and, to that end, to enter into such contracts * * * as may be proper to carry out the provisions of this section." This court has held that this statute did not grant either express or implied power to a village to purchase an electric light and power plant and pay for it by pledging future earnings. *Interstate Power Co. v. City of Ainsworth,* 125 Neb. 419, 250 N. W. 649. But, in the case at bar, the village of Deshler was the owner of a light plant and transmission lines when the contract in question was entered into. We conclude, therefore, that the village of Deshler had the power, under the statute cited, to add to its light plant and extend its lines and pay the expense and cost thereof by pledging the future earnings of the plant without obligating the municipality for its payment.

Plaintiff further contends that the contract sought to be enjoined differs materially from the specifications for the work given to bidders, in that the engine specifications contained in the original plans were completely omitted from the contract. The record shows that, at the time plaintiff sought a copy of the contract from the village, pages 36 to 44, inclusive, which pages contained the engine specifications, were missing. The evidence, however, is quite clear that the pages had been removed therefrom subsequent to the time that the contract was entered into and that the contract when made was full and complete and thoroughly understood and carried out by the contracting parties. We have also failed to find any evidence of fraud or collusion between the officials of the city and the bidders on the contract, as charged by the plaintiff in its petition.

The contention is made, however, that the cost of the improvements was $20,000 more under the plan adopted by the village board than it would have been if payment had been made in cash. Complaint is also made that Fair-

banks, Morse & Company, being the only bidder, exacted an excessive price from the village for its engine and equipment. The evidence on this subject tends to sustain this allegation of the petition. The evidence also shows, however, that the village board hired a special engineer to make estimates on costs and to advise them generally as to this work. The record shows that the special engineer performed those duties. The village board were fully cognizant of the terms of the contract and the price called for therein. It is not the province of this court to substitute its judgment for that of the village officials in matters of this kind. In the absence of fraud or mistake, this court is powerless to intervene.

In *City of Henderson v. Young*, 119 Ky. 224, 83 S. W. 583, the court said: "In the management and operation of its electric plant a city is not exercising its governmental or legislative powers, but its business powers, and may conduct it in the manner which promises the greatest benefit to the city and its inhabitants in the judgment of the city council; and it is not within the province of the court to interfere with the reasonable discretion of the council in such matters." In *Butler v. Karb*, 96 Ohio St. 472, 117 N. E. 953, the court said: "A mere departure from the exercise of sound judgment does not warrant the interposition of the court and the control and guidance of its mandate." In *McMaster v. Mayor and Council of Waynesboro*, 122 Ga. 231, 50 S. E. 122, the court said: "The business affairs of a municipality are committed to the corporate authorities, and it would require a strong case to authorize the courts to interfere with their management. Here nothing was shown to warrant an order restraining the city from making a contract for lighting with electricity, even if the result thereof would be to render valueless the small oil equipment and appliances already owned. * * * An injunction is intended to preserve the status, not to undo what has been done. Neither is it intended to restrain what is not threatened to be done. If, therefore, as alleged in the defendants' answer, the city had already made a contract,

or if, as alleged in the answer, it was not threatening or preparing to make a ten-year contract, there was nothing to enjoin."

We therefore conclude that the plaintiff has failed to show any right to the equitable remedy of injunction. The trial court properly dismissed the action.

AFFIRMED.

CITIZENS STATE BANK OF THEDFORD ET AL., APPELLANTS, V. UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLEE.

FILED MARCH 17, 1936. No. 29595.

1. **Pledges.** A pledgee becomes liable for conversion on surrendering a pledged certificate of deposit, and taking in lieu thereof, without pledgor's knowledge, a new certificate having a later maturity date.
2. **Evidence** examined, and *held* insufficient to sustain appellee's defense of ratification.

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

Squires, Johnson & Johnson and *Evans & Lee,* for appellants.

Clarence A. Davis and *L. L. Abbott, contra.*

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

EBERLY, J.

This is an action at law brought by the Citizens State Bank of Thedford, Nebraska, and J. H. Figard, against the United States Fidelity & Guaranty Company of Baltimore, Maryland, to recover the sum of $3,000 alleged to have been entrusted to the defendant company for the sole purpose of indemnifying it against loss because of the execution of an appeal bond in the case of the Nebraska State Bank of Valparaiso, Nebraska, v. Citizens State Bank of Thedford, Nebraska, J. H. Figard and Otto J. May. The appeal bond in the sum of $5,500 was actually executed by the defendant

company; the appeal was perfected; the judgment appealed from was reversed in the appellate court (122 Neb. 522); and later, after remand, the action was dismissed in the trial court. These facts admittedly negative all liability on the part of the defendant company on the appeal bond, and entitle the plaintiffs in the instant case to the return of the property pledged as indemnity. The fundamental question is whether the duty to return this pledge, under the peculiar facts in this case, has been performed by the defendant company, or whether it has been guilty of the conversion of the same and thereby incurred a personal liability therefor.

After trial in the district court judgment was rendered for defendant, and plaintiffs appeal.

The facts disclosed by the record include the following: On March 17, 1930, in an action commenced in the district court for Furnas county by the Nebraska State Bank of Valparaiso (of Saunders county) against the Citizens State Bank of Thedford, Nebraska, and J. H. Figard, both of Thomas county, Nebraska, and another, a judgment for an amount definite was entered against the defendants. In this litigation, J. H. Figard was represented by Stevens & Stevens, a firm of attorneys composed of John Stevens and Wade Stevens, both of whom were residents of Furnas county, Nebraska. These attorneys did not represent the Thedford bank in the proceedings that resulted in the judgment; nor, except for what services they may have rendered in securing an appeal bond, did they in any manner appear for that institution in the appellate proceedings. Throughout the litigation the Citizens State Bank of Thedford was represented by Evans & Lee, a firm of attorneys of Broken Bow, and by Squires, Johnson & Johnson, a firm of attorneys of Broken Bow, Nebraska. It appears that the Citizens State Bank of Thedford, after the rendition of the judgment, and before the filing of the appeal bond, "closed its doors." On the 7th day of April, 1930, after a telephone conversation between a representative of the firm of Stevens & Stevens and Figard, the latter, in company with T. P.

Hamilton, president of, and representing, the Citizens State Bank of Thedford, proceeded to Alliance, Nebraska, and on their own individual responsibility negotiated a loan of $3,000 from the Guardian State Bank. This was borrowed by Figard and Hamilton on a "fifty-fifty" basis for the purpose of depositing the same with the clerk of the district court as a "cash appeal bond" in the case heretofore mentioned, which they were both desirous of appealing. This money was immediately transmitted to the First State Bank of Beaver City by telegraph. This telegram to that institution contained the following: "Notify and pay to Stevens & Stevens, attorneys, $3,000 for J. H. Figard and Citizens State Bank, Thedford, Nebraska, we are remitting by mail."

In reply to this telegram the following letter, signed by "Stevens & Stevens, by Wade Stevens," was addressed to and received by Figard at Thedford:

"April 8, 1930. Mr. J. H. Figard, Thedford, Nebraska. Dear Mr. Figard: We had notice from the local bank last evening that they had received $3,000 from the bank at Alliance. We receipted for it today. We found no provision for the deposit of cash as a supersedeas bond and our clerk does not like to take the responsibility of holding the money, so we deposited the $3,000 on time deposit; which will draw 3% for six months or 4% for a year's deposit. We anticipate that it will be on deposit for a year. We then executed a bond and indorsed the certificates of deposit to the bonding company as security. The premium on this bond is $55 which we will ask that you and the bank send us. The interest on the deposit will be $120 if left a year, which will more than reimburse you for the premium. We would have had to lose the interest if we had induced the clerk to hold the money. We are inclosing an application for a bond which please fill out and return to us. You do not need to pay any attention to anything except the first page where you may fill in numbers 8 and 9 and then sign on the lines checked. Trusting this will meet with your approval we are, with best regards, Yours very truly."

With this letter there was inclosed the ordinary application for the execution of an appeal bond in the case of Nebraska State Bank of Valparaiso v. Citizens State Bank of Thedford et al., directed to the United States Fidelity & Guaranty Company. It provided for the payment of a premium of $55 per annum in advance during the continuance of the obligation.

The evidence is without dispute that the letter was never submitted to Hamilton and that he never was advised of the facts recited therein, and it does not appear that any other officer or agent of the Thedford bank was given any information as to its contents. It also appears without question that the United States Fidelity & Guaranty Company executed the appeal bond applied for, and the same was properly filed and approved on April 8, 1930, and that the applicants paid the first year's premium thereon in advance.

In connection with the bond transaction, John Stevens testifies that he is one of the members of the firm of Stevens & Stevens; that during the period of the events connected with this litigation his son, Wade Stevens, the other member of the firm, was in the bonding business, representing the United States Fidelity & Guaranty Company; that the firm of Stevens & Stevens, lawyers, had nothing to do with the bonding business; that it was a side business of his son Wade, and strictly his personal affair, and that the commission derived therefrom went to Wade. This witness also testified that he had nothing to do with the matters of business pertaining to the bonding business, and the furnishing of reports, "and such as that," between Wade Stevens and the United States Fidelity & Guaranty Company. This evidence is without express contradiction in the record.

It also appears from the "power of attorney," in writing, duly executed by the United States Fidelity & Guaranty Company, that Wade Stevens was the duly appointed attorney in fact for that company, and as such authorized and in charge of its business in Furnas county, Nebraska.

It further appears that, instead of a payment to Stevens

& Stevens of the $3,000 in cash by the First State Bank of Beaver City, there was issued by that institution to Stevens & Stevens on April 8, 1930, a nonnegotiable certificate of deposit, bearing date of April 8, 1930, due six or twelve months after date, bearing interest. Thereupon this certificate of deposit was indorsed, "Pay to United States Fidelity & Guaranty Company as security on appeal bond executed by J. H. Figard and Citizens State Bank of Thedford, Stevens & Stevens," and transmitted to the United States Fidelity & Guaranty Company, and thereafter held by them until about the maturity thereof. At that time it was indorsed by this company in the words, "for renewal only, United States Fidelity & Guaranty Company, by J. Irving Cook," and returned to their Furnas county agent, Wade Stevens. Thereupon Wade Stevens indorsed the name of "Stevens & Stevens" thereon, and on April 11, 1931, surrendered this instrument to the maker, and in lieu thereof there was issued to him a second nonnegotiable certificate of deposit bearing date of April 8, 1931, for the sum of $3,120 payable to Stevens & Stevens, or assigns, due 6 or 12 months after date, with interest. This, he indorsed, "Pay to United States Fidelity & Guaranty Company for security on appeal bond of J. H. Figard and Citizens State Bank of Thedford," and transmitted this renewal to that company.

In the meantime, on October 22, 1930, at the request of T. P. Hamilton, president of the Citizens State Bank of Thedford, the Guardian State Bank of Alliance addressed a letter to Stevens & Stevens with reference to this transaction. One paragraph of this letter reads as follows:

"He (Hamilton) now has up a cash bond and he would like to know if he could place up liberty bonds instead. If it is desirable to use the liberty bonds, would a safe-keeping receipt either from our bank or the United States National Bank of Omaha cover your needs?" On October 24, 1930, receipt of this letter is acknowledged by "Stevens & Stevens, by Wade Stevens." On October 30, 1930, "Stevens & Stevens, by Wade Stevens," transmitted to the Guardian

State Bank a letter addressed to Wade Stevens by the United States Fidelity & Guaranty Company, bearing date of October 27, 1930, declining to accept and make substitution of the liberty bonds under the conditions embodied in the offer made.

It also appears that on July 17, 1931, "Stevens & Stevens, by Wade Stevens," transmitted a letter to Figard, the last two paragraphs of which were as follows:

"The certificate of deposit was renewed in the amount of $3,120, so there is plenty of interest to take care of the premiums although the interest will not be available until the certificate is cashed.

"We therefore suggest that you send us $55 to pay the renewal premium."

Figard's evidence in the record is undisputed that prior to the receipt of this letter he had no information concerning the renewal of the certificate of deposit, and at no time authorized or consented thereto. He also testifies that this information was not transmitted by him to Hamilton or the officers of the Thedford bank. It is stipulated that the First State Bank of Beaver City, issuer of the second certificate of deposit, closed its doors and was taken over by the banking department of the state of Nebraska on November 20, 1931, and thereupon ceased to be a going concern. It also appears that the judgment of the district court appealed from, and to supersede which, pending such appeal, the bond executed by the United States Fidelity & Guaranty Company was given, was reversed in the supreme court of Nebraska on February 10, 1932 (*Nebraska State Bank v. Citizens State Bank,* 122 Neb. 522), and that cause thereafter remanded to the district court for Furnas county for further proceedings; that on June 10, 1932, by order of that court, the action was finally dismissed and all possible financial liability on the appeal bond terminated. On June 24, 1932, the plaintiffs made demand on the defendant company for the repayment of the sum of $3,000 advanced by them to the company, and such company "has at all times failed, neglected and refused to pay the same."

This transaction relates wholly to securing an appeal bond and indemnifying the surety on that obligation. The parties in interest were so situated that it was carried on wholly by telephone, telegraph, and letters. It was an insurance transaction and constituted a part of the insurance business of Wade Stevens, the agent of the United States Fidelity & Guaranty Company. Notwithstanding, in letters, we find the signature "Stevens & Stevens, by Wade Stevens," employed, the nature of the business which formed the subject of these communications fully discloses that they pertain to the insurance business of Wade Stevens, and in which the firm of Stevens & Stevens had no part or interest. But, at all events, the only business which the plaintiffs transacted with the defendant company was limited to "insurance business" which was strictly a business carried on by Wade Stevens as the company's agent. Granting that in these matters Wade Stevens, for purposes of his own, employed the name of the law firm of which he was a member, still in view of the nonnegotiable character of the instruments involved, and the relation of the parties in interest, this situation invokes the application of the rule:

"Notice to an agent, who, with their knowledge and consent, represents both parties to a transaction, is notice to either of them to whom it would be notice if the agent represented him alone, and if each would be charged the notice to the agent is notice to both. Thus, where a principal knows that his agent is also acting as agent for the party adversely interested in the transaction, and yet consents to let him act as his agent, the principal is estopped from denying notice and knowledge which the agent has during the negotiation." 2 C. J. 872.

Under the facts narrated, the first certificate of deposit was a chose in action, the receipt of which by the defendant company constituted a valid pledge to secure it against loss on the appeal bond it had executed. In this transaction it was chargeable with knowledge of the true relation of the parties involved, and that upon execution of the bond and

delivery of the collateral the transaction was finished. Thereafter, on maturity of the certificate of deposit, without notice to, or actual knowledge of, or authority from, the plaintiffs, on or about April 8, 1931, the defendant company renewed and extended the certificate of deposit for another year. The result of this action brings the case squarely within the rule, viz.: "The pledgee's unauthorized renewal or extension of pledged collateral amounts to a conversion." 49 C. J. 952.

The principle cited was approved by this court in *Haas v. Bank of Commerce*, 41 Neb. 754, 60 N. W. 85. In that case, in the opinion approved by this court, Irvine, C., says: "We think that the weight of authority is to the effect that if a pledgee, without the consent of the debtor, renews or extends a note pledged as collateral, or surrenders such note and takes new security, he must account to his debtor as if he had collected it in full. *Gage v. Punchard*, 6 Daly (N. Y.) 229; *Nexsen v. Lyell*, 5 Hill (N. Y.) 466; *Southwick v. Sax*, 9 Wend. (N. Y.) 122; *Depuy v. Clark*, 12 Ind. 427."

This doctrine was again approved in *Ross v. Barker*, 58 Neb. 402, 78 N. W. 730.

In *Larson v. National Surety Co.*, 60 N. Dak. 538, 235 N. W. 495, in a case involving facts almost identical with those here presented, it was held: "A pledgee holding as security a certificate of deposit payable on a day certain, with authority to collect it without notice at any time, who without the knowledge and consent of the pledgor surrenders the certificate of deposit so held by it and takes in lieu thereof a new certificate payable at a date long subsequent to the date of maturity of the original certificate, becomes liable to the pledgor as for a conversion."

In this situation the defendant company presents as its defense the doctrine of ratification of the renewal and extension of the certificate of deposit by silence—the failure of plaintiffs to promptly and seasonably disaffirm it.

Ratification may be defined as follows: "Ratification is the affirmance by a person of a prior act which did not bind

him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." Restatement, Agency, sec. 82.

It is necessary in this connection to distinguish between ratification and estoppel. "The substance of estoppel is the inducement to another to act to his prejudice. The substance of ratification is confirmation after conduct." *Steffens v. Nelson,* 94 Minn. 365, 102 N. W. 871.

Ratification is a matter of intention. In order that there be ratification, there must be a voluntary assumption of the unauthorized act on full information. 2 C. J. 928. It would not suffice to show that the principal omitted to make inquiries, or might have learned the facts by diligence. *Rawleigh Co. v. Bunning,* 107 Neb. 475, 186 N. W. 331. A party is bound by ratification only because he intended to be, and its existence is determined in such intention of the principal, either express or implied.

In *Oberne v. Burke,* 50 Neb. 764, 70 N. W. 387, this court announced the rule: "A ratification by a principal of the unauthorized act of his agent may be inferred from the conduct of the former inconsistent with any intention other than a purpose to adopt such act as his own."

It has been stated that "Silence simply in itself is ordinarily no evidence of anything." *Iron City Nat. Bank v. Fifth Nat. Bank,* 47 S. W. (Tex. Civ. App.) 533.

It is only when silence is connected with special circumstances making it the duty of the principal to speak that obligations are created. *White v. Langdon,* 30 Vt. 599.

As a practical matter, the maintenance of silence is almost inseparable from the circumstances under which it is maintained. Indeed, it is the conditions under which silence occurs and which accompany it that establish or negative ratification.

The defendant company cites to sustain its contention the following principle quoted from Restatement, Agency, sec. 94: "An affirmance of an unauthorized transaction may be inferred from a failure to repudiate it." In the text fol-

lowing the announcement of this principle appears the following comment: "a. Silence under such circumstances that, according to the ordinary experience and habits of men, one would naturally be expected to speak if he did not consent, is evidence from which assent may be inferred."

A careful examination of the Nebraska cases cited by appellee discloses that they are inapplicable to the instant contention.

In *Day v. Miller*, 1 Neb. (Unof.) 107, 95 N. W. 359, where property was knowingly received as the result of an unauthorized transaction, and knowingly retained for more than two years, it was held to amount to a ratification by such possessor as well as an estoppel binding upon him.

In *Fenimore v. White*, 78 Neb. 520, 111 N. W. 204, where plaintiff's attorney made a settlement with the defendant for $200 which was paid over to his client, with knowledge and without objection on part of such client, and the return of which was never offered or made, it was held sufficient to show a ratification of the acts of the attorney.

In *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*, 59 Neb. 7, 80 N. W. 48, this court announced the principle: "A sale of corporate assets, made by an agent in excess of his authority, will be, ordinarily, ratified by the acts of the corporation in dealing with the purchaser as the owner of the property."

In *Singer Sewing Machine Co. v. Barger*, 92 Neb. 539, 138 N. W. 741, we held that, where the holder of a note, with notice that it had been unlawfully altered by raising the amount, by its agent, brings an action upon it in its altered condition, and endeavors to recover in such action, he thereby ratifies the act of alteration.

In the instant case the plaintiffs neither received, dealt with, or sued upon the obligation which the defendant caused to be created.

In the case before us ratification is in the nature of an affirmative defense, and the form of the issue imposes the burden of the evidence upon the defendant. *Rawleigh Co. v. Bunning*, 107 Neb. 475, 186 N. W. 331.

Not only is there affirmative evidence in the record that the Thedford bank, T. P. Hamilton, and the bank's officers and agents at no time had knowledge of the renewal and extension of the certificate of deposit until substantially at the time of the commencement of this action, but no attempt is made to negative that fact. True, plaintiffs paid one-half of the renewal premium on the appeal bond about April 8, 1931, but that obligation was wholly unconnected with the subject of indemnity. Besides, the Thedford bank had "closed its doors" prior to the execution of the appeal bond and the necessary steps taken to secure it were performed by its president in his individual responsibility and for its benefit. No express authority to renew the certificate had been conferred on Stevens & Stevens by either J. H. Figard or the Thedford bank. None can be implied. *Luce v. Foster*, 42 Neb. 818, 60 N. W. 1027.

As a result of the renewal and extension of the certificate of deposit by the United States Fidelity & Guaranty Company on the 8th of April, 1931, made without knowledge or approval of plaintiffs, the rights of the parties thereto and the owners thereof were definitely fixed. Subsequently the defendant parted with nothing in reliance on the new situation. Nothing was accepted or received or enjoyed by the plaintiffs because of what had happened. Briefs fail to indicate that the defendant refrained from taking any steps that would have been taken had repudiation been made by plaintiffs earlier. Delay has impaired the rights of no one connected with the proceedings, and nothing of value has accrued to the plaintiffs by reason thereof. Under these circumstances, the authorities upon which defendant relies are inapplicable to the uncontradicted evidence. There has been a total failure on part of the defendant to establish a ratification by plaintiffs of the renewal of the certificate of deposit, and plaintiffs are entitled to recover the sum of $3,000 and interest as alleged in their petition.

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

REVERSED.

JOHN J. WILSON, TRUSTEE, APPELLEE, V. CONTINENTAL NATIONAL BANK, APPELLANT.

FILED MARCH 20, 1936. No. 29750.

1. **Banks and Banking:** REORGANIZATION. When a state bank is reorganized as a national bank, which takes over all the assets and rights of the state bank, the national bank is subject to all existing obligations of the old bank as if the change had not taken place.
2. **Limitation of Actions.** When a creditor sues a state bank to establish liability on a debt, the debt is merged in the judgment obtained; and when the creditor sues to enforce the judgment against a national bank, which was organized by taking over the assets and liabilities of the state bank, the statute of limitations begins to run on that judgment as of the date it was obtained.

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

Beghtol, Foe & Rankin, for appellant.

Burkett, Wilson & Van Kirk and *G. E. Hager, contra.*

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

GOSS, C. J.

Defendant appeals from a judgment rendered against it. The action was a law action, but was tried to the court without the aid of a jury.

Plaintiff John J. Wilson, as trustee in bankruptcy of the Lincoln Box and Manufacturing Company, sued Nebraska State Bank in 1930, claiming that the bank charged a deposit to the company's checking account and credited it on a demand note of the company held by the bank, thus receiving a preference over other creditors of the same class. The trial court found for Nebraska State Bank, but on appeal this court reversed the judgment and directed a judgment to be entered for plaintiff. *Wilson v. Nebraska State Bank,* 126 Neb. 168, 252 N. W. 921, filed February 16, 1934. Accordingly, on May 26, 1934, judgment was entered for

plaintiff against Nebraska State Bank for $12,570.16, with interest at 7 per cent. from the date of judgment.

In the instant case plaintiff alleges in his supplemental petition, filed May 29, 1934, not only the material facts above stated, but that, on March 22, 1929, Nebraska State Bank entered into a contract with the Continental State Bank of Lincoln, with the approval of two-thirds of the stockholders and with the approval of the department of trade and commerce of the state of Nebraska, consolidating, merging and thereafter continuing their banking business under the name of Continental State Bank; that Nebraska State Bank transferred all its resources and liabilities to, and they were taken over and retained by, Continental State Bank; thereupon Nebraska State Bank ceased to do business and has had no assets; that, by the contract of merger, the Continental State Bank assumed and agreed to pay all liabilities owing by the Nebraska State Bank, including the debt owing to plaintiff; that on or about May 25, 1929, the Continental State Bank was duly, under the provisions of the national banking laws, converted into a national banking association with the name Continental National Bank; and that, by virtue of the premises, defendant is liable for the judgment of plaintiff, no part of which has been paid.

The amended answer to the supplemental petition admits the execution of the contract of mergêr of the two state banks on March 22, 1929, admits that Continental State Bank was converted into Continental National Bank May 25, 1929, and is still operating as such, but denies other allegations of the petition; alleges that more than five years elapsed between the execution of the contract of March 22, 1929, and the filing of the supplemental petition and that the action is barred by the statute of limitations.

The amended answer also alleges, in paragraph 1 of section 7, that, in adopting the terms of the contract of merger of March 22, 1929, and claiming the benefit of it, plaintiff is subject to all the defects thereof to which the Nebraska State Bank would have been subject if it had sued

on the contract; then defendant proceeds further to plead in the same section 7 that the contract was procured by false and fraudulent representations as to certain of the bank's assets, which were relied upon by the Continental State Bank and this defendant to its damages, to wit, that the customers' notes were worth about $147,000 less than represented and the real estate was worth about $19,000 less than represented. In paragraph 8 of the amended answer defendant pleads that none of the foregoing facts were known to defendant, but were known to Nebraska State Bank at the time the contract was executed, that it relied upon the representations of value and would not have executed the contract if it had known the true facts; that defendant has been damaged by the Nebraska State Bank in the sum of more than $24,450.17, that its damage and the failure of consideration is more than the amount claimed by plaintiff on its judgment and defendant is entitled to an offset as to any claim of plaintiff.

Plaintiff moved to strike paragraphs or sections 7 and 8 of the amended answer and the motion was sustained.

Defendant then filed a motion reciting that, in the oral argument on plaintiff's previous motion, plaintiff's counsel stated that it did not seek to recover upon the contract as a contract, but that the contract was merely evidence of the alleged consolidation of the two banks, and that no claim was made in the petition, nor would be made at the trial, that this suit was on the contract itself as made for the benefit of plaintiff. Defendant therefore moved the court to enter upon the record the said statement of plaintiff's counsel, or, in the alternative, to require plaintiff to file a statement or pleading that this is not a suit upon the contract, or to permit defendant to withdraw its answer and to move to require plaintiff to elect whether he relies upon the merger pleaded or upon the contract pleaded or both. The court made a journal entry indicating that it considered the motion as one to require plaintiff to elect causes of action and overruled the motion.

The reply was a general denial. There was a trial to the

court which resulted in findings of fact and conclusions of law in favor of plaintiff. The conclusions of law are (1) that plaintiff's cause of action accrued when the judgment was ordered entered by the supreme court in *Wilson v. Nebraska State Bank, supra,* on February 16, 1934, and is accordingly not barred by the statute of limitations; (2) that plaintiff is entitled to recover from defendant here the full amount of that judgment with interest and costs, under section 8-160, Comp. St. 1929; (3) that plaintiff is entitled to recover from defendant "under the common-law rule making continuing corporations liable for all indebtedness of all corporations absorbed, merged into or consolidated with continuing corporation;" (4) that plaintiff is entitled to recover "under and by virtue of the written contract of consolidation and merger between the Nebraska State Bank and the Continental State Bank in connection with the described acts done and performed by the Continental State Bank and the Continental National Bank in the consummation of such merger." Judgment was entered for plaintiff.

The first assignment of error to be considered is that the action against defendant was barred by the statute of limitations because a favorable opinion on that subject would end the necessity for further discussion. The preference was secured by Nebraska State Bank in 1928, and on March 22, 1929, the merger contract was entered into by which the Nebraska State Bank was merged with the Continental State Bank. Plaintiff says the cause of action arose in 1928 and when the merger occurred in 1929 he could then have sued either of these banks or both of them. Plaintiff waited until 1930 and sued the Nebraska State Bank only. The present suit was begun (at least the supplemental petition was filed) May 29, 1934. Plaintiff contends that he first had to establish his right to a judgment, and for that purpose sued the Nebraska State Bank on his cause of action based on the preference of that bank when it took the deposit of the insolvent company to pay itself as a creditor; the district court erred in its judgment in

that cause and it was necessary to appeal to the supreme court to establish plaintiff's rights; that cause was not decided until February 16, 1934, when this court reversed the judgment of the district court and ordered the entry of judgment for the amount of the preference with interest and costs; so plaintiff asserts that his right of action against defendant did not accrue until he had established his judgment against the Nebraska State Bank and that the five-year statute of limitations had not run.

It is to be noted that plaintiff is not seeking to follow particular assets as a trust fund and to recover them wherever and whenever he finds them. He seeks to recover upon a judgment based upon a cause of action which has become merged in that judgment. "It is a general rule that a judgment is to be regarded as a new debt, and that the cause of action on which it is founded merges therein, but such general rule is subject to limitations and exceptions." *State v. Citizens State Bank*, 115 Neb. 593, 214 N. W. 6. We are not concerned in the exceptions, which are noted in the opinion. The body of the opinion states: "As a general rule, the doctrine of merger will be applied only when the ends of justice will be thereby subserved." It might well be said that the converse is true, and that the doctrine will be applied when it will serve the ends of justice. Perhaps that principle would not extend to preventing the statute of limitations from running in a case where it was clearly applicable. But here plaintiff had no right or at least was not required to sue Continental National Bank until he had established his asserted right to a judgment against Nebraska State Bank for taking as a preference the money of his bankrupt beneficiary for which he became the trustee. He brought his suit in ample time to get an adjudication long before any possible statute of limitations could run in favor of any party who could be involved. The delay in securing the judgment was not of his making but was caused by an erroneous decision of the trial court. When the judgment was secured, somewhat more than five years had elapsed since the original cause of action arose against

the Nebraska State Bank. If plaintiff had sued Continental National Bank without first obtaining a judgment against Nebraska State Bank, he would have been faced with the plea, by demurrer or otherwise, that he had not established liability of Nebraska State Bank for the unlawful preference. If he had sued Continental National Bank after his petition against Nebraska State Bank had been dismissed but before the cause had been reversed and before the alleged five-year statute of limitations, now claimed by defendant, had run, he would have been met by the plea of *res adjudicata,* or at least that no liability was shown to exist in favor of plaintiff and against Nebraska State Bank.

Plaintiff pursued a course provided by law when he sued Nebraska State Bank alone in the first instance. He might then perhaps have joined Continental State Bank, but he was not required to do so. In *Pearce v. Brilliant Coal Co.,* 200 Ala. 630, 77 So. 4, a similar situation arose, in which plaintiff was seeking to reach and subject to judgment certain assets of Aldrich Mining Company, which had been merged in defendant. The Aldrich Mining Company had been sued about a year before the consolidation. The case went three times to the supreme court on appeal and the final judgment was not obtained until more than eight years after the merger. The statute of limitations in that case was five years. A demurrer was sustained to the bill on the ground, among others, of the statute of limitations. The supreme court reversed the judgment. The statute made the new corporation liable, but notwithstanding this the court held that a plaintiff was not required to proceed in the first instance against the new corporation (though he might sue both) but plaintiff might first obtain an adjudication of liability against the old corporation. If he did so his claim against the consolidated corporation would not be barred in five years after the consolidation. While it is true that case differed from the case at bar in that the original debtor company was sued before the merger, we think the principle is applicable here. In the course of the opinion the court said: "It was never intended by the law-

makers that a diligent creditor should lose his claim or demand by pursuing one of the courses provided by law, purely on account of the law's own delay. * * * It is true that he might have proceeded earlier, and in different modes, against this appellee corporation. * * * It does not yet appear affirmatively that the doctrine of either laches, estoppel, or election has barred all remedies against the appellee corporation in person, or against the property it acquired from the original corporation."

We are constrained to hold that the statute of limitations does not bar the action of plaintiff here.

We next consider the assignment of error that the court erred in striking sections or paragraphs 7 and 8 of defendant's answer, the contents of which have heretofore been recited. Briefly restating the situation, plaintiff had pleaded the contract of merger between the Nebraska State Bank and the Continental State Bank, by which the latter had assumed and agreed to pay the liabilities of the former, which included the debt to plaintiff. Defendant in its answer admitted that the contract of merger was made and then pleaded, in the paragraphs that were stricken, that the contract was procured by the fraudulent representations, also pleaded. When the paragraphs were stricken, defendant vainly asked that the record be made to show that plaintiff did not rely upon the contract for a recovery here. No such record was made. The final judgment in the district court was, in part at least, expressly based upon "the written contract of consolidation and merger between the Nebraska State Bank and the Continental State Bank in connection with the described acts done and performed by the Continental State Bank and the Continental National Bank in the consummation of such merger." If this conclusion of law were based only upon the assumption of liability in the contract of merger, then the ruling of the court in striking defenses to the contract would be erroneous. But it is apparent that the court evidently merely considered the contract as in evidence to show the merger and with other "described acts" thereafter to bind defendant as to

the merger, and did not base plaintiff's right to recover upon the assumption clause of the contract. In this view, it was not prejudicially erroneous to strike the defenses complained of. They were not proper defenses against a third party depositor in Nebraska State Bank, whose deposit had been taken by the bank unlawfully under the bankruptcy act, especially when defendant took advantage of and kept the deposit and all other resources received in the consolidation. But, assuming that this particular reason for the judgment was not valid, that of itself would not invalidate the judgment. If there existed a proper basis for the judgment, it does not matter that the court gave wrong reasons for the judgment that was rendered. Indeed, one of the conclusions of law said that plaintiff was entitled to recover "under and by virtue of section 8-160 of the Compiled Statutes of Nebraska for 1929." That statute does not, of itself, make a consolidated bank liable. It merely provides that the transfer of resources by a merging bank shall not "operate to defeat the claim of any creditor * * * in the collection of his debt against such banks or either of them." So that the chief, if not the only, reason plaintiff was allowed to recover against defendant was under the common-law liability of defendant to pay "the indebtedness of all corporations absorbed, merged into or consolidated with continuing corporation," to use the language of the court in one of its conclusions of law. The debt sued on was a debt owed plaintiff by Nebraska State Bank. Defendant had taken over all assets of that bank and had continued to use them without repudiating any of the liabilities. We think this particular debt could not be repudiated in this action on the ground of fraudulent representation of value of its assets by Nebraska State Bank when Continental State Bank took them over in the merger. Plaintiff had no part in any fraudulent representations of assets. His was a debt due from Nebraska State Bank. He had a right to recover it from that bank and from any successor who could be shown to have assumed it legally. Therefore, it was not erroneous to strike such a plea from the answer.

As to common-law right of recovery, it is said in 7 R. C. L. 181, sec. 155: "The constituent corporations cannot by consolidation escape the payment of their debts incurred before the consolidation or defeat the right of their creditors to subject their property to the satisfaction of such debts. The consolidated corporation takes the property of the constituent corporation with notice of such trust and does not occupy the position of a *bona fide* purchaser for value; consolidation is wholly unlike the *bona fide* sale of the assets of one corporation to another."

Section 35, ch. 2, title 12, being the section of the national banking act which provides for the organization of state banks as national banking associations, states the well-known rule in an annotation found on page 85 of title 12, U. S. C. A.: "Rights and liabilities of reorganized bank. —The identity or corporate existence of the bank is not destroyed by its reorganization as a national bank, and all the assets and rights of the old bank pass to the new bank without any formal assignment, and it is subject to all existing obligations and liabilities of the old bank as if the change had not taken place." (Citing many cases.)

The debt to plaintiff was not established until the end of its suit against Nebraska State Bank. That was conclusive against Continental State Bank, which had consolidated the other bank with it and took over its liabilities as well as its assets. Defendant is liable under the common law or general law for all debts of Continental State Bank out of which Continental National Bank was formed. While we do not agree with all the reasons given by the district court for its judgment, we think the judgment itself was right. It is

AFFIRMED.

HENRY KUHSE, APPELLANT, V. ERNEST M. LUTHER ET AL., APPELLEES.

FILED MARCH 20, 1936. NO. 29517.

1. **Limitation of Actions:** JOINT DEBTORS. "A payment by one of several joint debtors on a note, without the authority or consent of the others, will not toll the statute of limitations as to them." *Hall v. Rogers*, 113 Neb. 290, 202 N. W. 908.
2. ———: ———. A joint maker primarily liable on a note, when executed, who has done nothing to waive the bar of the statute of limitations as a defense or to prevent it from running against the debt as to him, is not deprived of that defense by payments of his comaker or by that part of the negotiable instruments law providing that the person primarily liable is the person absolutely required to pay the debt. Comp. St. 1929, sec. 62-1702.
3. **Trial.** Where an issue of fact was stated in an instruction as the "delivery" of a check and the jury inquired of the court in writing if that meant delivery in person by the joint maker of a note to plaintiff, an affirmative answer in writing *held* not erroneous, there being no evidence of delivery in any other manner.
4. **Bills and Notes:** DEFENSES: WAIVER. A promissory note containing a waiver of demand, protest and extension of time for payment does not thereby waive the defense that an action on the note was barred by the statute of limitations.

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

Mapes, Johnson & Maynard, for appellant.

Cook & Cook and *Abbott, Dunlap & Corbett, contra.*

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

ROSE, J.

This is an action commenced September 27, 1934, on a promissory note for $5,000, dated March 11, 1925, payable March 11, 1926, and bearing interest at the rate of 6 per cent. per annum. Entries on the back of the note show annual payments of interest to March 11, 1932. There is

also an entry indicating that on August 23, 1933, interest was paid to March 11, 1933. Henry Kuhse, plaintiff, was payee. Ernest M. Luther and Edward Luther, defendants, were makers. The note contains the following provision:

"The makers and indorsers hereby severally waive demand, protest, and notice of protest and extension of time of payment of this note."

In addition to indorsements showing payments of interest, the following appears on the back of the note:

"Aug. 23, 1933, payment on this note is hereby extended to March 11, 1934, which is to be considered the due date. H. Kuhse."

The amended petition contains the plea that Edward Luther on August 23, 1933, paid the interest to March 11, 1933. There was a prayer for judgment for principal and unpaid interest amounting to $5,500.

To the petition Ernest M. Luther, defendant, interposed a general denial. Edward Luther, defendant, admitted the execution of the note, and alleged in his answer that he did not receive any part of the consideration; that he signed the note as surety for Ernest M. Luther and for the latter's accommodation; that the action was barred by the statute of limitations.

Upon a trial of the cause the jury rendered a verdict in favor of plaintiff and against Ernest M. Luther, defendant, for $5,548.33, and in favor of Edward Luther, defendant, against plaintiff. The district court entered judgment on the verdict. From that part of the judgment in favor of Edward Luther, plaintiff appealed.

Ernest M. Luther made no defense. The determining question is the statute of limitations as applied to the defense of Edward Luther. On appeal plaintiff stated his position as follows:

"All parties admit that the defendant, Ernest M. Luther, made all of the interest payments except the last one, which was made on the 23d day of August, 1933. Who paid this is in dispute. As to the payment of August 23, 1933, the plaintiff pleaded and produced evidence to prove that the

same was paid by Edward Luther, and the defendant Edward Luther denies this. The defendant Edward Luther took the position that if he did not make the payment the cause of action was barred as against him, and the plaintiff took the position that it made no difference which one of the defendants paid it, it kept the note alive as to both makers. This was the pivotal issue in the trial."

In a preliminary argument, plaintiff insists that defendants were joint makers; that the consideration received from plaintiff by Ernest M. Luther was also consideration as to Edward Luther; that the latter was primarily liable for payment of the debt; that payments of interest by Ernest M. Luther bound Edward Luther; that there should have been judgment against both defendants notwithstanding the verdict; that there was error in refusing offered instructions showing liability of Edward Luther considered as surety and accommodation maker. These propositions are without merit, if the evidence is sufficient to sustain the finding that the action as to Edward Luther was barred by the statute of limitations. The jury were instructed as follows:

"If * * * you find from a preponderance of the evidence that on August 23, 1933, Edward Luther paid the interest on the note to March 11, 1933, by giving to plaintiff a check signed by Ernest M. Luther and made payable to plaintiff, you will return a verdict for plaintiff against both defendants. On the other hand, if these facts have not been proved by plaintiff by a preponderance of the evidence you will return a verdict in favor of plaintiff against the defendant Ernest Luther and against plaintiff and in favor of the defendant Edward Luther. These questions are the sole questions for your consideration."

The defenses as to surety and accommodation maker were thus, in effect, decided in favor of plaintiff. A cause of action against Edward Luther on the note arose when it was due and unpaid March 11, 1926. The petition was filed more than five years thereafter on September 27, 1934. Defendant Ernest M. Luther alone paid the annual interest

to March 11, 1932. Did Edward Luther make the last payment of interest August 23, 1933, as alleged in the petition? In support of that allegation there was evidence tending to prove that, in the First National Bank of Hooper, in the presence of the cashier, on August 23, 1933, Edward Luther gave plaintiff a 300-dollar check to pay the interest to March 11, 1933; that he pushed the check and the note thus indorsed over to plaintiff. The check is in the record. It was signed by Ernest M. Luther alone and does not bear the name of Edward Luther. The latter testified in substance: Never had possession of the check; did not hand it to plaintiff; never saw it until produced in court; never orally promised to pay the debt; never paid anything on it; did not know any interest had been paid or know that the debt was unpaid.

On conflicting evidence the jury found that Edward Luther did not pay the interest for the year ending in 1933 or deliver the 300-dollar check to plaintiff. The pertinent facts were thus settled by the verdict. It follows that the action was outlawed as to Edward Luther long prior to the transactions of August 23, 1933, unless, as a matter of law, the payments of interest by Ernest M. Luther bound both defendants. The majority rule in the United States was recently stated by an annotator as follows:

"A part payment of principal or interest by one of two or more joint or joint and several debtors binds only the person making the payment, and does not operate to take the debt out of the statute of limitations as against his co-obligors." 71 A. L. R. 378.

The cases so holding are collected in the note, including the following Nebraska precedents: *Mayberry v. Willoughby*, 5 Neb. 368, 25 Am. Rep. 491; *Dwire v. Gentry*, 95 Neb. 150, 145 N. W. 350; *Hall v. Rogers*, 113 Neb. 290, 202 N. W. 908. In the last of the Nebraska cases cited the rule was stated in this form:

"A payment by one of several joint debtors on a note, without the authority or consent of the others, will not toll the statute of limitations as to them."

In argument there was an attempt by plaintiff to distinguish the case last cited on the ground that one of the signers of the note was a surety, whereas, in the case at bar, both signers were primarily liable to payee for the debt. The writer of the opinion in the *Hall-Rogers* case, however, said that it was immaterial whether one of the signers "was a surety or a joint obligor, so far as concerns his liability to payee."

It is further contended by plaintiff that the rule quoted was changed by the negotiable instruments law, which provides:

"The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same." Comp. St. 1929, sec. 62-1702.

A joint maker primarily liable on a note, when executed, who has done nothing to waive the bar of the statute of limitations as a defense or to prevent it from running against the debt as to him, is not deprived of that defense by payments of his comaker or by the provision quoted from the negotiable instruments law.

It is further insisted that the trial court erred in directing the jury that delivery of the 300-dollar check to plaintiff meant delivery in person by Edward Luther. Referring to the instruction that both defendants were liable, if Edward Luther paid the interest to March 11, 1933, by giving to plaintiff a check signed by Ernest M. Luther, the jury submitted to the trial court in writing the following inquiry:

"Does the delivery of this check mean delivery in person by Edward Luther?"

To this the presiding judge directed the jury in writing as follows:

"Yes. Delivery as used in these instructions means delivery in person by Edward Luther."

There was clearly no error in this direction, since there was no evidence of a delivery of the check in any other manner. The waiver of demand, protest, notice of protest and extension of time for payment was not a waiver of the

statute of limitations. In these views of the law and the facts, error prejudicial to plaintiff has not been found in the proceedings and judgment of the district court.

AFFIRMED.

H. E. GLATFELTER, APPELLANT, V. H. F. CURTIS ET AL., APPELLEES.

FILED MARCH 20, 1936. NO. 29564.

1. Contracts: RESCISSION. The right to rescind a contract for fraud or duress must be promptly exercised upon discovery of the grounds therefor.
2. ———: ———: DILIGENCE: QUESTION OF FACT. Whether one, seeking to rescind a contract on the ground that it was procured by fraud or duress, has acted with reasonable promptness is, ordinarily, a question of fact and in a law action is for the jury to determine.

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

W. T. Thompson and *John L. Mattox,* for appellant.

C. J. Campbell and *Fradenburg, Stalmaster & Beber, contra.*

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

GOOD, J.

This is an action to recover $4,250 alleged to be due plaintiff from defendants upon a written contract. It was alleged that the contract was executed by plaintiff and defendant Curtis, but, in fact, Curtis was acting not only for himself but for the Lyman-Richey Sand & Gravel Company (hereinafter referred to as the company), of which Curtis was president, and that therefore both defendants are liable to the plaintiff. The company denied that it was a party to the agreement or was liable thereon. Defendant Curtis admitted the execution of the contract, and each of

the defendants set up an affirmative defense that all claims of the plaintiff had been satisfied by a compromise agreement, by the terms of which plaintiff was paid $1,500 cash, given a promissory note for $1,500, a deed to certain real estate, and released from a provision in the original contract whereby plaintiff agreed to abstain from engaging in the sand and gravel business for a period of 15 years. Plaintiff admitted the execution of the settlement contract, but sought to avoid it on the ground that it was procured by fraud and duress. A trial of the issues to a jury resulted in a verdict and judgment thereon for defendants. Plaintiff has appealed.

The record discloses that January 9, 1926, a written option contract was executed by Glatfelter & Powell and Curtis, wherein the former gave an option to the latter to purchase the sand and gravel properties of Glatfelter & Powell, for a consideration named therein, within a stipulated period. Curtis exercised the option within the prescribed period, and the sand and gravel properties were conveyed to him. The consideration mentioned in the contract was $1,000, paid at the time the option contract was executed; $19,000, payable March 1, 1926; $30,000, payable April 1, 1926, and three promissory notes, aggregating $25,000. The promissory notes were due, respectively, March 1, 1927, 1928, and 1929. The contract further provided for the payment of $250 a month for 100 months, commencing April 1, 1926, to Glatfelter and a like amount to Powell. The contract further recited that Glatfelter & Powell would refrain from engaging in the sand and gravel business in the state of Nebraska for 15 years from April 1, 1926. The payments, aggregating $75,000, which were to be made to Glatfelter and Powell jointly, have been made, and a number of the 250-dollar payments have been made to Glatfelter. It is alleged that $4,250, however, was due plaintiff upon the 250-dollar monthly payments when this action was instituted. The record also discloses that shortly after Curtis acquired the properties of Glatfelter & Powell he leased them, with others that he had acquired, to the

company. There were three of these leases, each running for one year. After the expiration of the leases the properties were conveyed absolutely to the company. After the first of the leases was executed the 250-dollar monthly payments to Glatfelter were made by the company.

April 23, 1932, a compromise contract was entered into between Glatfelter, on the one hand, and Curtis and the company, on the other. By the terms of this settlement contract $1,500 in cash was paid to Glatfelter; he was given a promissory note for $1,500 and a deed to certain real estate, and he was released from his agreement to refrain from engaging in the sand and gravel business, as provided in the original contract. Plaintiff seeks to avoid this contract of settlement on the ground that it was procured by fraud and duress. The fraud alleged is that defendants falsely represented that the company was in financial difficulties, was insolvent and unable to pay its obligations in full. Plaintiff also alleged that at the time the contract of settlement was entered into he was threatened with prosecution under the anti-trust laws of the state whereby he would be criminally liable; that an action was then pending by the attorney general against the company and others, and that he would be made a party to this action; that this threat so operated on his mind as to destroy his free agency, and that, under the influence of the fraud and duress so practiced, he was induced to enter into the settlement contract. Plaintiff contends that he did not learn of the fraud practiced upon him until several months later, and very soon thereafter he rescinded the contract of settlement, and in December, 1932, tendered to Curtis return of the promissory note and the deed he had received, but did not return the $1,500 cash, as more than that amount was then due him under the original contract.

On trial of the cause, the court submitted to the jury the question of whether the original contract entered into was in behalf of the defendant Curtis alone or whether he was acting for himself and the company; and submitted to the jury the question of whether or not the contract of settle-

ment in April, 1932, was procured by fraud and duress, and in that connection gave this instruction: "In order to void the contract of April 23d, 1932, as obtained by fraud, or duress, it was incumbent upon the plaintiff to act to rescind it with reasonable promptness after learning the facts, that is, to tender back what he received thereby and disavow the contract, except that it was not necessary for him to offer back the $1,500 which he received. And if you find from the evidence that he failed to act with such promptness in this regard you are instructed that he is not entitled to recover."

Since the verdict was for both defendants and since the only defense offered by Curtis was the compromise settlement, it is clear that the jury found from the evidence either that the contract of settlement was not procured by fraud or duress, or that plaintiff did not act with reasonable promptness in rescinding the contract of settlement.

Plaintiff contends that there is no evidence in the record that plaintiff did not act with reasonable promptness in rescinding the settlement contract; that by the quoted instruction the jury were given to understand that, under the facts disclosed, it was their province to determine whether or not plaintiff had acted with reasonable promptness in disavowing the contract, and that the instruction was, therefore, prejudicial to plaintiff.

With this contention we are unable to agree. Plaintiff made no complaint against the contract of settlement until November, 1932, and does not claim to have made any tender of return of the deed and promissory note until December, 1932. Plaintiff contends that he had no knowledge of the fraud until he learned of a settlement, made some time after April, 1932, between the company and Powell. Plaintiff testified that at the time the contract of settlement was executed he inquired what the company was going to do with Powell, and that Curtis answered, in effect, that Powell would receive nothing further on his contract, and that plaintiff learned later that a settlement was made with Powell, whereby a considerable amount was paid to him.

We fail to discern wherein this information advised plaintiff of any fraud that may have been practiced upon him. From the record it appears that plaintiff was a man of education and quite large business experience; that he had in his employ an able lawyer much of the time and frequently consulted him on business matters.

From an examination of the record, it is very questionable whether there was sufficient evidence to warrant the jury in finding that the representation that the company was in financial stress was untrue. So far as the duress is concerned, plaintiff must have known thereof at the time the contract of settlement was made. Accepting as true his statement, he could have readily ascertained that the action pending against the company and others, to which, it was threatened, he would be made a party, was not a criminal action but one civil in its nature. But, aside from this, there is no competent evidence to show that plaintiff may not have been aware of any fraud or duress practiced upon him immediately after the settlement contract in April, 1932. Under these circumstances, we are convinced that it was a question of fact as to whether or not, under all the circumstances, he acted with reasonable promptness in disavowing the contract.

It is a rule of law that one who seeks to avoid a contract, the execution of which he claims was procured by fraud or duress, must act to rescind within a reasonable time after discovery of the fraud or duress.

In *Arnold v. Dowd,* 85 Neb. 108, 122 N. W. 680, it was held: "The right to rescind a contract for fraud must be promptly exercised upon discovery of the ground therefor." A similar holding was made in *American Bldg. & Loan Ass'n v. Rainbolt,* 48 Neb. 434, 67 N. W. 493. In the latter case it was held: "The right to rescind a contract on the ground of fraud must be promptly exercised upon the discovery of the ground therefor. The continued use or employment of property will, in such case, be construed as an election to affirm the contract under which it was received." This holding was reaffirmed in *Pollock v. Smith,* 49 Neb.

864, 69 N. W. 312. A similar ruling was made in *Vavra v. Claridge,* 112 Neb. 553, 199 N. W. 834. In the latter case it was further held that a "delay of two weeks, when no injury is shown to have accrued to the adverse party, is not an unreasonable delay."

Several months elapsed after the execution of the settlement contract before plaintiff made any complaint, and when, by the exercise of reasonable diligence, he might have been apprised as to whether the representations made were true or false, and been apprised of the character of the action to which he was threatened to be made a party. Under these circumstances, it was a question of fact as to whether the delay was unreasonable, and was a proper question to be submitted to the jury. We think that the court did not err in giving the quoted instruction.

Complaint is made of the giving of other instructions, which we have carefully examined, and we find no error in their giving. Plaintiff complains of the exclusion of certain testimony offered on rebuttal. Objection was sustained on the ground that the evidence was not proper rebuttal. We think the objection was properly sustained. The proffered evidence should have been offered in chief.

Error prejudicial to plaintiff has not been found. The judgment is

AFFIRMED.

ETTA TYLER, APPELLEE, V. ESTATE OF MARY A. MCDOUGAL, APPELLANT.

FILED MARCH 20, 1936. No. 29589.

1. **Witnesses:** COMPETENCY. In an action against a decedent's estate for money loaned, a disinterested witness is competent to testify to admissions against interest by the deceased as to what she owed claimant.
2. **Appeal:** LAW OF THE CASE. "When the evidence is substantially the same as on a former appeal, the weight and effect to be given such evidence must be considered as foreclosed by the

former decision on that point." *Hruby v. Sovereign Camp, W. O. W.*, 83 Neb. 800, 120 N. W. 427.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Harry R. Ankeny and *Raymond B. Morrissey*, for appellant.

Armstrong & McKnight, contra.

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

DAY, J.

Etta Tyler filed a claim against the estate of Mary A. McDougal, deceased, for $500, which she asserts was loaned deceased during her life. Upon trial to a jury, a verdict was returned in favor of claimant. This case has been before this court before (*Tyler v. Estate of McDougal*, 126 Neb. 534, 253 N. W. 672; *id.* 127 Neb. 681, 256 N. W. 518) when it was held that the evidence did not support the finding of the trial court that the amount of the purported loan was $500.

The claimant established her claim entirely by testimony of disinterested witnesses as to admissions of the deceased during her lifetime that she had borrowed $500 from the claimant. The appellant contends that such evidence is insufficient as a matter of law or matter of fact to establish a cause of action. The only authoritative opinion cited to support this contention is *Kislingbury v. Evans*, 40 Utah, 356, 121 Pac. 571, which holds: "Under the statute prohibiting a party to testify to any transaction with a decedent, or to any matter of fact equally within the knowledge of the parties and decedent, a plaintiff suing a decedent's estate for money loaned decedent on an open account is incompetent to testify, when shown a memorandum book and asked what it is, that it is the money that she loaned to decedent, and such testimony may not be considered as evidence of a loan." This does not seem applicable to our case, since Mrs. Tyler did not testify as to the declaration

of Mrs. McDougal. Of course, under our statute, she was likewise an incompetent witness.

However, the authorities almost unanimously support the following proposition: In an action against a decedent's estate for money loaned, a disinterested witness is competent to testify to admissions against interest by the deceased as to what she owed claimant. *Hartley v. Hartley,* 50 Ga. App. 848; *Finney v. Rollins,* 127 Ark. 617, 192 S. W. 210; *Schell v. Weaver,* 225 Ill. 159, 80 N. E. 95; *Jamison v. Jamison,* 113 Ia. 720, 84 N. W. 705; *Mohn v. Mansfield,* 167 Mich. 10, 132 N. W. 525; *Estate of Linkman,* 191 Wis. 353, 210 N. W. 705.

It is urged that the evidence in this case is substantially the same as that on the former appeal. The rule is: "When the evidence is substantially the same as on a former appeal, the weight and effect to be given such evidence must be considered as foreclosed by the former decision on that point." *Hruby v. Sovereign Camp, W. O. W.,* 83 Neb. 800, 120 N. W. 427.

While the record in the former trial is not before us for the purpose of comparison, a reference to the two former opinions in this case indicates that the evidence is not substantially the same. There are other and different witnesses, who testify as to admissions of the decedent relative to the loan by the claimant here, with particularity sufficient to establish the fact, if believed, that the decedent was indebted to the claimant for money borrowed in the sum of $500. The jury believed these witnesses. Under these circumstances, the judgment cannot be disturbed.

AFFIRMED.

TEWELL, District Judge, dissenting.

I dissent from the final conclusion reached by the majority of the court in this case. The evidence introduced in the second trial, and now here for review, does not differ, materially, from that introduced in the former trial, with the exception that in the second trial two witnesses, who did not testify in the first trial, have testified to admissions made by the deceased to the effect that the amount

the deceased had borrowed from the claimant was the sum of $500. No circumstance shown in the evidence, other than of admissions by the deceased, tends to establish the existence of a debt of the deceased to the claimant, and the admissions established by the testimony are mostly of a vague and ambiguous nature.

As against these admissions, the record shows the deceased to have had more than enough immediately available cash to have purchased the property, which it is claimed she purchased with the aid of money borrowed from the claimant, at the time of its purchase, and long after the time of the alleged loan, to have placed $430 in the hands of the claimant with which to pay for her burial in case of her death. While competent and reliable testimony of admissions of a deceased may be sufficient to establish a claim against his estate without corroboration by proof of other circumstances, proof alone of such admissions should be held insufficient as a matter of law when the admissions proved are vague and ambiguous, and other proved circumstances can only be construed as disproving the existence of the debt upon which the claim is based. The holding of this court upon the former appeal was not entirely based, as disclosed by the opinion recorded in 126 Neb. 534, 253 N. W. 672, upon the failure of the evidence to prove the amount of the alleged loan.

I think the rule announced in the second paragraph of the syllabus of the majority opinion should prevent the evidence being held sufficient upon this appeal, and especially so when it differs from the evidence considered on the former appeal only in that it purports to establish the amount of the alleged debt. The failure to establish the amount of the alleged claim at the first trial, when proof of the amount is so plainly a necessary part of the proof, itself looks suspicious. Rules applicable to the sufficiency of proof in cases of this nature had best be such as to occasionally result in denying a claim for an actually existing debt, than to be such as to allow a claim for a debt that has no existence to be so easily established and allowed.

ANNA ROSELAND, APPELLEE, V. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, APPELLANT.

FILED MARCH 20, 1936. No. 29599.

Trial. Where a question of fact that is material to the case is submitted to the jury by the trial court, upon which there is no evidence to support a finding, it constitutes prejudicial error.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

R. B. Hasselquist and *Donald S. Krause, contra.*

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

CARTER, J.

This is an action brought in the district court for Douglas county for damages alleged to have been caused by the negligent operation of one of defendant's passenger trains, resulting in a collision with the automobile in which plaintiff was riding and inflicting injuries upon the plaintiff for which recovery is sought. The verdict of the jury was for $11,000, and judgment was entered thereon. From the overruling of its motion for a new trial, defendant appeals.

The record shows that, on the evening of October 26, 1933, the plaintiff and her husband and about twenty other persons had attended a meeting a few miles from Dunbar, Iowa, all being transported in a school bus engaged for that purpose. At about 1 a. m. the next morning they returned by the same means to the depot in Dunbar where many had left their cars. The plaintiff, her husband and her husband's younger brother got into their car and started east on the highway immediately north of and paralleling defendant's tracks. At a point approximately 425 feet east of the depot, they turned south to cross defendant's railroad tracks, at which time the collision occurred.

Plaintiff contends that the train was traveling at a high,

dangerous and negligent rate of speed; that no whistle was sounded nor bell rung; that the train was being operated without a headlight on the engine; and that defendant negligently failed to have a flagman or automatic signal at the crossing to warn the public.

The contention of the defendant is that the plaintiff was guilty of such contributory negligence as would defeat her cause of action. Defendant also alleges that the whistle was blown and the bell rung before reaching the crossing, as required by law, and that the headlight on the engine was burning at all times mentioned prior to and at the time of the accident.

The record discloses that many witnesses were examined by each party on the matters at issue in the case. There was not any evidence produced, however, tending to show negligence based upon the absence of a flagman or a signaling device at the crossing when the collision occurred. Under the law of Iowa, it must be shown that the crossing is more than ordinarily dangerous before an action based on negligence can be predicated on the failure of the railroad company to provide a flagman or signaling device. *Glanville v. Chicago, R. I. & P. R. Co.*, 190 Ia. 174, 180 N. W. 152; *Williams v. Mason City & Ft. D. R. Co.*, 205 Ia. 446, 214 N. W. 692.

The court's second instruction informed the jury that the negligence alleged in the petition was as follows: (1) That the train in question was operated at a high, dangerous and negligent rate of speed; (2) that no whistle was blown within a distance of a mile of said crossing, and that none was blown at the point where a whistle-post sign was located; (3) that the bell upon the engine was not rung within a distance of a mile of the crossing; (4) that no headlight was provided upon the railroad engine; (5) that adequate lights were not provided upon the engine and train to warn the plaintiff and others of the approach thereof; and (6) that the crossing, under the circumstances then existing, was a dangerous crossing, partially obstructed from view, and that no flagman or signal was stationed or

erected thereby to warn the public of the approach of defendant's trains.

In its fifth instruction, the court informed the jury as follows:

"Before the plaintiff will be entitled to a verdict at your hand she must establish by a preponderance of the evidence one or more of her charges of negligence which she claims against the defendant and which she alleges as proximate causes of the collision between the defendant's train and the automobile in which she was riding and her consequent injury. Should she so establish as she is herein required to do as a prerequisite to being entitled to a verdict at your hands, you will find for the plaintiff, and be guided with reference to your money award by another instruction which will be given you later on herein.

"But should she not so establish as she is herein required to do as a condition precedent to being entitled to a verdict at your hands, then you will find generally for the defendant."

Defendant's instruction No. 8, which was refused by the court, was as follows: "Plaintiff makes some claim in her petition filed herein that the defendant was negligent in that no flagman or automatic signal was stationed or erected at the crossing in question. You are instructed that defendant, as shown by the evidence in this case, was under no duty to maintain a flagman at the crossing or to install and operate an automatic signal at said point, and you should disregard any such claims of the plaintiff."

As we have hereinbefore stated, there was no evidence offered on the subject of negligence in not providing a flagman or signal at the crossing in question that would warrant the submission of that issue to the jury. This court has held many times that a submission of an issue of fact material to the case that is not supported by the evidence is erroneous.

"Instructions to a jury which leave that body at liberty to infer or find facts as existent, of which there is no evidence, are erroneous, and such errors, unless without preju-

dice, furnish ground for reversal of a judgment." *State v. Bartley*, 56 Neb. 810, 77 N. W. 438.

"An instruction submitting to the jury as an issue of fact a question material to the case, regarding which there is no evidence to support a finding, is erroneous." *Chamberlain Banking House v. Woolsey*, 60 Neb. 516, 83 N. W. 729.

"The instructions of the court should direct the attention of the jury only to facts in support of which evidence has been introduced upon the trial. When an instruction is not founded upon the evidence, and is calculated to mislead the jury in considering the facts of the case, the judgment must be reversed." *Mannion v. Talboy*, 76 Neb. 570, 107 N. W. 750.

"The submission of such a charge of negligence without evidence to support it and with the instruction of the court that, if they found any of the charges of negligence true, they might render a verdict for plaintiff, led the jury to believe there was evidence to support this charge. For aught we know this may have been the charge of negligence on which the jury fixed liability on defendant. The instruction was prejudicially erroneous." *Tighe v. Interstate Transit Lines, ante*, p. 5, 263 N. W. 483.

We conclude therefore that the court erred in submitting to the jury the question of negligence based on defendant's failure to have a flagman or signal stationed or erected at the crossing where the collision occurred.

Plaintiff contends, however, that the court by giving instruction No. 8 withdrew this and other questions from the jury, and that the error, if any, was not therefore prejudicial to the defendant. The court's instruction No. 8 is as follows: "Should you find that the headlight of the train that injured the plaintiff was throwing its full flood of light before and at the time of the impact, then you will return your verdict for the defendant, as had the plaintiff looked in such condition of the full flood of such rays, she would have seen the oncoming train in time so that the accident could have been avoided by reasonable action on the part of the plaintiff."

It is the contention of plaintiff that this instruction withdraws all questions of negligence from the jury except whether the headlight on the engine was burning. To this we cannot agree. It will be noted that the instruction states that, if the headlight was throwing its "full flood of light" before and at the time of the impact, then the jury should return a verdict for the defendant. What constitutes a "full flood of light" was not defined by the instructions. It certainly would not include a dimmed light. Even if the headlight was burning, the jury might logically say that it did not throw a "full flood of light" and then find that the headlight on the engine was an adequate one and thus be forced to consider all the other allegations of negligence. In such case, the jury would have to consider instruction No. 2 and find the defendant negligent in one of the respects therein specified in order to bring in a verdict for the plaintiff. In so doing, they might consider the allegation of negligence that was not supported by the evidence. We therefore conclude that instruction No. 8 did not preclude the jury from considering the court's instruction No. 2.

For the reasons herein stated, the judgment is reversed and the cause remanded for a new trial.

REVERSED.

ANTON NELSON, APPELLANT, V. ERIC PLAUTZ ET AL., APPELLEES.

FILED MARCH 26, 1936. No. 29579.

Automobiles: NEGLIGENCE. The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is, in the circumstances of this case, more than slight negligence, as a matter of law, and defeats a recovery.

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

O. B. Clark, for appellant.

Chambers & Holland and *Roland A. Locke, contra.*

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

GOSS, C. J.

Plaintiff appeals from a judgment on a verdict directed against him in his suit for damages to him and his car in a collision. The point announced to the jury by the trial court when directing the verdict was that plaintiff was guilty of more than slight negligence.

The collision occurred about 8 o'clock on the morning of October 17, 1933, at the intersection of a north and south highway, called in the record the Emerald highway, and a road running northwest and southeast, called the Malcolm highway. Neither road was protected by stop signs. Plaintiff was on the seat at the right of his son, Edwin Nelson, who was driving plaintiff's car north. In the back seat were plaintiff's wife and daughter and his brother-in-law, Martin D. Franson. Mrs. Plautz and her mother were being driven by defendant Wilber Dewey in defendant Eric Plautz's car in a southeasterly direction on the Malcolm highway.

About 100 feet south of the intersection is a railroad track. Plaintiff's car slowed down for the track, which was considerably higher than the road it had been traveling, and when he was on the track, Edwin Nelson testified, he looked in both directions along the Malcolm highway but there was no car on that highway toward the northwest. He could see about a quarter of a mile to the northwest. The Emerald highway was level to the intersection. He was driving 15 to 18 miles an hour. There were some tall weeds that obstructed his view of the Malcolm highway for 20 or 30 feet after he left the railroad track, but when he reached a point 50 feet from the track he could have seen up and down the Malcolm highway. But he never looked again after leaving the track. He testified that he did not

see defendant's car coming from the northwest until it swerved to the left right in front of him to avoid a collision and then it was too late to do anything; that he saw it about ten feet away and then plaintiff's car was in the intersection with the front wheels across the center; the "front left corner" of plaintiff's car was hit by "about the center" of defendant's car; the right side of defendant's car was "pushed in quite a bit."

Franson was sitting on the left-hand side of the rear seat of plaintiff's car. He testified that he looked both ways when the car was on the railroad track—he could see a quarter of a mile west of the intersection—and saw no one coming; the next time he looked the Nelson car was just entering the intersection and he could see up that highway 300 feet but saw no one coming, and at that time the Nelson car was about 25 feet from where the collision occurred; there was no car in sight; he saw the Plautz car 200 feet away when the Nelson car was in the intersection; he thought the other car would slow up and go behind the Nelson car so he said nothing; he estimated the speed of the Plautz car at 60 miles an hour; the Nelson car was going about 10 miles an hour with its front wheels "almost" at the center of the intersection; the Nelson car proceeded about five feet when it was "side-swiped" (later changed by the witness to "front-swiped") by the Plautz car. The conclusion from the testimony of this witness that the car in which he was riding, going 10 miles an hour, was "front-swiped," after going 5 feet, by a car which traversed 200 feet in the same time, is too contrary to possibilities to justify credibility.

Plaintiff was a witness. He first saw the car about ten feet away. He says he grabbed the emergency brake, shut his eyes and when he came to "we were turned plumb around and over."

We get little help from the directions the cars took after the impact. That, of course, was influenced by the momentum with which they hit, the points where each contacted the other, and the consequent loss of control by the drivers.

If both cars had been driven with due care, the collision would not have occurred. It is not enough to prove that the driver of defendant's car was guilty of negligence if the evidence shows that the driver of plaintiff's car was also negligent and that his negligence was more than slight. Plaintiff "cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith; and, if, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which, under the circumstances, amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, the contributory negligence of plaintiff, however slight, will defeat a recovery." *Morrison v. Scotts Bluff County,* 104 Neb. 254, 177 N. W. 158. This leading case on the subject in this court has been followed in many others.

We do not seem to have any cases in our court where it was held, as a matter of law, that the failure to look would amount to more than slight negligence and preclude a recovery. In *Thrapp v. Meyers,* 114 Neb. 689, 209 N. W. 238, plaintiff testified that he looked in the direction of defendant before entering the intersection. So the court held that whether or not his failure to see the defendant constituted such negligence as would defeat a recovery was a question of fact. In the opinion the court said: "We have no doubt that cases may arise where it would be the duty of the court to rule, as a matter of law, that the failure of the driver of an automobile upon approaching an intersection to look in the direction from which other travelers upon the highway might be expected would amount to more than slight negligence and prevent a recovery, but we do not feel warranted in laying down a hard and fast rule governing all cases."

In *Thieme v. Weyker,* 205 Wis. 578, 238 N. W. 389, the court reversed a judgment for plaintiff and directed a judgment of dismissal, holding that, where plaintiff entered an

intersection at 15 miles an hour without looking, where looking would have been effective, he was guilty of contributory negligence as a matter of law.

To fail to apply such a rule to this case would be an invitation to the careless and reckless driver to continue in the exercise of these qualities. In these days, when automobiles in greater number and frequency cross even unimportant intersections, it is the duty of the court to state, upon occasions when such situations come before it, such rules of law as will aid in the safety of the highways. The driver of plaintiff's car had the opportunity to look when by looking he could see that defendant was coming at such a speed as would endanger plaintiff's car and its occupants, if it proceeded into the intersection without stopping or slowing down. Preventive action was easy. It would have been effective. He took no action whatever. This made him negligent in the circumstances, as a matter of law. It is true that plaintiff's car, being on the right of the other, had the right of way, other things being equal, but that did not do away with the duty of its driver to exercise due care and to avoid negligence on his own part.

The judgment of the district court is

AFFIRMED.

RAY A. CRANCER, APPELLANT, V. JOHN A. REICHENBACH ET AL., APPELLEES.

FILED MARCH 26, 1936. No. 29495.

1. Contracts: CONSTRUCTION. Whether a contract, in clear, unambiguous language, creates a trust relation between the parties thereto must be determined by the intention of the parties, as deduced from the language used in the contract.
2. ———: ———: QUESTION OF LAW. The construction of a written contract, if couched in clear, unambiguous language, is a question solely for the court.
3. ———: ———. Payment of interest by a trust company to its customer upon daily balance of funds he has placed in the possession of the company, though not conclusive, is a strong

indication that title to the funds passed to the company, and that the relation between it and its customer was that of debtor and creditor.

4. ———: ———. Contract, outlined in the opinion, *held* insufficient to create a trust.

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

Harry R. Ankeny and *Jay O. Rodgers*, for appellant.

Perry, Van Pelt & Marti, H. W. Baird and *Frank A. Peterson, contra.*

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

GOOD, J.

This is an action in tort to recover double damages for alleged conversion of trust funds. At the close of all the evidence, the trial court directed a verdict for defendants. Plaintiff has appealed.

In the petition are set forth 98 causes of action, each based upon a written contract between the Lincoln Trust Company and another. It is charged that each contract created a trust. Plaintiff was a party to one of the contracts, and the other contracts he claims to hold as assignee. In all material respects the contracts are identical. The defendants are officers and members of the executive committee of the Lincoln Trust Company which has been adjudged a bankrupt.

The Lincoln Trust Company created a department in its business for the handling and payment of life insurance premiums for customers, and designated the department as "eltelic." Contracts were prepared for the customers availing themselves of the service in this department. The contracts are identical in all material parts. In each the Lincoln Trust Company is designated as party of the first part and the customer as party of the second part. The following are the pertinent provisions of the contract:

"That said party of the second part is now carrying life insurance upon his life as follows (Here follows list of the

policies, date issued, amount of each, name of the company, due date of premium and amount thereof) * * *

"In consideration of the payment by said second party of the sum of $————, the receipt whereof is hereby acknowledged, and in further consideration of the covenants and payments hereinafter set out, the said Lincoln Trust Company, party of the first part, hereby covenants and agrees as follows:

"1. To pay unto each of the insurance companies hereinbefore named, at their respective offices or to their duly appointed agents qualified to receive the same, the said annual premiums as heretofore set out, during the life of this contract and in accordance with the terms of the several policies, promptly as the same, respectively, shall fall due.

"2. To open on the books of said trust company an account in the name of said second party; to credit to said account the amount herein acknowledged as received from second party and all subsequent payments to be made by second party, as hereinafter set out; and annually on the —— day of ———— (month) in each year hereafter, during the life of this contract, to credit to said account interest at the rate of five per cent. on the daily balances to the credit of said second party from month to month.

"And in consideration of the covenants and agreements of said first party, the Lincoln Trust Company, said second party agrees to pay the sum of $———— on the 1st day of each month hereafter to and including the month of (month and year), to said first party at its office * * * and each year thereafter during the life of this contract and the life of said policies of insurance, to pay to said first party on the 1st day of each month the sum of $———— * * *

"It is agreed by and between the parties hereto that if the second party shall fail and neglect to make the payments hereinbefore set out, at any time during the life of this contract, not having exercised the option hereinafter mentioned, then in such event first party shall have one of two options:

"(a) If the balance to the credit of second party on the books of first party is sufficient to pay the next annual premium falling due, first party may pay such premium to the insurance company entitled to receive it, and charge the amount to the account of second party notwithstanding his laches; or

"(b) First party may calculate interest up to the date current, close the account by mailing check or draft for the balance, if any, to second party, * * * declare the contract canceled and be acquitted and released from further liability hereunder."

Then follow a provision that second party may omit one or more monthly payments when the gains to his account from interest, dividends from the participating policies, overpayments or other gains, equal or exceed such monthly payments; a provision for terminating the contract upon the death of the second party and the payment of any balance to his account to the executor or administrator of the estate of second party, and a provision for terminating the contract by either party upon three months' notice, and, upon such termination, the first party to calculate interest to the date of such proposed termination and pay to second party the balance to the credit of his account.

It is plaintiff's theory that each of these contracts created a trust in which the trust company was the trustee; the customer was the trustor or creator of the trust, and the respective insurance companies were the beneficiaries; that the trust company, through its officers, directors and executive committee, diverted the funds paid in by the second parties and commingled and used the funds in the transaction of its business, and did not set apart the funds arising from the so-called "eltelic" contract in a separate trust, and, further, that, pursuant to a statutory provision, the defendants were liable for double damages.

Defendants admitted that the Lincoln Trust Company was a corporation organized as a trust company under the laws of Nebraska; admitted the existence of the "eltelic" department; the making of the several contracts, and the

amount that was to the credit of each of the second parties when the trust company was adjudged bankrupt; but denied that said contracts created, or were intended to create, a trust relation between the trust company and the parties. Defendants alleged that the second parties, or a great many of them, filed claims in the bankruptcy proceeding against the bankrupt trust company, wherein they designated their claims as debts due from the trust company; that thereafter they amended their claims to charge that the bankrupt trust company held the money of the second parties as a trust fund and sought the allowance of their claims as such, but later dismissed all of these proceedings and instituted the present action against the defendants as directors and members of the executive committee of the trust company.

Plaintiff was entitled to have his cause submitted to a jury if he made *prima facie* proof that trust funds, property of the plaintiff and his assignors, had been wrongfully converted by defendants. It was incumbent upon him to make a *prima facie* showing that a trust relation existed between the plaintiff and his assignors, on the one side, and the trust company, on the other, for, without a trust, there could be no trust funds to be converted.

Are the provisions of the so-called "eltelic" contract sufficient to create a trust? The contract appears to be in clear, explicit language and free from ambiguity. The applicable rule is stated in 13 C. J. 524, in this language: "The intention of the parties is to be deduced from the language employed by them, and the terms of the contract, where unambiguous, are conclusive, * * * the question being, not what intention existed in the minds of the parties, but what intention is expressed by the language used. When a written contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed." Another applicable rule is that the construction of a written contract is a question of law for the court. *Peru Plow & Implement Co. v. Johnson Bros.*, 86 Neb. 428, 125 N. W. 595; *Hinman v. Austin Mfg. Co.*, 65 Neb. 187, 193, 90 N. W. 934;

McCormick Harvesting Machine Co. v. Davis, 61 Neb. 406, 85 N. W. 390. In the latter case it was held: "It is the duty of the court to interpret the contract between the parties."

It may be conceded that no particular words are needed to create a trust, but it is also true that to create a trust it must clearly appear that such was the intention of the parties. In the light of these rules, let us examine the contract.

In the whole of the contract there is no reference to the words "trust" or "trustee;" there is no reference to a deposit for a special or specific purpose; there is no agreement to hold the funds and invest them in a particular manner; there is no agreement to use the specific funds to pay the insurance premiums; in fact, the implication is that the trust company itself was to make the payments out of its funds. The contract provides for opening an account with each of the parties. It speaks of the payments which they are to make in consideration for the service to be performed by the trust company. By the payment of the sums, stipulated in the contract, to the trust company, it undertook to pay the premiums due from the parties to the several insurance companies as such premiums became due. The contract provides for the payment of interest to the customer of the trust company. The payment of interest to the customer upon the daily balance is a strong, though not conclusive, indication that title to the funds paid to the trust company passed to it, and that the relation between it and the customer was that of debtor and creditor. *In re State Bank of Elkhorn*, 129 Neb. 506, 262 N. W. 15.

It is highly improbable that the trust company would receive these funds from its customers, perform the service of paying the premiums to the insurance company when they became due, and pay interest to the customers upon their daily balances in its possession, without any recompense whatever. It seems clear that the parties contemplated that the trust company should use the funds in its possession so as to make them yield an income to the company. If it was not to do this, it would be in the anomalous

situation of taking the customer's money, holding it until premiums were required to be paid, perform all this service and pay for the privilege of so doing without any recompense whatever.

We are of the opinion that the contract was wholly insufficient to create a trust relation between the trust company and the plaintiff and its assignors.

Plaintiff insists that there is evidence, aside from the contracts, indicating a trust relation. But, since the language of the contract is clear and unambiguous, we think the question of whether a trust was created must be determined solely from the provisions of the contract. *State v. Board of County Commissioners of Cass County*, 60 Neb. 566, 83 N. W. 733; *Wheeler v. Moore*, 78 Neb. 484, 111 N. W. 120.

Since no trust relation between the plaintiff and the trust company is shown, there was no trust fund for defendants to convert to their own use. The district court properly directed a verdict for defendants.

AFFIRMED.

ROY BEHRENS, APPELLEE, V. SMITH BAKING COMPANY ET AL., APPELLANTS.

FILED MARCH 26, 1936. NO. 29562.

1. **Injunction.** Where the bond voluntarily delivered to secure the issuance of a restraining order undertakes to indemnify for damages resulting from the injunction, the term injunction includes restraining order.
2. ———: ACTION ON BOND: DAMAGES. Reasonable counsel fees necessary to procuring the dissolution of a restraining order may be recovered in an action on the bond.

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

William Niklaus and *J. E. Mockett*, for appellants.

John J. Ledwith and *Max Kier, contra.*

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

DAY, J.

This is an action against the principal and surety on a bond for the wrongful issuance of a restraining order or a temporary injunction at the commencement of an equity suit. The jury returned a verdict for $240, upon which judgment was entered from which the defendants appeal.

The Smith Baking Company commenced a suit in equity to prevent Roy Behrens, a former employee operating a bread truck upon a route, from operating such a truck on the same route for a competitor. The petition alleges that a restraining order was issued in connection with said suit, which was dissolved at the trial of the case upon its merits. This suit was determined in favor of Behrens. The petition alleges that the plaintiff was damaged on account of loss of time in the sum of $90, and by reason of attorney's fees in the sum of $400. The defendant denies specifically that the petition in equity prayed for a restraining order and denies all other allegations in the petition.

The appellant contends that the trial court erred in submitting the question of plaintiff's damage for loss of time in excess of four days, since the restraining order was operative only from April 26, 1932, to April 30, 1932, and for the services of an attorney because the restraining order was dissolved by its own limitation on April 30, 1932, and not by an effort of an attorney.

An examination of the order issued by the trial court in the former suit reveals that it is the usual form of restraining order; that it fixed a day for the defendant four days thereafter to appear and show cause why a temporary injunction should not be issued; and ordered that the restraining order remain in force and effect until such hearing. On April 30, 1932, the day set for hearing, Behrens filed a motion to dissolve the restraining order. The motion was heard in conjunction with the hearing on the merits of the case on May 7, 1932, and the restraining order was dissolved by decree of the court entered May 19, 1932. It

fairly appears from the record that the parties in the former case facilitated the hearing as much as possible. It appears that the motion to dissolve was heard at the earliest available date for the trial court. The argument of the appellant is untenable that, since the undertaking provided to indemnify the defendant for damages resulting from an injunction and not a restraining order, there was no restraining order. True, the bond given used the word injunction instead of restraining order. No injunction was ever issued, so that upon this theory there was no reason for giving the bond. A restraining order was issued, conditioned upon the giving of such a bond, and the bond in this action was given to secure it. The restraining order was served upon Behrens.

Section 20-1062, Comp. St. 1929, provides: "The 'injunction' provided by this Code is a command to refrain from a particular act. It may be the final judgment in an action or may be allowed as a provisional remedy, and when so allowed it shall be by order. The writ of injunction is abolished." A well-known authority states: "Injunctions have been broadly defined as restraining orders, and more definitely as prohibitory writs restraining a person from committing or doing an act, other than a criminal act, which appears to be against equity or conscience." 14 R. C. L. 305, sec. 2.

In view of our statutory definition above quoted, it would not be a strained conclusion that, where the bond voluntarily delivered to secure the issuance of a restraining order, undertakes to indemnify for damages resulting from the injunction, the term injunction includes restraining order. It would be unthinkable that one giving such a bond could avoid liability by substituting the word injunction instead of restraining order. There is no case cited by appellant which supports such a proposition.

This court has heretofore held that reasonable counsel fees necessary to procuring the dissolution of a restraining order may be recovered in an action on the bond. *Meeske v. Baumann,* 122 Neb. 786, 241 N. W. 550.

Finally, the appellant argues that the restraint could not have been longer than from April 26, 1932, to April 30, 1932. *State v. Greene,* 48 Neb. 327, 67 N. W. 162, is cited, where a county judge, under the statute, in the absence from the county of the district judge issued a restraining order, and it was not heard in the district court on the date set, nor continued. Of course, the restraining order was ended by its own limitations because the county court has only very limited jurisdiction in such a case. But, in the case at bar, it is a fair inference from the record that the matter was heard by agreement of parties at the first opportunity available in the trial court.

In conclusion, liability attaches to one who executes a bond to secure the issuance of a restraining order even though he delivers a bond which uses the word "injunction" instead of the term "restraining order." Under such circumstances, the restraining order is not ineffective because no undertaking has been given. The restraining order did not become ineffectual because of its own limitation, where the case was tried by agreement of parties at the earliest available date. The appellee is entitled to recover damages for loss of time and counsel fees necessary to secure a dissolution of the restraining order.

AFFIRMED.

EMMA FAIRBANKS, APPELLEE, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLANT.

FILED MARCH 26, 1936. No. 29615.

1. Insurance: CONTRACT. The articles of incorporation, constitution, laws and by-laws of a fraternal insurance association, together with the application for membership and benefit certificate, constitute the insurance contract.
2. ———: ———: SUSPENSION: REINSTATEMENT. A suspended member of a fraternal benefit association can only be reinstated in strict conformity to the by-laws in force at the time, and has no rights under his certificate until so reinstated.
3. ———: ———: ———: ———. For reinstatement under

the contract, conditions precedent for reinstatement are that the suspended member pay the arrearages within a prescribed time and that he be in good health at the time.

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

Deutsch & Young and *Rainey T. Wells*, for appellant.

M. S. McDuffee, contra.

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

DAY, J.

This is an action upon two membership certificates issued by the Sovereign Camp of the Woodmen of the World, a fraternal insurance order. The order defended on the theory that the certificates lapsed in March, 1933, and in May, 1933, the member attempted to reinstate his insurance by the payment of arrearages under the provisions of the constitution, laws and by-laws of the order, which required as a condition precedent for the reinstatement without medical examination that the member be and warrant that he is in good health at the time of his reinstatement and continue in good health for a period of 30 days thereafter. It was alleged in the answer of defendant that the member at the time of his reinstatement was totally disabled and afflicted with a chronic, advanced case of diabetes and pyelitis of four years' duration, and that he died of this ailment September 12, 1933, after reinstatement. The defendant tendered a return of the assessments paid, which were refused. The case was submitted to a jury, which returned a verdict for the plaintiff.

The significance of the constitution, laws and by-laws of a fraternal benefit society has recently been determined by this court in *Van Dahl v. Sovereign Camp, W. O. W., ante*, p. 181, 264 N. W. 454, in which opinion the court cited the previous decisions of this court. The rules are restated briefly because they are applicable to this case. The articles of incorporation, constitution, laws and by-laws of a fra-

ternal insurance association, together with the application for membership and benefit certificate, constitute the insurance contract.

The *Van Dahl* case also states the law applicable to suspension and reinstatement of members in a fraternal insurance association. It is not necessary to repeat the statements at length here; it is sufficient to apply them. A suspended member of a fraternal benefit association can only be reinstated in strict conformity to the by-laws in force at the time, and has no rights under his certificate until so reinstated. Now, at the time the member attempted to reinstate his contract with the defendant, the by-laws required that, as conditions precedent, he must pay all the arrearages within a certain time, and he must be in good health and continue to be in good health for a period of 30 days following reinstatement. The member knew of these provisions, because he and the local secretary read the by-laws together relative to reinstatement. He met the first condition and paid all arrearages. But he did not meet the second condition. He was not in good health. The beneficiary furnished proof of death to the defendant. Her signed statement revealed the following: "The cause of his death being diabetes. * * * The deceased was taken sick with the trouble which caused his death on the 16 day of March, 1930, and the duration of his last illness was 3 or 4 weeks. He was unable to work after July 18, 1930. * * * When did you first notice or learn of any sign or symptom of failing heath in the deceased? Early spring of 1930."

As a part of the above proof, the beneficiary also sent a statement of an attending physician which contained the following: "For how long a time was deceased confined to his house or prevented from attending to his business? About 4 years. When, how long, and for what did you treat deceased during his last illness? From July 18, 1930, diabetes and an infected bladder and left kidney. * * * What was the cause of death? Diabetes and pyelitis. Duration: Approximately 4 years. * * * Was it complicated with any other disease, acute or chronic? If so, what? Pyelitis re-

sulted from diabetes. Duration: 4 yrs." The attending physicians were not permitted to testify on the theory that their knowledge was privileged. There is some question presented as to waiver, but it is unnecessary to determine whether this exclusion of evidence was erroneous for the reason that the evidence is sufficient to establish that the member was not in good health at the time he attempted to reinstate his membership in the order. The proof of loss sent the defendant establishes the fact that the defendant, who had been totally disabled for a period of four years with diabetes and died of the disease within four months, was not in good health at the time of the reinstatement. There is testimony of experts that by the use of insulin one suffering with diabetes may live for many years. In the case at bar, it would be quibbling over words and giving them an absurd and unusual meaning to say that one totally disabled with diabetes for a period of four years, who died within four months of his attempted reinstatement, was in good health at the time.

Under the contract in this case, the member had to pay all arrearages within a certain time and be in good health, as conditions precedent to his reinstatement. Rules of law relative to representation and warranty are not applicable to this case. The member did not comply with the conditions precedent for reinstatement and was never reinstated. The trial court should have directed a verdict in favor of defendant.

REVERSED AND DISMISSED.

PLATTE VALLEY IRRIGATION DISTRICT, APPELLANT, V. CHARLES W. BRYAN, GOVERNOR, ET AL., APPELLEES.

FILED MARCH 26, 1936. No. 29569.

1. **Venue.** In a personal action, service of summons in a county where a suit is brought against a defendant, whose interest in the subject of the suit is entirely moot, does not confer authority upon the court to issue a summons to another county for a real defendant.

2. ———. An action against a public officer for an act done by him in virtue of or under color of his office, or for any neglect of his official duty, must, under the provisions of section 20-404, Comp. St. 1929, be brought in the county where the cause or some part thereof arose.
3. ———. "Where an action is brought and service had upon one defendant in the county where the petition is filed, the action cannot be said to be rightfully brought in the county so as to authorize issuance of summons to a second defendant in another county, where it develops that the plaintiff is unable to present an issuable controversy as to the first defendant, and has no reasonable basis for a cause of action against him, and where no issue of fact is presented to establish that such defendant has any substantial interest in the suit adverse to the plaintiff." *Bailey v. Chilton*, 106 Neb. 795, 184 N. W. 939.

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

Halligan, Beatty & Halligan and *Perry, Van Pelt & Marti*, for appellant.

William H. Wright, Attorney General, Milton C. Murphy, F. E. Williams, Neighbors & Coulter and *Morrow & Morrow, contra.*

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

CARTER, J.

This is an action to enjoin the defendant irrigation districts from using certain waters of the North Platte river in violation of plaintiff's prior right thereto, and to restrain certain administrative officers of the state from permitting such diversions of water as would interfere with plaintiff's prior right. The trial court sustained special appearances filed by the defendant irrigation districts. Other defendants filed demurrers, which were likewise sustained. Plaintiff elected to stand on its petition and the action was dismissed. From the orders thus entered, plaintiff appeals.

The petition alleges that the defendant Charles W. Bryan was at the time governor of the state and vested with the

civil administration of its laws; that Arthur T. Lobdell was at the time the acting state engineer and the administrative head of the department of roads and irrigation; and that the defendant Robert H. Willis was the chief of the bureau of irrigation and superintendent of water division No. 1A. The petition further alleges that the Gering Irrigation District and the Farmers Irrigation District were regularly organized irrigation districts with their principal places of business in Scotts Bluff county, and that the Belmont Irrigation District and the Bridgeport Irrigation District were likewise regularly organized irrigation districts with their principal places of business in Morrill county. Service of summons was had on the defendants Bryan and Lobdell in Lancaster county, their place of residence. The defendants Willis, Belmont Irrigation District and Bridgeport Irrigation District were served in Morrill county, their places of residence, while the Gering Irrigation District and the Farmers Irrigation District were served in the county of their residence, the same being Scotts Bluff county. The question to be determined is the correctness of the ruling of the trial court in sustaining the demurrers and special appearances hereinbefore mentioned.

The petition alleges that the North Platte river is a nonnavigable stream which has its source in the mountains of Colorado and flows across a part of Wyoming and Nebraska to a point in Nebraska approximately 200 miles from the Wyoming-Nebraska line, where it joins the South Platte river to form the Platte river. The petition further alleges that the waters of the North Platte river are subject to appropriation for irrigation purposes upon the principle that priority of time bestows priority of right; that, since 1895, all permits for appropriation of water for irrigation purposes in this state have been through the administrative officers of the state, who have been charged with the duty of administering such appropriations; that plaintiff has an appropriation of 200 second feet of water with priority date of May 31, 1884; that plaintiff's appropriation is prior to that of the defendant irrigation districts and all other ir-

rigation districts whose headgates are located west of the headgates of the plaintiff.

Plaintiff also alleges that the defendants Bryan, Lobdell and Willis, as governor, state engineer and chief of the bureau of irrigation, respectively, were charged with the duty of administering the waters of the North Platte river fairly and impartially with regard to the established priority rights of users along the river; that in 1934 the rainfall in the area served by plaintiff's canal was less than normal and the water available in the North Platte river for irrigation purposes was insufficient to supply the needs of all users; that the defendants Bryan, Lobdell and Willis permitted, encouraged and aided the defendant irrigation districts to wrongfully use water of the North Platte river for irrigation purposes in violation of the priority rights of the plaintiff, and conspired with the defendant districts and among themselves to accomplish such result; that because of said wrongful action plaintiff was deprived of its irrigation water and suffered great damage as a result thereof. Plaintiff thereupon prayed for an injunction against all of said defendants restraining them from doing any of the wrongful acts complained of.

The record shows that the petition in the case at bar was filed on December 22, 1934. This court will take judicial notice of the fact that the terms of office of Bryan and Lobdell expired on January 3, 1935. It cannot be questioned that the irrigation season for 1934 had terminated when the suit was filed. Comp. St. 1929, sec. 46-609. The right to an injunction against the defendants with reference to the use and distribution of irrigation water for the season of 1934 was therefore a moot question. It must also be borne in mind that the defendants Bryan and Lobdell were charged with conspiring with the other defendants to deprive plaintiff of the irrigation water to which it was entitled. There certainly is no presumption that such a wrongful conspiracy would be continued by their successors in office. In fact, the presumption is to the contrary. The plaintiff knew at the time of filing its petition that the terms

of office of Bryan and Lobdell would expire on January 3, 1935. It therefore knew that relief could not be obtained against them for the irrigation season of 1935 or any irrigation season thereafter. Under such circumstances, Bryan and Lobdell were made parties to an action that was moot as to them and, they being the only resident defendants in Lancaster county, the district court for Lancaster county did not obtain jurisdiction over the other defendants by serving a summons upon them in the counties of their residence. Comp. St. 1929, sec. 20-504.

In order for an action to be rightly brought against the defendant who is served with summons in the county in which it is brought, and that a summons may be issued to another county for service upon another defendant, it must appear that such defendant has a substantial interest in the subject of the suit adverse to the plaintiff. His interest must be more than nominal. *Miller v. Meeker,* 54 Neb. 452, 74 N. W. 962; *Bailey v. Chilton,* 106 Neb. 795, 184 N. W. 939; *Adams v. Guthrie & Co.,* 113 Neb. 192, 202 N. W. 867.

We have also concluded that this action cannot be maintained in Lancaster county. Section 20-404, Comp. St. 1929, provides in part as follows: "Actions for the following causes must be brought in the county where the cause or some part thereof arose: * * * Second: An action against a public officer, for an act done by him in virtue of or under color of his office, or for any neglect of his official duty." It will be noted that the cause of action pleaded in this case asks an injunction that is mandatory in its nature. It would require the defendants Bryan and Lobdell to take action to prevent the defendant districts from taking irrigation water from the North Platte river that belongs to the plaintiff. This would require such action in Morrill and Scotts Bluff counties. Necessarily, the cause of action arises in those counties and not in Lancaster county. Such being the case, the action was not rightfully brought against Bryan and Lobdell in Lancaster county, it being an action against a public officer for an act done in virtue of or under color of his office. The district court for Lancas-

ter county could not therefore obtain jurisdiction over the other defendants by serving them with summons outside of Lancaster county. *Kyd v. Exchange Bank of Cortland,* 56 Neb. 557, 76 N. W. 1058; *State v. McHugh,* 120 Neb. 356, 233 N. W. 1; *Harrison v. Cheney,* 105 Neb. 821, 182 N. W. 367. It is clear therefore that the duties imposed upon the defendants Bryan, Lobdell and Willis, with reference to administering appropriations of water for irrigation purposes, are not to be performed in Lancaster county, and the suit at bar could not therefore be commenced in that county. Since the trial court did not have jurisdiction of the subject-matter of the action, it could not acquire jurisdiction over any of the defendants. In view of this holding, it will not be necessary to discuss other assignments of error relied on by the plaintiff.

We conclude that the special appearances and demurrers of defendants were properly sustained and the action rightfully dismissed.

AFFIRMED.

FRED J. SCHOLLMAN, APPELLEE, V. PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLANT.

FILED MARCH 26, 1936. No. 29449.

1. **Insurance: DISABILITY: NOTICE: WAIVER.** Where an insurance policy provides that, if the insured becomes permanently disabled and incapacitated so as to be unable to engage in work or occupation of any kind for financial value and furnishes due proof thereof to the insurer, the company, while such disability exists, will waive the premiums which become due on the policy after the receipt of proof of such disability, and insured furnished such proof in June, 1933, after which and before suit brought, the insurer refused payment because the proof was not satisfactory, such denial of liability does not waive the required notice so as to give insured the right to recover premiums paid after incurring the disability and before furnishing proof of disability.
2. ———: **PREMIUMS: WAIVER.** Denial of liability after proper proof of disability was given under an insurance policy, because

the proof furnished did not satisfactorily show that insured was permanently disabled, waives any further proof, but does not increase the insurer's liability under the policy, as to waiver of premiums which were paid before proof of disability was made.

3. ———: DISABILITY: PROOF. "The term 'due proof of such disability,' used in an insurance policy, does not require any particular form of proof which the insurer might arbitrarily demand, but such a statement of facts as, if established in court, would require payment of the claim." *Wray v. Equitable Life Assurance Society*, 129 Neb. 703, 262 N. W. 833.

4. ———: POLICY: CONSTRUCTION. In case of repugnancy between a principal clause of the disability provisions of a life insurance policy, obligating the insurer to pay monthly benefits upon the insured becoming totally and permanently disabled, and a subordinate clause which, standing by itself, would postpone the payments of such benefits until proof of disability was given, the first and principal clause is controlling, and insured is entitled to recover the benefits from the date the disability was incurred.

5. ———: ———: ———. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of terms which the parties have used, and if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense; but when such contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men, on reading the contract, would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured.

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

Montgomery, Hall & Young and *Laurens Williams*, for appellant.

Frost, Hammes & Nimtz, contra.

Heard before GOOD, EBERLY and DAY, JJ., and RAPER and PROUDFIT, District Judges.

RAPER, District Judge.

This action was begun October 7, 1933, by plaintiff, Fred J. Schollman, to recover total disability benefits and return

of two premium payments on a life insurance policy issued to him by the defendant, Prudential Insurance Company. The policy for $5,000 was issued May 16, 1923, and contained the following clauses:

"Disability Before Age 60—Waiver of Premiums. If the insured shall furnish due proof to the company that, while this policy was in full force and effect, he (or she), at any time after payment of the first premium on the policy, while less than sixty years of age, from any cause whatsoever had become permanently disabled or physically or mentally incapacitated to such an extent that he (or she) by reason of such disability or incapacity is rendered wholly and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value, the company will waive the payment of any premium or premiums under the policy the due date of which, as specified on the first page hereof, shall occur after the receipt of proof of such disability and while such disability continues. * * *

"Disability Before Age 60—Monthly Income to the Insured. If such disability shall occur before the insured is sixty years of age and prior to the maturity of the policy as an endowment, the company will, in addition to such waiver, during such disability, pay to the insured monthly, as specified on the first page hereof, the sum of $10 for each $1,000 of the face amount of insurance under the policy. The first monthly payment shall be made three months after the company shall have received such proof and subsequent payments shall be made on the first day of each month thereafter during such disability. * * *

"The payment of disability instalments shall begin immediately after the company shall have received due proof of disability instead of being deferred for the period specified in these disability provisions.

"The Prudential Insurance Company of America,
"By Willard I. Hamilton, Secretary"

This latter clause appears by indorsement.

The petition contains three causes of action. In the first

cause plaintiff alleges that he was under 60 years of age, and while the policy was in full force he was stricken with sickness and disease and as a result thereof he was, and has been ever since, disabled to such an extent that he is unable to engage in any occupation or perform any work for any kind of compensation of financial value, and that the defendant received due notice of plaintiff's disability, and before filing of the petition denied liability, and thereby waived all further proofs of disability. He prays judgment on the first cause for $50 a month from March 25, 1932, and interest thereon.

The second cause of action alleges the issuing of the policy, and plaintiff's sickness and disability, and defendant's waiver of proof of disability, as stated in first cause, and that when plaintiff was sick and confined in a hospital, and after defendant had been notified of plaintiff's illness, the defendant refused to waive payment of the premium due May 16, 1932, and plaintiff paid same in the sum of $199.75, to prevent defendant from declaring the policy forfeited, and prays for judgment for said sum with interest.

The third cause of action is to same effect as the second cause for the premium due May 16, 1933, which plaintiff paid in the sum of $205.40.

The defendant answered the first cause of action, admitting the issuance of the policy and that it contained the provisions for total and permanent disabilities as set out hereinabove and that the policy is in full force and effect, admits that plaintiff "is now disabled within the terms of said policy," and alleges that due proof of said disability was not furnished it until late in June, 1933; admits that plaintiff is entitled to benefits at the rate of $50 a month, payable in June, 1933, and on the first day of each month thereafter, and denies all other allegations on second and third causes; admits that plaintiff paid the two annual premiums, and denies every other allegation of the petition.

Plaintiff for reply admits he was disabled as alleged in the answer, and entitled to $50 a month benefits, and denies

allegations not admitted in the answer, and plaintiff again alleges that the defendant denied liability before suit was begun, and it cannot now, after litigation has begun, change its ground and defend on the ground that formal proof of disability was not furnished it until July 19, 1933.

Trial was had to a jury. At close of plaintiff's testimony the defendant offered to confess judgment for all disability from June 22, 1933, to date of trial, and asked the court to direct verdict in its favor, which request was overruled. At close of all the testimony defendant moved the court to direct verdict in its favor, which was denied.

The court then, on its own motion, gave a peremptory instruction to the jury to return a verdict for plaintiff on his first cause of action in the sum of $1,388, and for $224.21 on the second cause of action and $218.20 on the third cause of action, and judgment was rendered on the verdict.

At the hearing on the motion for new trial, the court refused a new trial on the first cause of action; set aside the judgment on the second and third causes, and dismissed those causes. Defendant appeals on first cause, and plaintiff appeals from dismissal of second and third causes.

The briefs of both parties set forth the evidence as to the disability of the plaintiff, which is not necessary to review here, it being sufficient to state that it is clearly shown that he was totally disabled from March 25, 1932, and defendant admits in its answer that plaintiff was so disabled from June 22, 1933, and defendant does not now claim that plaintiff was not so disabled.

Plaintiff was taken to a hospital on March 26, 1932. Mrs. Schollman testified she told Schnurman, a collector for the insurer, that plaintiff was very, very sick soon after plaintiff went to the hospital and he would ask her once or twice a week how plaintiff was. After plaintiff came from hospital (in July, 1932) she told Schnurman that she thought they were entitled to some insurance on that policy and asked him to go to the house and check it up. Afterwards she told Schnurman that the doctor said

he would very likely never be able to go to work. Later she called the defendant's office and told them that the plaintiff was sick, and they said they knew it.

Mr. Schollman, plaintiff, testified that he stayed in the hospital until July 2, 1932, and about two weeks after that Mr. Schnurman came to his home and read the policy, and he told Schnurman that he thought he was entitled to the sick benefits, and Schnurman asked plaintiff if he expected to get well, and plaintiff responded, "I told him I hoped so," and Schnurman told him that he was not entitled to any benefits out of this policy. Mr. Schnurman denied that he told plaintiff he was not entitled to benefits. Nothing further was done in the giving notice of disability until June 22, 1933, when written proof of disability was made. A letter from the assistant manager of the defendant to a subordinate dated August 14, 1933, was read to Mr. Schollman soon after its date. This letter states: "We have made a very careful inquiry into the facts in the case, and regret to advise that we will be unable to allow any benefits at this time. As you undoubtedly know, insured's policy provides for disability benefits only upon receipt of proof by the company indicating that the insured is considered to be so totally and permanently disabled as to never again be able to engage in any form of gainful occupation." The letter then states some facts which the company claimed would indicate that plaintiff was not disabled to the extent that would accord with the terms of the policy, and then continues: "If, at some time in the future, the insured is considered disabled in accordance with the terms of his policy contract, we will gladly consider a claim again upon receipt of the necessary application for disability forms."

The policy does not provide that proof of disability shall be in writing, nor does it state when such proof must be made, nor does the policy provide that the insurer shall furnish forms for such proof. Until the time the written proof was made, plaintiff made no request to defendant for form for proof.

Plaintiff contends that, by the information given to Mr.

Schnurman and his statement that no benefits were due under the policy, and the letter of August 14, 1933, the defendant waived notice. In the conversations with Mr. Schnurman, in no place does the testimony of Mr. and Mrs. Schollman state that they made claim that plaintiff was totally and permanently disabled. In July, 1932, Mrs. Schollman states that she said the doctor thinks he may not recover, and Mrs. Schollman says he told Mr. Schnurman that he hoped to recover. The statements made by Mr. and Mrs. Schollman were not sufficient to apprise defendant that plaintiff claimed he was disabled within the terms of the policy, and such information and Mr. Schnurman's response, even if so made, are not sufficient to establish waiver of due notice. It will be noted that the conversations relied on took place in July, 1932, and that one of the premiums was due in May, 1932.

The case of *Wray v. Equitable Life Assurance Society*, 129 Neb. 703, 262 N. W. 833, gives a rule which is applicable here: "The term 'due proof of such disability,' used in an insurance policy, does not require any particular form of proof which the insurer might arbitrarily demand, but such a statement of facts as, if established in court, would require payment of the claim."

However, plaintiff further claims that by the letter of August 14, 1933, the defendant, by denying liability, waived notice of disability, and that such waiver related back to the time of plaintiff's illness, so as to give a right of action for the two premiums paid before the written proof was made.

At the close of the evidence the trial court, at the time he directed a verdict for plaintiff on the three causes, stated:

"I am satisfied from this evidence that there is only one verdict that can be rendered and that is for the plaintiff for the amount he claims, because the insurance company, in my judgment, by denying liability by their letter in August, waived any question of notice, and therefore plaintiff is entitled to recover," and entered judgment on all three causes of action.

In the memorandum opinion on the hearing on the motion of defendant for new trial, the court states: "Two questions are presented by the motion: (1) Is plaintiff entitled to recover on the second and third causes of action? And, (2) Is plaintiff entitled to recover monthly payments prior to the furnishing of proof of disability to the insurance company? Of these in their order: 1. The provisions of the policy with reference to waiver of the premium is as follows: (The language of the policy is then given.) There seems to be no ambiguity in this language. The waiver of premiums is made to depend upon the furnishing of proofs of disability, and only premiums becoming due after such proof is furnished are waived. There would seem to be, therefore, under the plain provisions of the policy, no right of recovery for premiums paid prior to the furnishing of proof. The plaintiff claims, however, that defendant waived proof of disability by a letter dated August 14, 1933, in which they stated they will be unable to allow any benefits at that time. The letter continues: 'As you undoubtedly know, insured's policy provides for disability benefits only upon receipt of proof by the company indicating that the insured is considered to be so totally and permanently disabled as to never again be able to engage in any form of gainful occupation.' The letter then proceeds to state that they do not consider the evidence sufficient to show complete disability. Upon mature deliberation I am convinced that this denial of liability or refusal to allow the claim does not constitute a waiver of the provisions of the policy requiring proof of disability; on the contrary it calls attention to the fact that no benefits are payable except upon receipt of proof by the company and bases its refusal on the ground claimed, insufficiency of the proof. This is quite different from a refusal based upon the entire absence of proof. * * * It does not seem reasonable to hold that the company should be liable without the performance of the condition precedent and thus enlarge its liability beyond the terms of its contract. * * * If no notice whatever had been given and defendant even denied that the policy was

in force, such denial would not operate to enlarge the liability of the defendant—the policy would simply be enforced according to its terms and the provision for waiver of the premiums would not come into effect because of failure to perform the condition precedent."

This reasoning by the able trial judge and his conclusion are sound and are adopted. Furthermore, it may be observed that most of the cases cited in plaintiff's brief is where the insurer claims the policy is void. There is no claim of that kind asserted by defendant. In *Campbell v. Columbia Casualty Co.*, 125 Neb. 1, 248 N. W. 690, Judge Rose states: "After receiving notice of plaintiff's claim * * * defendant denied liability, but this was not a waiver of timely notice." If, after claim filed and proof furnished in support thereof, the defendant denies liability on the ground of insufficiency of proof, such company will be deemed to have waived additional or corrected proof, and will be estopped to deny that due proof of disability has been furnished. *Pagni v. New York Life Ins. Co.*, 173 Wash. 322, 23 Pac. (2d) 6, 93 A. L. R. 1325. See, also, *New England Mutual Life Ins. Co. v. Reynolds*, 217 Ala. 307, 116 So. 151, 59 A. L. R. 1075.

The plaintiff cites *Still v. Equitable Life Assurance Society*, 165 Tenn. 224, 54 S. W. (2d) 947, 86 A. L. R. 382. In that case the issue was whether the premium was voluntarily paid.

Plaintiff cites *Pittenger v. Salisbury & Almquist*, 125 Neb. 672, 251 N. W. 287, *Yates v. New England Mutual Life Ins. Co.*, 117 Neb. 265, 220 N. W. 285, and *Feis v. United States Ins. Co.*, 112 Neb. 777, 201 N. W. 558, to the effect that, where a party gives a reason for his decision and conduct involved in a controversy, he is estopped after litigation has begun from changing his ground and putting his conduct on another and different consideration. This salutary rule has been frequently followed in this state. Those cases are not in point; the facts being entirely different. There is nothing in defendant's letter that makes such rule applicable. At most, the letter waives any fur-

ther proof. There appears no good reason why plaintiff failed to give notice if he was, in his opinion, disabled within the purview of the policy before June, 1933.

Plaintiff asserts that the burden of proof was upon the defendant to plead and prove policy provisions which made furnishing formal proof of disability condition precedent to recovery. This, of course, is the rule in this state. The petition sets forth in full the clauses in the policy under which he claims recovery, and alleges that defendant, before suit was brought, waived proof of disability. The defendant admitted issuing the policy and the conditions, as stated in the petition, that the policy was in full force, and alleges that due proof of disability was not furnished until in June, 1933. The answer sufficiently pleads lack of notice before June, 1933, to give plaintiff knowledge of such defense, and in his reply plaintiff again pleads that defendant had waived notice. It was unnecessary for defendant to set out in the answer the part of the policy pleaded in the petition and admitted in the answer.

The defendant alleges as error the award of the court for the monthly benefits from the inception of the disability instead of from June, 1933. The language of the policy in the clause hereinabove set forth pertinent to this issue, beginning "Monthly Income to the Insured," is "If such disability shall occur, * * * the company will, in addition to such waiver (of premium), during such disability, pay to the insured monthly, as specified on first page hereof, the sum of $10. * * * The first monthly payment shall be made three months after the company shall have received such proof and subsequent payments shall be made on the first day of each month thereafter during such disability." The learned trial judge gives his interpretation of that language as follows: "The first paragraph above quoted binds the company, without any qualification as to notice, to pay monthly indemnity 'during such disability;' the liability is based solely upon the existence of the disability. * * * In my opinion the second paragraph presents an ambiguity; according to its wording no benefit would accrue or be pay-

able for the three months succeeding the proof, whereas, as above stated, the prior paragraph contains no such restriction. It seems to me that the second paragraph merely postpones the time when payment shall begin but does not fix the date when liability shall commence. * * * An extra premium was paid on account of these benefits and the intention of the parties undoubtedly was to secure such payments from the time the total disability commenced; that was what the parties contracted for. * * * I have not overlooked the fact that by indorsement on the policy the first payment was to be made immediately after the receipt of proof instead of delaying for three months."

The defendant contends that the clause, "The first monthly payment shall be made three months after the company shall have received such proof and subsequent payments shall be made on the first day of each month thereafter," should be construed with the waiver of premium clause in the first paragraph, and that the monthly payments provision limits and controls the promise to pay the monthly benefits, so that no benefits can be recovered before notice of disability was received. The plaintiff insists that the absolute promise to pay benefits is not limited by the terms fixing the time of payment. As stated by the trial judge, there is an ambiguity in the language of the policy. In such case, "When an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured." *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452. The insurance contract agrees to pay the disability benefits, and the provision for the monthly payments fixes the time for the payments to become due after receiving due notice, but there is no language or statement that the company will not be liable for the benefits "during such disability." The construction asked by the company is manifestly repugnant to the express agreement to pay the benefits during dis-

ability, the word "during" in that connection can have no other meaning than throughout the course and continuance of the disability, and the fixing of the time of payment does not limit the plaintiff's right of recovery from the time the disability first occurred. The plaintiff is entitled to the benefits from date of disability; all benefits due to him were payable on receipt of the notice, and from that date, the payments to be made monthly. *Bank of Commerce & Trust Co. v. Northwestern Nat. Life Ins. Co.*, 160 Tenn. 551, 26 S. W. (2d) 135, 68 A. L. R. 1380; *Hablutzel v. Home Life Ins. Co.*, 332 Mo. 920, 59 S. W. (2d) 639.

The defendant cites many cases to uphold its view, but none of those cases contains the same language as is in this policy. A review of some of those cases will show a clear distinction from this case at bar.

In *Orr v. Mutual Life Ins. Co.*, 57 Fed. (2d) 901, the policy provides: "The company, upon receipt and approval of such proof, will grant the following benefits: * * * waive payment of each premium * * * commencing with the first premium due after approval of said due proof. * * * Will * * * pay to the insured a monthly income * * * the first such monthly payment being due on receipt of said due proof and subsequent payments on the first day of each calendar month thereafter." The court held that insured was not entitled to monthly benefits before the time proof was given. In *Corbett v. Phœnix Mutual Life Ins. Co.*, 259 N. Y. Supp. 221, the policy provides: "And beginning at the date of such proof of disability will pay to insured." Another case *Walters v. Jefferson Standard Life Ins. Co.*, 159 Tenn. 541, 20 S. W. (2d) 1038, the provision is: "Commencing immediately from the acceptance by the company of the original proofs of disability, * * * a monthly income," etc. In *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489, the contract reads: "Upon receipt by the company of satisfactory proof * * * the company will 2. Pay to the insured a monthly income * * * the first payment of such income to be paid immediately upon receipt of such proof." And such language or its equivalent appears in those cases

where monthly benefits are not allowed prior to giving notice of disability. It will be noted that in each of those cases the policy provides, in apt and unequivocal language, that the disability benefits do not begin until proof of disability is made—quite different from the policy provisions in this case.

The judgment of the district court is in all things

AFFIRMED.

ARLINGTON OIL COMPANY ET AL., PLAINTIFFS, V. GEORGE E. HALL, TREASURER, ET AL., DEFENDANTS.

FILED APRIL 4, 1936. No. 29739.

Declaratory Judgments. "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Comp. St. 1929. sec. 20-21,145.

Original action for a declaratory judgment. Heard on motion to dismiss. *Motion sustained.*

Lee Bayse, Stewart, Stewart & Whitworth and *Charles B. Paine,* for plaintiffs.

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

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

GOSS, C. J.

This is an original action in this court for a declaratory judgment. The authority for such judgments is found in sections 20-21,140 to 20-21,155, Comp. St. 1929.

Plaintiffs are four dealers in gasoline. Defendants are the state treasurer, who has the custody of state money, and the secretary of the department of agriculture and inspection, one of whose duties is to collect state taxes on motor vehicle fuels.

Plaintiffs seek a decree declaring House Rolls Nos. 11 and 37, Laws 1935 (Special Session) chs. 18, 19, unconstitutional and void and declaring the funds raised by the one-cent special gasoline tax between March 1, 1935, and September 20, 1935, to be held in trust for plaintiffs and others similarly situated; and declaring that plaintiffs are entitled to a return by defendants of the respective amounts of the tax paid by plaintiffs. The tax was collected by defendants under Senate File No. 363 (Laws 1935, ch. 155) and House Roll No. 432 (Laws 1935, ch. 161), which were held by this court to be unconstitutional and void. *Smithberger v. Banning*, 129 Neb. 651, 262 N. W. 492, 100 A. L. R. 686. The opinion was released September 20, 1935, and the judgment was entered the same day. Thereupon defendants ceased to collect the additional tax on gasoline. Plaintiffs allege that defendants had collected about $1,000,000 which they now hold intact and separate from other funds and refuse to return to plaintiffs and others who paid it.

House Rolls Nos. 11 and 37, passed with emergency clauses, were approved by the governor on November 9 and 26, 1935, respectively. The first act provides for an additional tax of one cent a gallon on motor vehicle fuels from March 1, 1935, to September 20, 1935, and further provides that, if the one-cent tax has been paid, the act shall be deemed to have been obeyed. The second act provides that the one-cent tax shall become the property of and vest in the state and shall be subject to appropriation and use by the state, notwithstanding the unconstitutionality of the acts under which the tax was collected, and ratifies, confirms and validates all acts of officers, agents and employees in reference to collection and payment.

The allegations of the petition, except as to House Rolls Nos. 11 and 37, are about the same as those of intervener Stover, in *Smithberger v. Banning, ante*, p. 354, 265 N. W. 10, which is the same as the former one of the same title. It came before the court again on a motion of defendants to dismiss certain petitions of intervention. In that case, on February 1, 1936, the court dismissed the petition of

intervener Stover, who, like plaintiffs here, was a dealer, and dismissed another petition of another intervener which was not a dealer but a mere association of dealers; the court further refused to render a declaratory judgment because, if rendered, it "would not terminate the uncertainty or controversy giving rise to the proceeding," quoting the whole of section 20-21,145, Comp. St. 1929, as authority, and making it the syllabus of the opinion. That section reads as follows: "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." The court also cited and applied the doctrine of *Monteith v. Alpha High School District,* 125 Neb. 665, 251 N. W. 661. The syllabus of that opinion says:

"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. * * *

"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."

We are entirely satisfied with the reasoning of the opinion on the motion to dismiss and on the refusal of the court to render a declaratory judgment in *Smithberger v. Banning, ante,* p. 354, 265 N. W. 10. For the further reasoning in that case, reference is made to it without repeating it here. Here as there, all the real persons in interest are not made parties; even the amounts due or claimed to be due the individual plaintiffs are not stated; and the ultimate consumers of gasoline, or at least some of them, ought to be heard, "on the ground that some designated necessary party or parties should have been heard, not only for the information of the court but because such a party might be affected by, even though not bound by, the decision; and in

so conclusive a proceeding it would be neither just nor proper to render a judgment without hearing and binding such interested person. Any suggestion, of course, that interested parties could be bound by a judgment in a proceeding to which they were not parties served, with opportunity to be heard, would encounter constitutional objections." Borchard, Declaratory Judgments, 104-106.

Not only because of the confusion and uncertainty that apparently would follow our retaining jurisdiction and entering personal judgments for plaintiffs, but in the exercise of the discretion committed to us by the statute, we are of the opinion we ought to refuse to enter a declaratory judgment or decree in this suit.

It is therefore ordered that defendants' motion to dismiss the petition be and the same is hereby sustained, without prejudice to further action or actions.

MOTION TO DISMISS SUSTAINED.

STATE, EX REL. WILLIAM H. WRIGHT, ATTORNEY GENERAL, RELATOR, V. LANCASTER COUNTY RURAL PUBLIC POWER DISTRICT ET AL., RESPONDENTS.

FILED APRIL 4, 1936. NO. 29814.

1. **Corporations**: POWER DISTRICTS. Under the act authorizing the organization of public corporations to supply electrical energy in organized districts, service in the same territory by two districts is not forbidden, where the exercise of powers and the performance of duties by one will not nullify, conflict with or materially affect those of the other. Comp. St. Supp. 1935, sec. 70-702.
2. ———: ———: ORGANIZATION. For the purpose of organizing a power district to supply electrical energy therein, the certificate by the department of roads and irrigation that the project is feasible, conforming to public convenience and welfare, *held* sufficient as against an attack by *quo warranto* on the ground that the services will materially affect those of another district in overlapping territory. Comp. St. Supp. 1935, sec. 70-703.
3. **Quo Warranto**. "*Quo warranto* under our statute (Rev. St. 1913,

sec. 8328) is intended to prevent the exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising those powers." *State v. Drainage District*, 100 Neb. 625, 160 N. W. 997.

4. **Corporations:** POWER DISTRICTS: ORGANIZATION. The act authorizing the organization of public corporations to supply electrical energy in organized districts does not require the department of roads and irrigation, in issuing a certificate of approval, to include a finding that services in one district will not materially affect those of another district in overlapping territory. Comp. St. Supp. 1935, sec. 70-703.
5. ———: ———: ———: CERTIFICATE OF APPROVAL. In the act authorizing the organization of public corporations to supply electrical energy in organized districts, the provision that the state department of roads and irrigation "shall," within 30 days from the receipt of the petition for incorporation, issue a certificate approving the project, if deemed feasible, the word "shall" is directory, as distinguished from a mandatory or jurisdictional meaning, where the act itself imposes duties of a judicial nature requiring a longer time. Comp. St. Supp. 1935, sec. 70-703.

Original proceeding in *quo warranto* to dissolve the Lancaster County Rural Public Power District. *Dismissed.*

William H. Wright, Attorney General, and *Lester A. Danielson,* for relator.

C. A. Sorensen, for respondents.

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

ROSE, J.

This is an action in the nature of *quo warranto* to dissolve the organization or corporate existence of the Lancaster County Rural Public Power District. The action was brought originally in the supreme court by the state, on the relation of the attorney general, and is based on alleged failure to comply with the act of 1933, authorizing the creation of public light and power districts. Laws 1933, ch. 86; Comp. St. Supp. 1935, secs. 70-701 to 70-716.

By that act the legislature provided for the organization

and operation of light and power systems to furnish electrical energy to customers in organized districts. To this end provision was made for acquiring the rights and property essential to feasible electric light and power projects.

The territory included in the Lancaster County Rural Public Power District consists of the 35 voting precincts in Lancaster county outside of the city of Lincoln.

In an answer to the information of relator, the proceedings on which the organization or incorporation of the Lancaster County Rural Public Power District depends are stated in detail. There is no controversy over the material facts. The issues are to be determined on a motion by relator for judgment on the pleadings.

The organization or incorporation of the Lancaster County Rural Public Power District is first attacked by relator as fatally defective on the grounds that its territorial boundaries are included in the Eastern Nebraska Public Power District composed of the counties of Lancaster, Richardson, Pawnee, Nemaha, Johnson, Cass, Otoe, Sarpy, and Saunders; that both districts were in the course of organization at the same time; that territory in the two districts overlap, both planning to construct transmission lines in rural Lancaster county to furnish electrical energy in the same territory to the same persons; that, under the plans adopted by both districts, one would nullify, conflict with or materially affect the other in the exercise of corporate powers and duties, contrary to statute. These contentions of relator, though well presented, do not seem to be tenable when considered with the entire act and the organization records of the two districts. According to the statute, a public power district may be created by a petition containing the required data, by the filing thereof with the department of public works, or its successor, and by that department's certificate of approval after an investigation. Comp. St. Supp. 1935, sec. 70-703. The act provides:

"Upon receipt of such petition it shall be the duty of said department of public works at once to make an investiga-

tion of the proposed district and of its proposed plants, systems and irrigation works and, if deemed by said department feasible and conforming to public convenience and welfare, the department, or its successor, by its secretary or executive head, shall thereupon and within 30 days from the receipt of such petition execute a certificate, in duplicate, setting forth a true copy of said petition and declaring that said petition has been approved." Comp. St. Supp. 1935, sec. 70-703.

The record shows compliance with statutory requirements, unless legal organization was defeated by the overlapping of districts in rural Lancaster county, or by delay in the issuance of the certificate of approval. A section providing that a public power district, when created in the manner prescribed by statute, "shall be a public corporation or political subdivision of the state" contains the following proviso:

"Provided nothing in this act shall be construed to prevent the organization of a district hereunder within, or partly within, the territorial boundaries of another district organized hereunder, so long as the plants, systems and works, the operation of the same, the exercise of powers and the assumption of duties and responsibilities hereunder, of or on the part of one such district, do not nullify, conflict with, or materially affect those of or on the part of another such district." Comp. St. Supp. 1935, sec. 70-702.

Overlapping is not forbidden except where there is a conflict in material respects mentioned in the proviso. For the purposes of organization, the duty to investigate and determine whether such a conflict exists was imposed on the department of public works, or its successor, the department of roads and irrigation with the state engineer as executive head. The department of roads and irrigation, by the state engineer, issued, in duplicate, after an investigation, a certificate of approval declaring that the proposed rural electric light and power project of the Lancaster County Rural Public Power District is feasible, conforming to public convenience and welfare. It was argued by re-

lator, however, that the certificate of approval lacks a finding that the systems and projects of the two districts for supplying electrical energy in the same territory will not be in material conflict. The statute does not require such a finding.

The duty of the state department, as imposed by provisions already quoted from the statute, was to make an investigation of the proposed district and of its proposed plants and systems and, if deemed feasible and conforming to public convenience and welfare, to execute, in duplicate, a certificate setting forth a true copy of the petition and declaring it approved. Comp. St. Supp. 1935, sec. 70-703. In this respect the record of organization shows compliance with the statute. The state department made the required investigation and issued certificates declaring that the proposed plants and systems of both districts were "feasible," conforming to public convenience and welfare, thus implying and deciding that overlapping will not create any material conflict within the meaning of the legislative act. As to this alleged defect, the certificates were sufficient for the purposes of the organization attacked by *quo warranto*. The record fails to show that the powers of the two districts cannot be so exercised as to prevent a material conflict. *Quo warranto* "is intended to prevent the exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising those powers." *State v. Drainage District,* 100 Neb. 625, 160 N. W. 997. On this phase of the case, therefore, relator is not entitled to a writ of ouster.

The organization or incorporation of the Lancaster County Rural Public Power District is also attacked as void on the ground that the state department's certificate of approval was not issued within 30 days from the receipt of the petition for incorporation, as required by law, 58 days having intervened. The act provides that the certificate of approval "shall" be executed within 30 days from the receipt of the petition. Comp. St. Supp. 1935, sec. 70-703. The position of relator is that "shall," in the connection

used, is a mandatory word and that the issuance of the certificate of approval within 30 days is jurisdictional. On the other hand, it is argued that "shall" is directory, when the duties imposed on the state department by the entire act are considered with legislative intent. The state department is charged with the imperative duty "to make an investigation of the proposed district and of its proposed plants, systems and irrigation works." Comp. St. Supp. 1935, sec. 70-703. Whether the proposed project is feasible, conforming to public convenience and welfare, is a determinable question directed to the state department. Comp. St. Supp. 1935, sec. 70-703. The investigation is judicial in its nature. It may require an intricate examination of technical engineering data and of plants and electrical systems. The examination of witnesses may be necessary. If the investigation required cannot be made in the orderly course of procedure within 30 days, the legislature did not mean to thus arbitrarily limit the time or to require an impossibility. Under the rule of reason, sufficient time for the performance of the official duties imposed, though more than 30 days, was intended, in view of all the circumstances. In this interpretation of the law "shall" was used in a directory sense, not mandatory. Decisions so holding are numerous and need not be cited. The delay in issuing the certificate of approval was not caused by neglect or other fault of the state department nor by the Lancaster County Rural Public Power District. The petition was filed July 20, 1935, and Ida Belle Betz objected to its allowance August 5, 1935, on the ground that the territory described therein was overlapped by the territory of the Eastern Nebraska Public Power District. There was a hearing on the objections August 13, 1935. August 16, 1935, supplemental objections of a similar import were interposed. August 19, 1935, the state department ordered a continuance to permit further consideration of the objections, to study the question as to overlapping and as to the feasibility of petitioner's plans. After an investigation requiring 58 days the certificate of approval was executed

September 18, 1935. On these facts jurisdiction to issue the certificate of approval was not lost by delay, since, under the circumstances, the 30-day provision for official action was not mandatory. It follows that a writ of ouster is denied and the action

DISMISSED.

STATE, EX REL. WILLIAM H. WRIGHT, ATTORNEY GENERAL, RELATOR, V. EASTERN NEBRASKA PUBLIC POWER DISTRICT ET AL., RESPONDENTS.

FILED APRIL 4, 1936. No. 29815.

Quo Warranto. Organization of the Eastern Nebraska Public Power District as a public corporation or political subdivision of the state sustained in an attack by *quo warranto* for reasons stated in the opinion in *State v. Lancaster County Rural Public Power District, ante*, p. 677, 266 N. W. 591.

Original proceeding in *quo warranto* to dissolve the Eastern Nebraska Public Power District. *Dismissed.*

William H. Wright, Attorney General, and *Lester A. Danielson,* for relator.

Perry, Van Pelt & Marti and *Charles A. Defoe,* for respondents.

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

ROSE, J.

This is an action in the nature of *quo warranto* to dissolve the organization or corporate existence of the Eastern Nebraska Public Power District. The action was brought originally in the supreme court by the state, on the relation of the attorney general, and is based on alleged failure to comply with the act of 1933, authorizing the creation of public light and power districts. Laws 1933, ch. 86; Comp. St. Supp. 1935, secs. 70-701 to 70-716.

By that act the legislature provided for the organization and operation of light and power systems to furnish electrical energy to customers in organized districts. To this end provision was made for acquiring rights and property essential to feasible electric light and power projects.

The territory included in the Eastern Nebraska Public Power District consists of the counties of Lancaster, Richardson, Pawnee, Nemaha, Johnson, Cass, Otoe, Sarpy, and Saunders.

In an answer to the information of relator, the proceedings on which the organization or incorporation of the Eastern Nebraska Public Power District depends are stated in detail. There is no controversy over the material facts. The issues are to be determined on motion of relator for judgment on the pleadings.

The organization or incorporation of the Eastern Nebraska Public Power District is attacked by relator as fatally defective on the ground that its boundaries include the territory of the Lancaster County Rural Public Power District, thus causing alleged conflict of powers and duties forbidden by statute. Comp. St. Supp. 1935, sec. 70-702. There is also a further attack on the ground that the certificate of approval issued by the state department of roads and irrigation was not issued within 30 days from the receipt of the petition for incorporation, as required by law. Both of these issues were determined against relator in the case of *State v. Lancaster County Rural Public Power District, ante,* p. 677, 266 N. W. 591. The decision in that case determines the case at bar. The two cases were argued, submitted and considered together. It follows that a writ of ouster is denied, and the action

DISMISSED.

PAUL HANSON ET AL., APPELLEES, V. THOMAS GASS ET AL., APPELLANTS.

FILED APRIL 6, 1936. No. 29727.

1. **Intoxicating Liquors:** STATUTE. Section 26 (5) C, ch. 116, Laws 1935, the liquor control act, provides for the issuance by the liquor control commission of a license to sell alcoholic liquors. Alcoholic liquors as defined by section 2 of the act include "alcohol, spirits, wine and beer."
2. ———: ———: CONSTRUCTION. Section 3, ch. 116, Laws 1935, is merely the declaration of policy in the nature of a preamble and is not a legislative enactment in the nature of substantive law.
3. ———: ———: ———. Positive and specific provisions of a law as enacted are not changed or modified by a preliminary declaration as to public policy.
4. **Statutes:** CONSTRUCTION. Resort may be had to recitals of legislative intent for the purpose of construing an ambiguous statute, but where there is no ambiguity, the meaning will not be affected by such recitals.
5. **Intoxicating Liquors:** STATUTE: CONSTRUCTION. Sections 82 and 83, ch. 116, Laws 1935, are clear, explicit and unambiguous and provide for the issuance of a license to sell alcoholic liquor including beer at retail and are not subject to construction.

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

William H. Wright, Attorney General, Milton C. Murphy and *Robert D. Flory,* for appellants.

Dorsey, Baldrige & Chew, contra.

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

DAY, J.

Several holders of licenses to sell at retail alcoholic liquors under subsection C, subdivision 5, of section 26 of the liquor control act (Laws 1935, ch. 116, Comp. St. Supp. 1935, ch. 53, art. 3) instituted this suit to secure an injunction against the defendants, members of the Nebraska state liquor control commission and its agents, to restrain them from preventing said licensees from selling beer and alcoholic liquors other than beer in the same room or premises

described in their respective licenses. The trial court permanently enjoined and restrained the defendants from prosecuting plaintiffs for selling all kinds of alcoholic liquors including beer at their licensed premises, and from requiring plaintiffs to sell beer and other alcoholic liquors except beer in different or separate rooms or premises. The members of the commission have appealed.

The appellees applied for and received licenses in accordance with the procedure set forth in sections 82 and 83 of the Nebraska liquor control act (Laws 1935, ch. 116) which provide, in substance, that applicants "for license to sell alcoholic liquors, including beer regardless of alcoholic content, at retail by the drink," in any city or village, shall file with the local governing body a sworn application setting forth, among other things, "the location and description of the premises or place of business which is to be operated under such license;" that the local governing body shall, after published notice, act upon the same, and, if it approves, issue the license in triplicate and forward it to the commission, which, in case no protest is filed within three days, shall countersign and return the same to the municipal clerk for delivery to the applicant.

The appellees having complied with all requirements of the law, their licenses were duly issued and delivered to them, and they have since operated thereunder. Later on, however, the commission and its agents, notwithstanding the language of the sections of the statute under which appellees were licensed as aforesaid, made known their purpose to arrest and prosecute them unless they would abandon the right therein granted to licensees to sell alcoholic liquors, including beer, without regard to alcoholic content, in their respective licensed premises, and make choice to sell therein beer only, or other kinds of alcoholic liquors (not including beer) only.

The appellants rely upon section 3, ch. 116, Laws 1935, as providing for the separate sale at retail of beer and alcoholic liquors other than beer, and preventing the sale of both beer and alcoholic liquors other than beer at the same

place. Is this section so inconsistent with the provisions of sections 25 (d), 26 (5) C, 82 and 83 of the same act as to render them inoperative?

In order to discuss the questions presented in an understanding manner, it seems advisable to quote these sections as far as applicable. Section 3: "The legislature further declares the public policy of this state to be separate sale at retail of beer and alcoholic liquors other than beer: Provided, nothing herein shall prevent any retail licensee from holding licenses for both the sale of beer and of alcoholic liquor other than beer, if the same are conducted as separate businesses and sold in separate and distinct places or premises. The legislature further declares the public policy of this state to be that beer and all other alcoholic liquors, except beer, shall be sold and dispensed at retail in separate and distinct rooms or premises: Provided, however, the same licensee shall be eligible to be the recipient of both a retail beer license and a retail license to sell alcoholic liquors except beer, if the retail businesses so licensed are operated in separate and distinct rooms or premises. The legislature further declares the public policy of this state to be that no license for the sale of alcoholic liquors, except beer, shall be granted to any applicant making application therefor outside the corporate limits of any city or village within this state, save and except as provided in section 46 of this act."

The other sections of the act which the appellees rely upon provide, in so far as pertinent: Section 25 (d): "A retailer's license shall allow the licensee to sell and offer for sale at retail either in the original package or otherwise, as therein prescribed, in the premises specified in such license, alcoholic liquors or beer regardless of alcoholic content, for use or consumption, but not for resale in any form."

Section 26 (5) C: "Alcoholic liquors within the corporate limits of cities and villages, for consumption on the premises and off the premises (sales in original packages only), the sum of $250.00."

Section 82: "Any applicant for license to sell alcoholic liquors, including beer regardless of alcoholic content, at retail by the drink within the corporate limits of any city or village within this state shall first submit to the local governing body thereof an application under oath stating: * * * (6) The location and description of the premises or place of business which is to be operated under such license; * * * (7) A statement whether applicant has made similar application for a similar other license on premises other than described in this application, and the disposition of said application; * * * In addition to the foregoing information, such application shall contain such other and further information as the state commission or the local governing body may, by rule or regulation not inconsistent with law, prescribe."

Section 83: "All original and renewal applications for license to sell alcoholic liquors, including beer regardless of alcoholic content, at retail by the drink within the corporate limits of cities or villages shall be filed in each instance with the municipal clerk of the local governing body at least fifteen days before the hearing thereon is had."

The Nebraska state liquor control commission, of which the defendants are members, have construed the act to require that beer and alcoholic liquors, other than beer, be sold in separate places. Such a ruling was the cause of this suit. The rule adopted and promulgated is as follows:

"The Nebraska liquor control commission has carefully considered the provisions of H. R. 128 covering the sale of beer and other alcoholic liquors; the opinion of the attorney general construing the various sections of the act on this question, and the able presentation of the question by interested parties. Section 3 is the main section dealing directly with this question and reads as follows: (Omitted because heretofore set out in this opinion).

"It is contended by some that sections 25 and 26, and other sections of the act, are so directly and clearly in conflict with section 3 as to abrogate the provisions of section 3. Section 25, however, apparently distinguishes in a way,

between beer and other alcoholic liquors, as 25 (d) states, 'a retailer's license shall allow the licensee to sell * * * alcoholic liquors or beer.' Section 26 is the section that is chiefly in conflict with other sections throughout the statute, including section 3, and sections providing the procedure for obtaining licenses.

"The commission, in construing section 26, in view of these various conflicts, can only hold that this section 26 is controlling only as to the amount of license fees, and the various kinds of licenses.

"Sections 4 and 97, and other provisions of the liquor act, authorize the commission to adopt rules and regulations to control the manufacture, distribution, and sale of alcoholic liquors except as specifically delegated in this act. After a careful consideration of the entire act, and assisted by the opinion of the attorney general, the commission has come to the conclusion that while there is considerable question as to the conflict between section 3 and other sections of the liquor act, particularly section 26, that in our opinion these conflicts are not irreconcilable. It will be noted that section 3 provides that licenses for the sale of beer and other alcoholic liquors may be granted to the same person, but again specifically says, 'If the same are conducted as separate businesses and sold in separate and distinct places or premises.'

"The duty of the commission is to carry out to the best of its ability the will of the people as expressed by the legislature. We are unable to come to the conclusion that the provisions of sections 25 and 26, and other sections of the act, justify the complete repudiation of section 3 and that, at least until a judicial decision on these conflicting sections is available, the commission is bound to respect the plain instructions of the legislature as expressed in said section 3.

"The Nebraska liquor control commission therefore rules that the sale of beer and the sale of alcoholic liquor other than beer must be conducted as separate businesses and be sold in separate and distinct premises, places, or rooms not

to be connected by openings used by the public, and that any violation thereof shall be illegal and subject to the general penalty provided for the violations of the liquor control act, and the revocation of the licenses of any licensee guilty of such violation." This is the administrative construction of the statute which we are to consider.

The city of Omaha, under the provisions of the Nebraska liquor control act, voted for the sale of alcoholic liquors at retail. Thereafter, the plaintiffs applied to the local governing body, the city commission, which approved the applications, and thereafter the licenses were issued by the Nebraska liquor control commission. The licenses issued were under the provisions of sections 25 (d), 26 (5) C, 82 and 83 of the Nebraska liquor act. Section 25 (d) has been set out above, and states that a retailer's license shall permit the sale of alcoholic liquor or beer regardless of alcoholic content. Section 26 permits the sale of alcoholic liquors. Section 82, also quoted, uses the language: "Any applicant for license to sell alcoholic liquors, including beer regardless of alcoholic content, at retail by the drink." Section 83 uses this language: "All original and renewal applications for license to sell alcoholic liquors, including beer regardless of alcoholic content," shall file application with the municipal clerk. These excerpts from the act, together with other sections which are quoted herein, indicate that the act was not a harmonious whole, each part consistent with the others. From a legislative history of the act, we find that it was before the legislature for a long time and called for several conference committees for the House and the Senate. This probably accounts for some of the confusion, for sections were added and sections deleted which render inconsistencies.

The plaintiffs contend that since they were issued a license under section 26 (5) C, and hereinafter referred to as a class C license, which is for the sale of alcoholic liquors for consumption on the premises, this authorizes them to sell beer. The act, section 2, subdivision 5, defines terms used therein as follows: "The phrase 'alcoholic liquor' in-

cludes the four varieties of liquor above defined, 'alcohol, spirits, wine and beer' and every liquor or solid, * * * containing alcohol, spirits, wine or beer, and capable of being consumed as a beverage by a human being."

Considering these sections, it would seem to be without reasonable dispute that, under the definitions, a class C license would provide for the sale of alcoholic liquors including beer. Section 26 provides for the several classes and cost of licenses to be issued as follows, giving their substance:

(1)	To manufacture alcohol and spirits	$1,000.00
(2)	To manufacture beer and wine:	
	A. Beer—according to daily capacity from $100 to	800.00
	B. Wines	250.00
(3)	For alcoholic liquor distributor's license, wholesale, "except beer"	500.00
(4)	Beer distributor's license, wholesale	250.00
(5)	For a retailer's license:	
	A. Beer, only, consumption on premises	100.00
	B. Beer, only, for consumption off the premises (sales in the original packages only), the sum of	25.00
	C. Alcoholic liquors within the corporate limits of cities and villages, for consumption on the premises and off the premises (sales in original packages only), the sum of	250.00
	D. Alcoholic liquors, including beer, regardless of alcoholic content, within the corporate limits of cities and villages, for consumption off the premises (sales in the original packages only), the sum of	150.00
	E. Alcoholic liquors without the corporate limits of cities and villages, in counties mentioned in section 46 of this act, for consumption off the	

premises (sales in original packages only) 150.00

F. Provides for sale of beer without the corporate limits of cities and villages, for consumption on the premises..... 25.00

No doubt can exist that the legislature provided for licensees to sell either beer or other alcoholic liquor separately, if the licensee desired. But class C is a special provision for sale of alcoholic liquors for consumption on the premises. It is a license differing from all others. It cannot be issued except in cities and towns which have voted for it.

These sections clearly provide for the issuance of a license for the retail sale, by the drink, of "alcoholic liquors, including beer regardless of alcoholic content." They are the only sections in the act that provide a procedure by which the type of license described in subdivision (5) C of section 26 can be applied for or granted. That subdivision does not contain the words "including beer regardless of alcoholic content" which occur in sections 82 and 83, but the definition of "alcoholic liquor" in section 2 (5) of the act, as including beer along with alcohol, spirits and wine, supplies the place of those words, which in sections 82 and 83 simply make explicit the fact that licenses applied for and issued under those sections were intended to grant to licensees the privilege of selling beer by the drink along with the other forms of alcoholic beverages.

Sections 82 and 83 of the act are complete within themselves, and they provide specifically the form of the application for a license to sell "alcoholic liquors, including beer * * * at retail by the drink," and the procedure whereby the license is granted and issued to the applicant. The application must contain "the location and description of the premises or place of business which is to be operated under such license" (sec. 82 [6]), and the notice of the time and place of hearing on the application before the local governing body, required by section 83 to be published, must contain "the legal description of the premises sought to be licensed."

Section 49 of the act says: "Retail licenses issued hereunder apply only to the premises described in the application and in the license issued thereon, and only one location shall be so described in each license."

Sections 82 and 83 are the specific and concrete provisions, and the only provisions, of the liquor control act that govern the issuance of the licenses involved in the case at bar, and which define their scope. They unquestionably authorize the licensee to sell "alcoholic liquors, including beer," in the premises described in the application and the license; that is, to sell beer and the other kinds of alcoholic liquor in the same premises. It would be impossible to read into these sections a provision to the effect that beer could not be sold in the licensed premises, or that the other kinds of alcoholic liquor could not be sold therein along with beer, without destroying their entire structure and purport, and giving them a meaning exactly opposite to that which they now convey.

But the real controversy arises over the construction of section 3 of the liquor control act, which has been quoted in the beginning. Section 3 is not legislative either in substance or form, but is merely a declaration of policy in the nature of a preamble. Although it appears as a section of the act, it does not change the provisions of the act. It declares that it is the public policy of the state to separate the sale at retail of beer and alcoholic liquors other than beer. It also provides that the same person may have a license to sell both if the sale is conducted as separate businesses and sold in separate and distinct places or premises. This is a most unusual and fantastic legislative pronouncement. Its like is not found in the books. However, it seems that what the legislature does in positive and specific provisions of the law as enacted is not changed by a preliminary declaration as to public policy. It was held in *State v. McKune*, 215 Wis. 592, 255 N. W. 916, as follows: "Legislative declaration of the purpose of a statute is not controlling except to the extent disclosed on the face of the act or inferable from its operation."

The principle just stated is illustrated in *Coulter v. Pool,* 187 Cal. 181, 201 Pac. 120, wherein the supreme court of California said: "A legislative declaration, whether contained in the title or body of a statute, that the statute was intended to promote a certain purpose, is not conclusive on the courts and they must inquire into the real, as distinguished from the ostensible, purpose of the statute." Along the same line, it was held in *Brahmey v. Rollins,* 179 Atl. (N. H.) 186, that "legislative policy is law only to extent that enactments incorporate such policy." And in *Cantor v. Sachs,* 18 Del. Ch. 359, 162 Atl. 73, it was held: "That court is cognizant of legislature's purpose in enacting language does not justify finding that such purpose was expressed when language used does not justify it." And in *Wade v. Madding,* 161 Tenn. 88, 28 S. W. (2d) 642, it was said: "It is a reasonable rule of construction that, when the legislative expression of a general intent conflicts with a particular intent subsequently expressed, the latter will prevail." The same principle is adhered to in *Doemker v. City of Richmond Heights,* 322 Mo. 1024, 18 S. W. (2d) 394, as follows: "In cases of doubt as to the proper construction of * * * statute, resort must be had to the preamble or recitals, for the purpose of ascertaining the legislative intent. But where the enacting part of the statute is unambiguous, its meaning will not be controlled or affected by anything in the preamble or recitals."

In view of the foregoing authorities, we conclude that the declaration of policy or purpose in section 3 of the act is not substantive law, and that it could only be of use to determine the intent of the legislature in case sections 82 and 83 were ambiguous with respect of the right of a holder of license C thereunder to sell alcoholic liquors, including beer regardless of alcoholic content, in the licensed premises. The only ambiguity that exists in this connection is when an attempt is made to give section 3 the effect of substantive law. Sections 82 and 83 of themselves are not ambiguous on the question. They could not be clearer or more explicit with respect to the retail sale of alcoholic liquors including

beer by the drink. These sections provide for the issuance of licenses. They are vital parts of the operation of the statute and must be taken as the authoritative expression of legislative intent and are not to be overcome or even rendered ambiguous by a mere declaration of policy in a preceding section, which the legislature abandoned or ignored when they enacted the substantive and specific provisions of the act.

But even if section 3 be accorded the force of law, when it is in reality only a mere declaration of policy, it would nevertheless be, as has been shown, in direct and irreconcilable conflict with sections 82 and 83; both could not stand, and one or the other must yield. Section 3 is general in its terms, while sections 82 and 83 are positive and specific on the subject with which they deal, and they are subsequent to section 3 in their arrangement and numerical order in the act. The supreme court of Nebraska has laid down the rules by which the courts should be guided in such cases. In *Omaha Real Estate & Trust Co. v. Kragscow,* 47 Neb. 592, 66 N. W. 658, this court said: "Where two sections or portions of the same statute, passed at the same time, are inconsistent with and repugnant to each other, so much so that both cannot be enforced, the last section, or last words, will be allowed to prevail and the section or words in conflict therewith held to be repealed." The exact situation existing in the case from which the above rule is quoted is explained in paragraph 7 of the syllabus, as follows: "Sections 5 and 41 of chapter 43, Revised Statutes of 1866, entitled 'Real Estate,' were enacted at the same time, as parts of the same statute, and being in some of their provisions so repugnant that both could not be executed, inasmuch as they conflicted, the last section—41—prevailed and the other was repealed." This rule was first announced in *Albertson v. State,* 9 Neb. 429, 2 N. W. 742, in which it was held: "Where there is an irreconcilable conflict between different sections or parts of the same statute, the last words stand, and those which are in conflict therewith are, so far as there is a conflict, repealed."

Another rule of equal force in this state is announced in the following decisions of this court, and it stands today unaltered: "Specific provisions of a statute relating to a particular subject will prevail over general provisions in the same enactment." *State v. City of Kearney,* 49 Neb. 325, 68 N. W. 533. "The several sections and provisions of a legislative act should be construed together, and harmonized if possible; and, if there is a conflict in them, general expressions must give way to special and specific provisions." *State v. Nolan,* 71 Neb. 136, 98 N. W. 657. "Special provisions in a statute in regard to a particular subject control general provisions." *Mancuso v. State,* 123 Neb. 204, 242 N. W. 430.

Sections 82 and 83 are the specific and particular provisions, and the only provisions, of the act by which the practical procedure for applying for and procuring licenses for the retail sale of alcoholic liquors, including beer, are prescribed and governed. By the language of those sections the licensee is granted the undoubted right to sell all forms of alcoholic liquor, including beer, in the premises described in the application and the license, without any restriction or exception as to different or separate premises. Section 3, if accorded everything that could be claimed for it, is nothing more than a general provision to the effect that beer and the other kinds of alcoholic liquor cannot be sold except on separate and distinct premises.

If given the construction contended for by appellants, section 3 would be in irreconcilable conflict with sections 82 and 83, and this rule would be applicable. While the last rules discussed have never been departed from in this jurisdiction, and are in accord with the weight of authority, it is not necessary to invoke them here except by way of argument. This court is of the opinion that section 3 is a declaration of legislative policy in the nature of a preamble, and does not change, modify, or conflict with sections 82 and 83 of the liquor control act, and the judgment of the trial court is

AFFIRMED.

PAINE and CARTER, JJ., dissent.

RIGGS-ORR INVESTMENT COMPANY, APPELLEE, V. CITY OF OMAHA ET AL., APPELLANTS.

FILED APRIL 10, 1936. No. 29606.

1. Taxation: VOLUNTARY PAYMENT. "When a voluntary payment (of a real estate tax) is spoken of, the qualifying word is not used in its ordinary sense, and many payments are held to be voluntary which are made unwillingly and only as a choice of evils or of risks." 2 Cooley, Taxation (3d ed.) 1501.
2. ———: ———. Pleadings examined and payment of taxes here *held* to be voluntary.
3. ———: SUIT TO RECOVER TAXES. "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." *Monteith v. Alpha High School District*, 125 Neb. 665, 251 N. W. 661.
4. ———: ———. One who seeks to avail himself of the statutory right to recover a tax voluntarily paid must show a substantial compliance with the statute. *Monteith v. Alpha High School District*, 125 Neb. 665, 251 N. W. 661.

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

Seymour L. Smith, Frank H. Woodland, Harold C. Linahan and *W. W. Wenstrand*, for appellants.

James C. Kinsler and *A. Marvin Lungren, contra.*

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

GOSS, C. J.

Defendants city of Omaha and School District of the city of Omaha appeal from judgments against them for separate amounts.

Plaintiff was the owner of a tract at the northwest corner of Harney and Twentieth streets in Omaha, fronting south on Harney street 95 feet and east on Twentieth street 132 feet. In April, 1926, the county assessor duly assessed the entire tract, and in August, 1926, the taxes on the tract were duly levied, with certain portions thereof for the 1927 taxes for the city and the school district.

On March 30, 1926, the city passed an ordinance declaring the necessity of widening Twentieth street from Dodge to Leavenworth street. The ordinance contemplated taking the east 40 feet of plaintiff's tract, which was finally done. In April, 1926, appraisers were appointed. On August 3, 1926, the appraisers reported in writing and on September 28, 1926, their report was approved.

It is alleged in the petition filed February 13, 1931, that the 40 feet in width thereupon became nontaxable property; that on June 11, 1927, the *ex officio* city treasurer (who was a party here but against whom no personal judgment was rendered) represented to plaintiff that it was liable for taxes on the whole tract, demanded and received from plaintiff the full amount of the taxes levied against the 95 by 132 tract, notwithstanding the east 40 feet had been appropriated and had become a part of Twentieth street, and the property of the city. Plaintiff prayed judgment for forty ninety-fifths of the total tax paid.

In its answer the city alleges that plaintiff appeared before the appraisers, submitted its claim for damages, appealed from the action of the city council in approving the report of the appraisers and in appropriating the property; that plaintiff knew when it paid the taxes that the property had been appropriated, but paid the taxes with full knowledge and voluntarily; and that after paying the taxes plaintiff for more than three years failed to seek a return and is therefore estopped to demand a return and to maintain this action.

Defendant school district makes about the same answer as the city. It pleads estoppel and laches. It pleads, also, that no demand had been made upon it prior to the commencement of the suit and that the taxes were paid voluntarily before they were delinquent.

Plaintiff moved for judgments on the pleadings and the motion was sustained. Judgment was against the city for $644.61, against the school district for $768.83, and against the Metropolitan Utilities District for $37.44. The last named defendant did not appeal.

Do the pleadings show that the payment of the taxes on the 40 feet of the tract taken over by the city on September 28, 1926, was voluntary? The brief of appellee prints a memorandum opinion said to have been furnished by the trial judge to both parties at the time the judgment below was rendered. That memorandum argues that the tax had been levied on the whole 95 feet and that the city treasurer had no authority to determine how much was attributable to the east 40 feet and how much to the west 55 feet; while the tax was not paid under protest, the facts do not bring the case within any of the statutory provisions for the recovery of illegal taxes; in fact, the tax when levied (August, 1926) was not illegal because at that time the city had not acquired title (it is said to have been acquired by the city September 28, 1926); upon vesting of the title in the city the 40 feet became exempt from taxation and the treasurer had no authority to collect taxes on city property; under the conditions stated the payment by plaintiff was *in invitum;* this furnishes a firm foundation for an action for money had and received; and the case is ruled by *Fremont, E. & M. V. R. Co. v. Holt County,* 28 Neb. 742, 45 N. W. 163.

We think the case above cited is not in point and is not authority for the judgment entered by the trial court. The facts and law of that case are stated in the syllabus, which says: "Before the organization of Brown county it was attached to Holt county for election, judicial, and revenue purposes, and in June, 1883, Holt county levied taxes upon all property in Brown county. Before such taxes became due, however, viz., September, 1883, Brown county was duly organized and elected county officers and thereafter transacted county business at the county seat of the latter county, and the authority of Holt county over it wholly ceased. The taxes upon the plaintiff's property, however, were carried on its tax rolls, although a copy thereof of property in Brown county had been obtained by the duly elected officers of that county. When the taxes on the plaintiff's property became due they were paid to the treasurer of Holt county, who placed the same in the county treasury. In an

action to recover back such taxes, *held,* from the statement of facts in the petition, that the payment was made to a public officer under color of his office, but whose authority to collect the taxes in question had ceased, and that the money so paid could be recovered back."

In the instant case the city treasurer had authority to collect the taxes and it was his duty to collect them because they had beeen properly assessed and levied when plaintiff owned the whole property. By warrant of the duly authorized officer they had been certified to the treasurer and had been entered upon his books for payment. It was the duty of the plaintiff to pay the taxes under protest before he could sue to recover them back.

Section 77-1923, Comp. St. 1929, provides the method for recovery of a tax when "the property upon which it was levied was not liable to taxation." The party aggrieved may pay them under protest to the county treasurer or other authority and get a receipt "stating thereon that they were paid under protest, and the grounds of such protest, whether or not taxable or twice assessed, and taxes paid thereon." The statute also provides that, if "for any other reason except as hereinbefore set forth," a party claims a right to recover taxes paid, he must make written demand of the treasurer within thirty days as a condition precedent to recovery. If the plaintiff here proceeds upon any such provision of the statute, it has not pleaded any such demand or has made none except by the bringing of his suit more than three years after the tax was paid.

"Voluntary payments. That a tax or assessment voluntarily paid cannot be recovered back, the authorities generally agree. And it is immaterial in such a case that the tax or assessment has been illegally laid, or even that the law under which it was laid was unconstitutional. The principal is an ancient one in the common law, and is of general application. Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as a reason why the state should furnish

him with legal remedies to recover it back." 2 Cooley, Taxation (3d ed.) 1495.

"Mistake of fact can scarcely exist in such a case except in connection with negligence; as the illegalities which render such a demand a nullity must appear from the records, and the taxpayer is just as much bound to inform himself what the records show, or do not show, as are the public authorities." 2 Cooley, Taxation (3d ed.) 1498.

"When a voluntary payment is spoken of, the qualifying word is not used in its ordinary sense, and many payments are held to be voluntary which are made unwillingly and only as a choice of evils or of risks." 2 Cooley, Taxation (3d ed.) 1501.

See, also, *Dorland v. City of Humboldt*, 129 Neb. 477, 262 N. W. 22; *Black Bros. v. Logan County*, 100 Neb. 478, 160 N. W. 740; *Welton v. Merrick County*, 16 Neb. 83, 20 N. W. 111; *Foster v. Pierce County*, 15 Neb. 48, 17 N. W. 261.

We are of opinion the payment of the taxes by plaintiff was voluntary and that a decision is ruled by *Monteith v. Alpha High School District*, 125 Neb. 665, 251 N. W. 661. In that case the syllabus says:

"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. * * *

"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."

The judgment of the trial court is reversed and the action dismissed.

REVERSED AND DISMISSED.

AMELIA COVEY, APPELLANT, V. E. DAVID ANDERSON, APPELLEE.

FILED APRIL 10, 1936. No. 29636.

1. **Gross Negligence.** "Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1931 (now 1935), 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, 248 N. W. 96.
2. ———: PROOF. "The existence of gross negligence must be determined from the facts and circumstances in each case." *Morris v. Erskine*, 124 Neb. 754, 248 N. W. 96.
3. ———: QUESTION FOR JURY. The question of gross negligence is for the jury, where reasonable minds might draw different conclusions from the evidence. *Morris v. Erskine*, 124 Neb. 754, 248 N. W. 96.

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

Morrow & Morrow, for appellant.

Neighbors & Coulter, contra.

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

GOSS, C. J.

This is a suit for damages for personal injuries received in an automobile accident. At the close of evidence on behalf of plaintiff, the court instructed a verdict for defendant. On overruling the motion for a new trial, the court dismissed plaintiff's action, and plaintiff appealed.

In support of a petition which stated a cause of action, the evidence shows the following. On November 11, 1934, after dark, plaintiff was riding as a guest with defendant in his car on their return from Gering to Mitchell. As the car, driven north by defendant, approached a culvert over a lateral irrigation ditch, a car, with very strong headlights or a bright spotlight, coming south, blinded plaintiff so that she could not see the road. She asked defendant if he could see and asked him not to drive so fast, but he paid no attention. He drove the car into the concrete on the right

side of the culvert and plaintiff was injured and became unconscious. The road across the culvert was wide enough for two cars to pass. About two weeks before the trial defendant told plaintiff that he had stopped and put his lights out, but when he saw a car approaching from the rear he had started up without putting on his lights and consequently hit the guard or cement projection of the culvert. There were injuries to plaintiff sufficient to support a judgment if defendant were found liable.

The petition charges, among other things, that defendant was grossly negligent in proceeding along the highway with his lights turned off and in failing to keep a proper lookout ahead.

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

Plaintiff, being a guest of defendant, must show that her damage was caused by the gross negligence of defendant. Comp. St. Supp. 1935, sec. 39-1129. The term "gross negligence" in this guest statute has been defined to mean negligence in a very high degree, or the absence of even slight care in the performance of a duty. The existence of gross negligence must be determined from the facts and circumstances of each case. Where reasonable minds might draw different conclusions from the evidence, the question of gross negligence is for the jury. *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96. See, also, *Gilbert v. Bryant,* 125 Neb. 731, 251 N. W. 823; *Swengil v. Martin,* 125 Neb. 745, 252 N. W. 207; *Sheehy v. Abboud,* 126 Neb. 554, 253 N. W. 683; *Howard v. Gerjevic,* 128 Neb. 795, 260 N. W. 273.

We think there was sufficient evidence to go to the jury and that it was prejudicially erroneous for the court to direct the jury to return a verdict for defendant.

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

REVERSED.

PAINE, J., dissents.

CARTER, J., dissenting.

Plaintiff was the only witness who testified as to how the accident in question occurred. Her testimony was that defendant turned a square corner about one-quarter of a mile south of the place where the accident happened and then drove north at a rate of 60 miles an hour without lights and into a concrete banister of a bridge over an irrigation lateral. Plaintiff also testified that a car with a bright spotlight was approaching from the north and that another car was following them from the rear. She also testified to an admission by the defendant in which he said that his car was stopped just south of the bridge and that he started the car without turning on his lights and ran into the bridge. There is also evidence that she asked defendant just before the accident not to drive so fast. On cross-examination plaintiff testified that she did not know whether or not the car was stopped, as stated by the defendant. In a statement which plaintiff admits she made after the accident, she said: "Just at the time this car with the spotlight was passing us, Mr. Anderson had swerved his car so far to the right-hand side of the road that he ran into a cement projection on a culvert." She also admitted that she was blinded by the spotlight on the car approaching from the north. She did not recall whether either of the other two cars passed the scene of the accident. Neither of them stopped at the scene of the accident.

The petition is drawn on the theory that defendant was driving his car at a high rate of speed without lights. The evidence is not sufficient to sustain a judgment on such a theory. It is so indefinite and uncertain as to how the accident happened that it should not have been submitted to a

jury. The courts have repeatedly held that negligence will not be presumed. It must be alleged and affirmatively shown. A presumption of negligence cannot be raised without foundation, and the mere fact that an injury occurred is no evidence of fault on the part of the defendant. From all that this record shows, the accident may have resulted because the defendant was blinded by the spotlight on the car coming from the north. Plaintiff admits that she does not know whether the car was stopped just before the accident. If it was so stopped, the accident could not have been caused by the high rate of speed of the car.

Clearly, the above facts fall far short of establishing gross negligence on the part of the defendant. Plaintiff apparently does not know what caused the accident or whether it was caused by defendant's negligence or other intervening causes. That the defendant was guilty of gross negligence should be affirmatively established and not left to speculation and conjecture. The plaintiff failed to show that the accident was the result of the gross negligence of defendant and, in my opinion, the trial court correctly found that the evidence was insufficient to support a judgment and properly directed a verdict for the defendant. I therefore dissent.

CHARLOTTE PORTER, APPELLANT, V. LANCASTER COUNTY, APPELLEE.

FILED APRIL 10, 1936. No. 29585.

1. **Highways**: INJURIES: LIABILITY OF COUNTY. County is not liable for damages to a person injured by reason of insufficiency or want of repair of a highway which the county is not required to maintain and keep in repair.
2. ———: MAINTENANCE. Since January 1, 1926, it is the duty of the department of public works to maintain the whole of the state highway system, after the state has actually undertaken construction or maintenance of such highways.
3. ———: INJURIES: LIABILITY. In the absence of contract between the county and the department of public works, whereby the former undertakes the maintaining of state highways, there

is no liability of the county for an injury to a person occurring by reason of want of repair of such highway, provided that the state has actually undertaken construction or maintenance of such highway.

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

Sterling F. Mutz and *Robert S. Stauffer,* for appellant.

Max G. Towle and *Farley Young, contra.*

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

GOOD, J.

This is an action for damages for personal injuries alleged to have been caused by a defective condition of a state highway. At the close of plaintiff's testimony there was a directed verdict for defendant. Plaintiff has appealed.

It may be conceded, for the purpose of argument, that plaintiff's injuries were caused by a defect in a state highway about a mile west of the city of Lincoln. The principal question for determination is: Was the county of Lancaster liable because of the defect in the highway?

Section 39-832, Comp. St. 1929, provides: "If special damage happens to any person, * * * by means of insufficiency or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county, * * * provided, further, no county or village shall be liable for damages occasioned by defects in state highways and bridges thereon which, under the provisions of section 8336, Compiled Statutes of Nebraska for 1922, as amended by chapter 158, section one, Laws of Nebraska for 1925; as amended by chapter 187, section one, Laws of Nebraska for 1927, the department of public works is required to maintain: Provided, however, the county or village shall not be relieved of liability until the state has actually undertaken construction or maintenance of said highways."

It is conceded that the defect giving rise to the accident

is on a state highway, and in plaintiff's brief it is conceded that "The highway is a state highway which since 1926 ordinarily has been repaired and reconstructed by the state highway department, but this particular dangerous condition in the highway was apparently not reported to the state highway department by the officials of Lancaster county and reconstruction of the abutment or elimination of the danger had not been commenced by the state highway department at the time of the injury complained of." Prior to 1925 the duty had been imposed upon the counties to maintain all of the public highways of said county.

In 1919 the legislature passed an act relating to, and providing for a system of, state highways, and, among others, designated highway No. 33, commencing at Lincoln and running near or through Emerald, Seward, Tamora, Utica and Waco, to York. Laws 1919, ch. 190. Section 4 of the act imposed upon the counties the duty of maintaining the highway system lying within the county, in accordance with directions, specifications and regulations made for such maintenance by the department of public works. Section 8 of the act authorized the county board to close temporarily to traffic any portion of a state highway for the purpose of repairing or making improvements thereon. Section 9 authorized the county board to arrange detours around portions of state highways closed for repairs, as it might deem expedient for this purpose. It will thus be seen that, as the law then existed, the duty was imposed upon the county board to maintain the roads designated as state highways.

In 1925 the law relating to state highways was amended by chapter 158, Laws 1925. Section 1 of that act, now appearing as section 39-1404, Comp. St. 1929, provides: "On and after January 1, 1926, it shall be the duty of the department of public works to maintain the whole of the state highway system, including bridges thereon: * * * In carrying out such work of maintenance, the department of public works is hereby authorized to enter into agreements with boards of county commissioners and county supervisors in counties which it may find to have an organization and

equipment suitable for that purpose, or to employ such other methods or means as it may deem best for that purpose; provided, that if any county which may enter into any such agreement for maintaining the state highways therein shall fail to perform such maintenance work in accordance with said agreement and to the satisfaction of the department of public works, such department may cancel such agreement and adopt such other means as it may deem best for the performance of such work."

By this latter act the duty of maintaining and keeping in repair state highways was imposed upon the department of public works, and of course was necessarily taken from the counties, except where the county boards, by contract with the department of public works, undertake to maintain such state highways. It is true that several of the sections of the act of 1919 were left intact, but, as we view it, they would have no application now to the duty of counties to maintain and keep in repair state highways, except where the counties had undertaken, by contract with the department of public works, to maintain state highways within such counties. We think that, under the circumstances as disclosed by the legislative act, the county was relieved of the duty of maintaining state highways except where it contracted for such maintenance with the department of public works.

Plaintiff has cited and to some extent relies upon *Franek v. Butler County*, 127 Neb. 852, 257 N. W. 235, *Frickel v. Lancaster County*, 115 Neb. 506, 213 N. W. 826, and *Saltzgaber v. Morrill County*, 111 Neb. 392, 196 N. W. 627. In the *Franek* case the question did not involve state highways, but was whether the road was a county road or one which the township was required to keep in repair. The facts giving rise to the decisions in *Frickel v. Lancaster County, supra,* and in *Saltzgaber v. Morrill County, supra,* arose prior to the enactment of the law of 1925, and were ruled by the law as it previously existed. The rules therein announced are inapplicable under the law as it existed at the time of plaintiff's injury.

There is no allegation or evidence that Lancaster county had entered into a contract with the department of public works for the maintenance of the highway whereon the accident occurred. We conclude, therefore, that there was no duty devolving upon Lancaster county to maintain and keep in repair the highway in question, and, in the absence of such duty, there could be no liability.

We think that the court properly directed a verdict for defendant.

AFFIRMED.

WALTER SWAIN ET AL., APPELLANTS, V. D. B. COGSWELL ET AL., APPELLEES.

FILED APRIL 10, 1936. NO. 29609.

1. Trial: DIRECTION OF VERDICT. Trial court should direct verdict for defendant where evidence is insufficient to support a verdict against him.
2. Appeal. The verdict of a jury in a law action, based on conflicting evidence, will not be disturbed unless clearly wrong.

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

Madden & Madden and *Stevens & Stevens*, for appellants.

McNeny & Sprague, contra.

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

GOOD, J.

Plaintiffs brought this action on a written contract, alleging an oral modification thereof. Defendant Cogswell answered, denying that he was a party to the contract, or that he was liable thereon. Defendant Vance admitted the execution of the written contract and admitted an oral modification thereof, but claimed that it differed from the modification alleged by plaintiffs. At the conclusion of plaintiffs' evidence, there was a directed verdict for defend-

ant Cogswell. The cause proceeded as to defendant Vance, was submitted to the jury, and a verdict returned for defendant Vance. Plaintiffs have appealed.

The record discloses that Cogswell is a resident of Texas and is interested in the development of oil and gas properties. He entered into a contract with defendant Vance, which recited that theretofore Cogswell had entered into an agreement with one Eaton, of Beaver City, Nebraska, whereby Eaton was to secure for Cogswell oil, gas and mineral leases covering approximately 35,000 acres of land in a block located in certain described territory in Furnas county, Nebraska, and that Eaton had secured leases covering approximately 26,000 acres. The contract then provided that defendant Vance agreed that he would aid Eaton in securing oil, gas and mineral leases on a certain form, covering a total of at least 35,000 acres of land situated in Furnas county, Nebraska; the leases to be taken in the name of Cogswell and placed with Eaton as escrow agent. This contract also provided that, in consideration of the performance by Vance of his part of the agreement, Cogswell would pay to Vance the sum of $1,800 as soon as said leases covering said total acreage had been secured. It further provided that Vance should have a one-third "carried interest" in any and all of said leases and leasehold interests and one-third interest in all franchises that had been or would be secured within a radius of 75 miles from any of said leased acreage. This contract was dated April 29, 1933.

On May 4, 1933, a written contract was entered into between Vance, upon the one hand, and plaintiffs, upon the other. This contract recited, among other things, that Vance, with the financial help of another, had been securing a block of oil, gas and mineral leases in Furnas county, together with certain franchises, and in consideration of $800, paid by the plaintiffs upon the execution of the agreement, and for the further consideration that plaintiffs, on or before June 1, should secure additional oil, gas and mineral leases as may be necessary, together with the leases pre-

viously secured, so that the total acreage shall cover at least 35,000 acres of land in a block located in specially described territory in Furnas county. Upon condition that the plaintiffs should fully perform their part of the contract in securing such leases, Vance agreed to pay and deliver to the plaintiffs, when and as received, one-half of the proceeds, stock or property of whatever kind or character, which he, Vance, received from Cogswell in the operation, sale or disposition of said leases, leasehold interests and franchises, and, further, Vance was to repay to the plaintiffs, upon completion of the contract, $800, plus whatever necessary and actual expenses the plaintiffs may have incurred in completing said block of acreage leases; the total sum, in any event, not to exceed $1,200. There were other provisions of the contract which need not be considered.

It is charged in the petition that defendant Vance was acting as agent for and on behalf of Cogswell in entering into the agreement with plaintiffs, and that both Cogswell and Vance were liable thereon.

The record is barren of any competent evidence that Cogswell ever authorized Vance to enter into the agreement or contract between plaintiffs and Vance, or that he had any knowledge thereof, until after all that plaintiffs had done thereunder had been completed. He was not a party to the contract, and, since there was no competent evidence that Vance had authority to make such a contract on behalf of Cogswell and bind him thereto, the evidence was insufficient to support a verdict against Cogswell. Where the evidence is insufficient to support a verdict against a defendant, the trial court should direct a verdict for him.

After plaintiffs had secured a considerable number of leases, it became apparent that it was difficult to obtain leases for the number of acres provided for in the contract, within the limited territory described in the contract. Thereupon, the question of modification of the contract to extend the territory was taken up orally. Vance admits that there was a modification of the contract by extending the territory on the west, covering an additional strip 1 mile

wide; while plaintiffs contend that the modification was to extend the territory on the west of that described in the contract by a strip 2½ miles wide. Plaintiffs testify that they had secured leases covering the acreage required within the territory described in the written contract, plus the 2½-mile strip adjacent thereto. The evidence as to the number of acres covered by the leases within the territory, even as claimed by plaintiffs to have been enlarged by the oral modification, is in conflict. Plaintiffs' testimony indicates that they had secured leases of acreage totaling more than 35,000 acres within the prescribed territory, including the 2½-mile strip; while the evidence on behalf of Vance tends to show that the acreage was somewhat short of 35,000, even including the 2½-mile strip. Vance testified that the modification extended only to an additional 1-mile strip, and his evidence is to the effect that the acreage fell considerably short of the 35,000, covered by the leases, as applied to the original territorial limit, plus the 1-mile strip.

The record presents purely questions of fact. It is a question of fact whether the written contract was modified by an extension of a 1-mile strip or a 2½-mile strip on the west. This question was fairly submitted to the jury. The jury found for defendant. Since the evidence was in conflict, the jury's finding on this question must be sustained. The evidence is in conflict as to whether the number of acres covered by the leases was 35,000 or a considerable amount less. This question was also submitted to the jury, and their finding in favor of defendant is based upon competent evidence in the record.

It is a general rule that in a law action the finding of the jury, based on conflicting evidence, will not be disturbed unless it is clearly wrong. There is nothing in the record from which we are able to say that the verdict is clearly wrong, or that it is not sustained by sufficient evidence.

Complaint is made of a number of instructions given, but nothing is pointed out in the briefs wherein it is apparent that any error was committed by the trial court. A careful examination of the record convinces us that the questions

were fairly and properly submitted to the jury, and, since only questions of fact were involved and the evidence is in conflict, the jury's finding is conclusive, on appeal.

No error prejudicial to plaintiffs has been found. Judgment

AFFIRMED.

GOTTLIEB LAIER, APPELLANT, V. SOUTH SIDE IRRIGATION COMPANY, APPELLEE.

FILED APRIL 10, 1936. No. 29620.

1. Waters: IRRIGATION COMPANIES: RATES. An irrigation company is a common carrier of water for those entitled to its use by appropriation, and its rates and charges are subject to regulation and control.
2. ———: ———: ———. Contracts between an irrigation company and landowners for the use of appropriated water and for the maintenance of the works are subject to the right of the state to regulate and control the rates.
3. ———: ———: CONTRACTS. The Constitution and laws of the state relating to irrigation and the use of the water of the streams for that purpose form a part of a contract for the use of such water and the maintenance of irrigation works.
4. ———: ———: RATES. An operator of an irrigation system must deliver all water legally appropriated to parties entitled to its use at rates fixed by the railway commission.
5. ———: ———: ———. Where there has been a good faith controversy and protracted litigation as to the interpretation of a contract between an irrigation company and a water user, it would be inequitable to require payment of past-due maintenance charges as a condition precedent to the delivery of water.

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

O. E. Bozarth and *C. E. Clark*, for appellant.

Cook & Cook, contra.

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

DAY, J.

The plaintiff is the owner of land for which there is an appropriation of water for irrigation dating back to 1895. The present dispute arose over a long-standing argument between the plaintiff, his predecessors in title, and the South Side Irrigation Company over socalled maintenance charges.

The crux of the case is the construction of a right of way contract executed by the company and the plaintiff's predecessor in title in 1914. A brief historical sketch will be helpful to an understanding of the present situation. In January, 1895, some men, one of whom owned the land herein involved, made an appropriation of water for the purpose of irrigation and organized the Orchard & Alfalfa Irrigation Company. The various landowners interested contributed money and labor for the construction of a canal and ditches. Under this set up, water was applied to the land until 1907, when, through disuse and failure to maintain the works, the canal and ditches became filled and in such a condition that they were not usable. In 1913 the South Side Irrigation Company was organized to serve the same general function as the old company. It opened up the canal and ditches and made them serviceable. This new company executed contracts with the appropriators and users of water, recognizing their perpetual right to the use of water for their land and requiring them to pay a maintenance charge for the upkeep of the system. But the then owner of the land involved herein would not enter into such an agreement. However, after some negotiations, a contract was executed providing a right of way in consideration of a perpetual right to the use of the water. The problem of the landowners was to get the water from the river to their land, and the company undertook to solve this problem. The plaintiff contends that this contract means the perpetual water right with free delivery to his land. Around this contract has been waged a protracted argument between the parties. In 1917 there was an appeal before this court in an action brought by the company against the owner of the land to collect the maintenance fee. The own-

er had never exercised his right to the use of water, and the court held that, since he had not promised to pay a maintenance fee to the irrigation company, he was not liable for such a fee on the contract before he commenced using the water. *South Side Irrigation Co. v. Brooks,* 102 Neb. 57, 165 N. W. 467. The plaintiff seeks here to secure the enjoyment of his water right by requiring the company to deliver water on his land without the payment of the annual maintenance charge, and especially the amount of the annual maintenance charge for the past years during which the works have been in operation. An irrigation company is a common carrier of water for those entitled to its use by appropriation, and its rates and charges are subject to regulation and control. *McCook Irrigation & Water Power Co. v. Burtless,* 98 Neb. 141, 152 N. W. 334.

This is a substantial argument against the contention of the plaintiff for a construction of this contract as one to relieve him from payment of maintenance charges. This contract seems plain and unambiguous and incapable of construction. However, contracts between an irrigation company and landowners for the use of appropriated water and for the maintenance of the works are subject to the right of the state to regulate and control the rates. *Marquis v. Polk County Telephone Co.,* 100 Neb. 140, 158 N. W. 927.

The Constitution and laws of the state relating to irrigation and the use of the water of the streams for that purpose form a part of a contract for the use of such water and the maintenance of irrigation works.

In *South Side Irrigation Co. v. Brooks, supra,* it is written: "By statute in this state irrigation companies are made common carriers of water. They are not permitted to make excessive charges or discriminate between users. The defendant, as a user of water, must pay the same fees that others do."

Section 3454, Rev. St. 1913, was repealed in 1919 (Laws 1919, ch. 190), but was substantially the same as section 46-627, Comp. St. 1929, which declared that irrigation works are common carriers, and that they should deliver

all water legally appropriated at a reasonable rate to be fixed by the state railway commission. An operator of an irrigation system must deliver all water legally appropriated to parties entitled to its use at rates fixed by the railway commission.

Such water must be delivered without discrimination between users. The right of way contract in this case recites that the consideration is the granting of a perpetual water right. This term does not include the delivery of water free from the maintenance charge assessed to all other users of water. The district provides for two classes of users, those who were granted perpetual water rights from the system, as the plaintiff, and those who pay what is termed water rent at a higher rate. All others who bought and paid for a perpetual water right at the time of the reconstruction of the works are required to pay the maintenance fee assessed against the plaintiff. To grant him a different rate or delivery of water without payment of a maintenance fee would be discrimination. The contract in question did not deal with the question of maintenance charges. There is no expression relating to it. In *South Side Irrigation Co. v. Brooks, supra,* it was held that the defendant had not agreed to pay a fee, and was not obliged to pay until he commenced to use the water. It is equally true that the company did not agree to furnish water without compensation. The statutes make such a contract impossible. Kinney, Irrigation and Water Rights (2d ed.) p. 2718. The facts are that water has been used upon this land and the maintenance fees paid by tenants of plaintiff. Assuming that the plaintiff was not aware that his tenants paid this rent, nevertheless he was aware that water was being used and knew it was so used when he purchased the land. It would be a gross discrimination to permit the plaintiff to use the water delivered through the canals and ditches of the irrigation company without the payment of charges for maintenance. The trial court rightly held that this suit did not litigate the personal liability of plaintiff for the past maintenance charges. However, it was prop-

erly decreed that plaintiff should be required to pay all maintenance charges upon his land from the date of the decree. Even though an irrigation company may refuse delivery of water for nonpayment of charges past due, it would be inequitable in this suit, where the matter has been in controversy for years, and where there was a good faith argument as to the interpretation, to require payment of all past-due charges, including charges prior to plaintiff's ownership of the land, as a condition precedent to the delivery of water.

The decree of the district court is

AFFIRMED.

SCOTTS BLUFF COUNTY, APPELLANT, V. MATTHEW H. MCHENRY ET AL., APPELLEES.

FILED APRIL 10, 1936. No. 29407.

1. **Counties and County Officers:** INTEREST. Interest received on public funds held by a county officer is a perquisite.
2. ———: OFFICIAL BONDS. An official bond covers only such acts, or failures to act, as come within the legal duties of the officer, to wit, *virtute officii*, as distinguished from acts done *colore officii*.
3. ———: INTEREST. The county is entitled to any interest earned upon public funds in the hands of a county officer.

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

Wright & Wright, for appellant.

Mothersead & York and *J. L. Grimm, contra.*

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

PAINE, J.

This is an appeal by Scotts Bluff county, appellant, from a judgment in its favor, in the sum of $429.76, instead of $5,385.30, as claimed by the county, against Amanda S.

McHenry, administratrix of the estate of Matthew H. McHenry.

An action was commenced by Scotts Bluff county, as plaintiff, against Matthew H. McHenry, the clerk of the district court, and his bondsman, the Fidelity and Deposit Company of Maryland, to recover for the county interest which the clerk had earned on money which had come into his hands as clerk of the district court, and some of which he had deposited in a bank in open checking account, and held a portion of it in the form of certificates of deposit, and other sums in interest-bearing securities. He had retained all of the interest earned thereon, for which interest he had made no accounting to the county. Upon the death of Mr. McHenry before trial, his widow, as administratrix, was substituted as a party defendant. While the petition is in the form of an equitable action for an accounting, it was tried twice as a law action, once to a jury, and the second time a jury was waived and it was tried to the court. The court entered a judgment for the county, as above set out, and also entered a judgment in favor of the defendant Fidelity and Deposit Company.

A large amount of evidence was taken in the case, supported by some 91 exhibits, consisting of the auditor's report, deposit slips, certificates of deposit, bank ledger pages, and pages from the fee and cash books of the office of the clerk of the district court. The period covered by the surety bonds of defendant company is from 1921 to 1930. The sums accumulated were made up of a very large number of small items, such as uncalled-for witness fees and mileage, some unclaimed for many years, uncalled-for sheriff's fees, and uncalled-for fees due newspapers for publication notices, together with the proceeds of some judgments which had been paid to the clerk. There were, in addition, other funds, such as items of alimony and support money, and other sums which items the clerk was not required to collect, but which appeared to be paid him simply for the convenience of the parties.

On January 8, 1908, when Matthew H. McHenry took

over the office of clerk of the district court of Scotts Bluff county from James McKinley, he received the sum of $2,837.89 for sundry items, and of these original amounts the report of the auditor shows he had never paid out items amounting to $594.44 which he had retained from 1908.

Mrs. McHenry was appointed administratrix of her husband's estate on September 26, 1930, and testified that she had paid over all the principal sums to the successor clerk of the district court, and such clerk testified that on March 24, 1931, she paid him $14,302.84, and on November 15, 1930, she had paid the additional sum of $8,767.73.

The brief of the plaintiff commences its argument with a reference to section 2370, Comp. St. 1922, which provides: "That in all counties in which the fees of the office may be in excess of the amounts fixed by law which the clerk is entitled to retain as compensation, he shall in no case retain to his own use any fees, revenues, perquisites or receipts from whatsoever source, that may come to him by virtue of holding said office, but shall account for and pay the same into the treasury of the county." This section of the statute was amended in 1927 (Laws 1927, ch. 118) and now appears as section 33-108, Comp. St. 1929, which in so far as applicable to this case is as follows: "The clerk of the district court of each county shall in no case retain to his own use any fees, revenues, perquisites or receipts, fixed, enumerated or provided in this or any other section of the statutes of the state of Nebraska."

The plaintiff contends that, under the above-quoted statutes, the interest earned from funds which McHenry held by virtue of being clerk of the district court was a perquisite of his office, and he was bound to account to the county for such interest. "Perquisite" is defined by Webster's New International Dictionary as follows: "A thing or property acquired otherwise than by inheritance, as by industry or purchase. A gain or profit incidentally made from employment in addition to regular salary or wages. A gratuity or tip."

Interest received by a county treasurer on deposit of pub-

lic money is a perquisite within the meaning of the statute requiring all perquisites to be paid into the county treasury. *Lake County v. Westerfield,* 196 Ill. App. 432, Ann. Cas. 1918E, 102.

On the other hand, the defendants claim that only a part of the money upon which interest was earned was fees of the office, and that the balance had come as costs in actions pending in court, judgments, and alimony paid to him, sheriff's fees and printer's fees, and that, because the county was not entitled to all of the principal sum upon which interest was earned, the county was not entitled to interest.

The law now requires quarterly reports to be filed, and upon following the provisions of section 77-2602, Comp. St. 1929, certain funds of this nature will be forfeited into the common school fund of the county. Another provision to the same effect is found in section 33-154, Comp. St. 1929. *Douglas County v. Moores,* 66 Neb. 284, 92 N. W. 199.

In the case of *Huffman v. Koppelkom,* 8 Neb. 344, this court had before it an action upon an official bond of the sheriff for personal injury in making an arrest. Judge Lake maintained that an action on an official bond could only be maintained for injuries done *virtute officii,* and not for acts done *colore officii* merely, and the opinion holds that the facts show positively that the act was done *virtute officii.* The same case came before the court, after trial to a jury, in 12 Neb. 95, 10 N. W. 577. Since this case, innumerable references have been made to this early case, and it is referred to by United States Circuit Judge Stone, as follows: "Whatever may be the rule elsewhere, in Nebraska it is firmly established that an official bond covers only such acts or failures to act as come within the legal duties of the officer; in other words, such as some of the decisions term *virtute officii,* as distinguished from acts done *colore officii* merely." *Bassinger v. United States Fidelity & Guaranty Co.,* 58 Fed. (2d) 573.

The Nebraska holding is clearly set forth in two cases: First, in *Stephens v. Hendee,* 80 Neb. 754, 115 N. W. 283, where Commissioner Good held that the sureties upon an

official bond of a county judge were not liable for money which did not come into the possession of their principal by virtue of his office; and, second, in *Knox County v. Cook*, 126 Neb. 477, 253 N. W. 649, in which the same judge held that a county judge was liable on his official bond for trust funds which came into his hands by virtue of his office, which funds he had lost by the failure of the bank in which he had deposited them, following the decision in *Thomssen v. Hall County*, 63 Neb. 777, 89 N. W. 389, and many other decisions. We find an exhaustive discussion of this distinction in 13 Neb. Law Bulletin, 321.

It has been well stated that, while this seems a harsh rule to require a county judge to be an absolute insurer of such funds, the remedy must come from the legislature, and not from the court.

It is shown that the majority rule as adopted in many states has been consistently followed by our Nebraska court, to the effect that a public officer is an insurer of public funds in his custody, while the minority rule, supported by a few states, is that an officer, when he has exercised diligence in good faith, is not liable for losses arising from matters beyond his power to prevent.

The trial court was right in holding that the surety company was not liable for the interest collected on funds held by him. However, after his death, which occurred while in office, when a proper demand was made upon his estate to account to his duly qualified successor in office, then all such funds should be accounted for to his successor, and as this was not done promptly, and as certain portions of the money withheld by him belonged to the county itself, together with interest earned by him thereon, the trial court was right in holding that his estate was liable for a certain amount of interest drawn thereon.

No prejudicial error having been shown in the record, the judgment of the trial court is hereby

AFFIRMED.

DAY, J., dissents.

ALICE WELLS, APPELLEE, V. EQUITABLE LIFE ASSURANCE SOCIETY, APPELLANT.

FILED APRIL 10, 1936. No. 29477.

1. **Death.** Seven years' unexplained absence raises the presumption that the missing one is dead.
2. ———. If it is alleged that such death occurred in less than the seven-year period, the one so alleging has the burden of proving the fact.
3. ———. To sustain such burden, facts and circumstances must be shown which make it more probable that he came to his death at a particular time than that he survived.
4. **Limitation of Actions.** In a disappearance case, the cause of action does not accrue until the expiration of the seven-year period, at which time the statute of limitations begins to run.

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

Brown, Fitch & West, for appellant.

Crofoot, Fraser, Connolly & Stryker, Thomas C. Quinlan and *Leslie F. Johnson, contra.*

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

PAINE, J.

This is a suit at law by the widow of an employee of the Union Pacific Railroad Company upon a group insurance policy issued by the Equitable Life Assurance Society. The jury returned a verdict for $1,660.97, being one year's wages of deceased. The insurance company appeals.

Samuel F. Wells, aged 47 years, was a steamfitter, and worked for many years for the Union Pacific Railroad Company at Omaha. A group insurance policy was secured and held by the railroad company upon all its employees, and a simple certificate based thereon was issued to each employee.

Mr. Wells gradually developed a mental trouble that was somewhat unusual. He had fits of melancholy, and would sit around the house and would not talk. He once tried to kill himself by putting a gas tube in his mouth in the base-

ment, and also threatened to jump in the river, and mentioned other ways of committing suicide, and his condition gradually got worse as time went on. He would sometimes leave home and remain away for a whole day and tell nobody where he went, and at one time was gone two days and two nights.

The plaintiff had been married prior to her marriage to Samuel F. Wells, and had two sons by that marriage, and to one of these sons Mr. Wells became greatly attached, and loved him as he would an own son. This young man died very suddenly of pneumonia on March 15, 1925, at the age of 27, and Mr. Wells grieved greatly over his death. Mr. Wells was very nervous, and would not eat, and at times would not go to bed, would drive around aimlessly in his car, and his mental condition became more serious as time went on. The last day that he worked for the Union Pacific was Saturday, June 5, 1926. He came home at half past five, and the widow of this stepson, having concluded that she did not want to keep house any more, had sent back all of this stepson's furniture and all of the clothing and shoes and everything else that belonged to the stepson, and when Mr. Wells reached home this was all piled up on the front porch. His widow testifies that he went all to pieces, had no control over himself, took the car and went away, came back late, would not eat supper, went over to the store, paid the store bill, brought back some money and steak, and went away again in the car; would stay awhile and come back, telling nothing about where he was going; was depressed and despondent, and kept making these trips until midnight. Between 4 and 5 o'clock the next morning, being Sunday, June 6, 1926, he got up and got nothing to eat, went out the back door, took the car and drove away, came back about 9 o'clock, and did not tell where he had been. He would not talk to anybody, appeared to be heartbroken, drove away again, and came back about 5 o'clock. He refused to eat breakfast or dinner or supper, and gradually acted more depressed. He retired about 10 o'clock Sunday night, and about midnight got up, put on his hat and coat, and went

out the back door. He took no money with him, leaving his money on the dresser. He did not take his automobile with him, and the plaintiff testifies she never saw him after that time. A little later the widow got up, went out to the garage, down in the basement, and looked all around the yard. She notified the police station, and had his disappearance broadcast over the radio. He had no other relatives, either in Omaha or elsewhere, that the plaintiff ever knew of. There was no domestic difficulty in the family of any kind. She investigated during the next few months, personally or through friends, at undertaking establishments, the body of every man who was found dead.

The stepson, Frank C. Hazard, a meatcutter, was living at home, and came home from work late that Saturday night, June 5, and brought home some chili and asked his stepfather if he would help him eat it. He refused, and said he would not need anything more to eat. He was wild-eyed, and the stepson was afraid that he was going crazy. On Sunday night this stepson got home after midnight, and his mother sent him out looking for his stepfather; he went around three or four blocks, but did not find him. About a week after his stepfather disappeared, he testified, he went over to Council Bluffs to see a body which had been taken out of the Missouri river, but they told him the body had already been buried because it was bloated past recognition. It is undisputed that the records of the Union Pacific Railroad Company show opposite the name of Samuel F. Wells, "Dropped 6/14/26. Cause—Absent without leave."

On September 25, 1933, the plaintiff filed a petition against the Equitable Life Assurance Society, alleging many of the facts set out, and, further, that seven years had elapsed after the sudden and mysterious disappearance, and alleged that she believes the fact to be that Samuel F. Wells died on or about June 6, 1926, and praying that she be given a judgment for $2,160, being one year's wages, with interest from the time he disappeared.

To this an amended answer was filed, setting up the fact

that said Wells terminated his employment with the Union Pacific on June 5, 1926, and that the group insurance policy provided insurance upon the life of an employee of said railroad company only so long as such person remains in the employment of the company, and, further, that the action was barred by the statute of limitations of the state of Nebraska. The defendant assigns as grounds of error the admitting of the evidence of a fisherman of the finding of a body on June 14, over the objections of the defendant, and also the testimony of the stepson, Frank C. Hazard, in regard to said matter, and also sets out as error the refusal of the court to instruct the jury to return a verdict in favor of the defendant, or to dismiss the case for the reason that the evidence was insufficient to sustain a verdict in favor of the plaintiff.

The defendant insists that Wells was not an employee of the Union Pacific Railroad Company after June 5, the day he ceased to work, and alleges as error the giving of instruction No. 3 by the court on its own motion, setting out, in brief, that the presumption of death arises from a continued and unexplained absence of seven years where nothing has been heard from him by those who, were he living, would naturally hear from him; and then the instruction reads that it is not enough to prove that he died at some time during the seven-year period, but instructed the jury that plaintiff must go farther than that and present evidence which will preponderate and convince the jury as a matter of fact that Wells did come to his death prior to June 14, 1926, at which date he was dropped from the rolls as an employee of the Union Pacific Railroad Company, and this long instruction closed with these words: "And in considering this question you may consider his acts and demeanor, words and conduct to the extent that they are established by a preponderance of the evidence as being correctly given to you, as bearing on the question of his disappearance and claimed suicidal death." In our opinion, this instruction states the law correctly, and was proper under the evidence in this case.

A number of insurance cases involving disappearance have been before this court, one of the most recent being that of *Munson v. New England Mutual Life Ins. Co.*, 126 Neb. 775, 254 N. W. 496, in which it was held that the presumption of life of an absentee continues for seven years, but after seven years of unexplained absence the presumption is that the missing one is not then alive, and that such presumption of death after seven years requires that he who asserts an absentee is then alive must prove it, but, on the other hand, if it is asserted that an absentee died in less than seven years, the burden is on the one so claiming to prove such fact. It is further held: "To raise the presumption of death at any particular time less than the seven-year period, facts and circumstances of special peril must be shown which make it more probable that he died at a particular time than that he survived." See 8 R. C. L. 712, sec. 8; *Fredrikson v. Massachusetts Mutual Life Ins. Co.*, 126 Neb. 240, 252 N. W. 802; *Yates v. New England Mutual Life Ins. Co.*, 117 Neb. 265, 220 N. W. 285; *Warner v. Modern Woodmen of America*, 124 Wash. 252, 214 Pac. 161; *McLaughlin v. Sovereign Camp, W. O. W.*, 97 Neb. 71, 149 N. W. 112; *Rosencrans v. Modern Woodmen of America*, 97 Neb. 568, 150 N. W. 630; *Coe v. National Council of K. & L. of S.*, 96 Neb. 130, 147 N. W. 112.

The defendant insists that, if the plaintiff proved the death to have occurred prior to June 14, 1926, then the cause of action was barred by the statute of limitations. This brings the question squarely before this court as to when the five-year statute of limitations began to run in this case. Employee's certificate No. 40768, which was delivered to Samuel F. Wells, had no requirements about making proof of death; but when we examine exhibit No. 2, being the copy of the original group life insurance policy, No. 5170023, issued by the defendant company to the Union Pacific Railroad Company, and dated August 13, 1921, we find it provides: "And on receipt of due proof of the death during said term of any such employee (provided this policy is then in force as to such employee)." It is

therefore necessary, in order to collect on this policy, that due proof of death should be made, and as due proof of death cannot be made in a disappearance case until seven years have elapsed, then no cause of action accrues until that date. This is well stated in 7 Couch, Cyclopedia of Insurance Law, 5728, sec. 1640: "Where it is necessary to rely on the presumption of death arising from seven years' unexplained absence, the general rule is that the cause of action accrues at the expiration of the seven-year period, so that proofs of loss cannot be made before such expiration, and, in the absence of contract or statutory provision to the contrary, limitations run from the date thereof; that is, where limitations run from the date of death, and death is established by the presumption arising from seven years' unexplained absence, the limitation period runs from the date when the presumption of death arose. In fact, in case death has to be inferred from seven years' unexplained absence, proof of death cannot be made until the expiration of such period, and, consequently, the statute of limitation does not begin to run until such proofs can be made." This statement is amply supported by decisions cited in the footnotes from California, Iowa, Minnesota, Massachusetts, Pennsylvania, Texas, Washington, and Canada.

In the case of *New York Life Ins. Co. v. Brame,* 112 Miss. 828, 73 So. 806, L. R. A. 1918B, 86, it was said that it was imperative to ascertain when the cause of action actually accrued, for the insurance company agrees to pay the amount due on the policy immediately upon the receipt and approval of proof of death of the insured, and where both the insurance company and the beneficiary were uncertain as to the fact of death, it would be harsh, inequitable, and unjust to hold that the statute of limitations was applicable.

It is the opinion of this court that in a disappearance case the cause of action does not accrue until the expiration of the seven-year period, for death is then established by the presumption then arising, and the limitation period runs from the termination of the seven-year period.

The last question which arises is this: Granting that

proof of loss cannot be made until the seven-year period has elapsed, is it then allowable for the jury to show by their verdict that in their opinion death occurred prior to June 14, 1926? It is the law that the jury have the right to weigh all the evidence and to determine the date of death.

In the instant case, where a man has a permanent job at good wages, and his home life is happy and in every way agreeable, but in spite of all this he has shown increasing mental disease, had threatened and attempted suicide, and has repeatedly absented himself from home without cause, is greatly upset and shocked by a family occurrence, after which he does not partake of food and misses several consecutive meals, his conduct is such as to cause his relatives to fear he is becoming crazy, and he leaves all his money on the dresser and walks away from home about midnight on June 6, 1926, and is never seen again, and never communicates with the members of his family, for whom he has shown unusual attachment, and a body of a man is taken out of the Missouri river in a bloated and unrecognizable condition about a week later, the jury would therefore be justified in finding that he died prior to June 14, 1926.

We have examined the entire record, and, finding no prejudicial error, the judgment is affirmed, and an attorney fee of $150 allowed in this court.

AFFIRMED.

JAMES D. SHORT, APPELLEE, V. FLOYD L. BOLLEN, APPELLANT.

FILED APRIL 10, 1936. No. 29638.

1. **Courts: APPEAL: PLEADING: AMENDMENT.** On appeal from a justice court, or the county court, the amount of damages claimed on the same causes of action may be increased, but not beyond the jurisdiction of the lower court.
2. ———: ———: ———: ———. District court, on appeal from municipal court, may permit amendments to pleadings, in proper case, to same extent as in original case. Comp. St. 1929, secs. 22-408, 22-1105, 22-1106, 22-1618.

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

Floyd L. Bollen, J. F. Miller and *J. C. McReynolds,* for appellant.

Herman Ginsburg and *Joseph Ginsburg, contra.*

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

PAINE, J.

This was an action to recover damages to plaintiff's automobile, occasioned when the defendant backed his automobile out of his private driveway and collided with plaintiff's car. Plaintiff secured a judgment of $39.66 in the municipal court, and upon appeal to the district court a jury returned a verdict for plaintiff in the sum of $150.

The defendant and appellant testified for himself, and he called no other witness. In brief, his testimony is to the effect that on the morning of September 11, 1934, he was backing his car from his private driveway from the south into A street in the city of Lincoln. In backing from the driveway, the view on A street is obscured by a large house on each side of the driveway, and until the driver reaches a point in line with the north line of porches of the two houses. While in the process of backing between the two houses, plaintiff's mother and sister entered plaintiff's car, unobserved by defendant. Defendant backed his car slowly, using the mirror until he reached the point of vision of A street. At this point he brought his car to a full stop and looked for cars approaching from east and west. No cars were approaching, but he did see plaintiff's car parked at the curb. He was unable to observe any occupants in plaintiff's car. He then backed his car slowly down decline, using brakes and looking for approaching cars. From his position he was unable to see plaintiff's car while backing down decline. When he reached the sidewalk, he released the brakes and collided with plaintiff's car near curb line. Both cars were damaged. Neither party saw the other; neither party sounded any alarm.

The sister of the plaintiff testified that she resided with plaintiff, and that the driveway is the joint driveway of the plaintiff and defendant, and leads between their houses to a common garage; that their Chevrolet coupé was parked at the curb, about 15 feet west of the driveway; that the witness and her mother entered their parked car and started it up, when defendant's car crashed into them. She testified that immediately after the accident defendant directed her to take their car to any garage she desired and he would have it fixed.

Plaintiff testified that his 1933 Chevrolet had been driven about 10,000 miles, and was in good condition prior to the accident; that it took two weeks' time to repair it, during which time he had to ride street-cars to work, and could not take his father to work daily, for which his father paid him $10 a month. He gave the value of his car before the accident as $550, and as only $450 after the crash. The plaintiff further testified that he had received in the mails a check from the defendant in the sum of $24.41, to which was attached plaintiff's repair bills and a bill that had been rendered the defendant for work done on his automobile. This check was not cashed, as plaintiff refused to accept it in payment of the damage to his car.

Fourteen errors are relied upon by defendant for a reversal. We will only consider those argued in the defendant's brief, as assignments of error not discussed by appellant in his brief are deemed waived. *Lewis v. Rapid Transit Lines*, 126 Neb. 158, 252 N. W. 804.

The first error argued by defendant is the overruling of defendant's motion to strike out of plaintiff's petition in the district court new matters set out there for the first time. In the municipal court the plaintiff asked for $50 damages, and on appeal demanded $175. Plaintiff insists that the amount demanded in the lower court cannot be increased in the district court except as to new matters arising after trial in the lower court, and cites *Deck v. Smith*, 12 Neb. 389, 11 N. W. 852; and in the case of *O'Leary v. Iskey*, 12 Neb. 136, 10 N. W. 576, it was said that, if new issues can

be raised in the appellate court, it is not a trial of the same cause, not, in fact, an appeal; but in *Citizens State Bank v. Pence,* 59 Neb. 579, 81 N. W. 623, it was said that, even if the facts had been pleaded with more particularity, nevertheless the identity of the cause of action was fully preserved.

"On appeal, the amount of damages claimed on the same causes of action may be increased, if not beyond the jurisdiction of the lower court," is said in the case of *Plano Mfg. Co. v. Nordstrom,* 63 Neb. 123, 88 N. W. 164. This view appears to be founded upon a statement by Judge Maxwell in *Union P. Ry. v. Ogilvy,* 18 Neb. 638, 26 N. W. 464, to the effect: "That the petition could not be amended to claim more than $1,000, * * * being the limit of the civil jurisdiction of the county court." To the same effect is *Sloan Commission Co. v. Fry & Co.,* 4 Neb. (Unof.) 647. Section 22-408, Comp. St. 1929, specifically provides for amendments before trial, during trial, or upon appeal, to supply any deficiency when substantial justice will be promoted.

In appeal from the same municipal court as in the case at bar, it was held in *Baxter v. The Maccabees,* 124 Neb. 160, 245 N. W. 415, that in all cases of appeal from the municipal court to the district court, such court is empowered by statute to permit amendments to the same extent as though the action had been originally instituted in that court. In explanation of this seeming change in the holdings of this court, Judge Eberly says: "The instant case, however, is not an appeal or a proceeding in error from either of the courts named in appellant's authorities. It is from the municipal court, and, as such, the provisions of the municipal court act relating to appeals are necessarily controlling."

Therefore, in appeals from the justice court or the county court, except for new matter arising after trial in the court below, a case must be tried in district court on appeal upon the same issues as in the court below, and the amount originally demanded in the lower court cannot be increased by amendment beyond the jurisdiction of the court from which the appeal is taken, but in appeals from municipal

court the statute allows any amendment as might have been made had the case been originally brought in the district court.

Appellant next insists that an offer to compromise made by a party which is not accepted by the other is not competent evidence, and should be excluded, and cites, in support thereof, *Kierstead v. Brown,* 23 Neb. 595, 37 N. W. 471; *Eldridge v. Hargreaves,* 30 Neb. 638, 46 N. W. 923; *Callen v. Rose,* 47 Neb. 638, 66 N. W. 639.

The court allowed the defendant's check of $24.41, which plaintiff had received in the mails, to be received in evidence. There had been no previous negotiations at all, no letter accompanied the check, nothing implied that the check had been a conditional offer of settlement, no writing appears on the check.

In *Robb v. Hewitt,* 39 Neb. 217, 58 N. W. 88, it was held in a bastardy case that an unsolicited offer to pay one-half of certain expenses was an admission, as distinguished from an offer of compromise.

The check is dated October 2, 1934, and suit was not started until five months later, and no intention of a purpose to bring one had been communicated to the defendant. The ruling of the court in admitting the check in evidence said if it was not an offer of compromise it was entitled to go to the jury for what it was worth. We see no prejudicial error in the admission of the check.

We have examined all of the instructions given the jury and see no reversible error in any of them.

As to the amount of the damages, that question was submitted to the jury under proper instructions, and their verdict will not be set aside. Two courts have entered judgments for the plaintiff, and the amount of the judgment was argued to the trial judge in the motion for a new trial. We find no errors in the record warranting a reversal, and, therefore, the judgment of the trial court is

AFFIRMED.

LE BRON ELECTRICAL WORKS, INC., APPELLEE, V. CLYDE LIVINGSTON, APPELLANT.

FILED APRIL 10, 1936. No. 29631.

1. **Agency:** PROOF. Evidence of acts or declarations of an agent concerning the existence or extent of his authority are not admissible against the principal to prove its existence or extent.
2. **Principal and Agent:** ACTS OF AGENT: RATIFICATION. In order for a ratification of the acts and declarations of a third person to be binding upon a person, it must, as a rule, be made by him with full knowledge of all the facts necessary to an intelligent exercise of the right of election.

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

Foster & Yates, Frank A. Dutton and *Jack Lee,* for appellant.

William A. Day, contra.

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

CARTER, J.

This was an action brought by the Le Bron Electrical Works, Inc., against Clyde Livingston to recover the reasonable value of services rendered and materials used in repairing certain electrical refrigerating machinery. Plaintiff obtained a verdict for $195.28, upon which judgment was entered. From the overruling of his motion for a new trial, defendant appeals.

The record shows that on October 16, 1933, Clyde Livingston was the owner of certain refrigerating machinery and equipment that he had stored in Omaha. On that date he sold the machinery to George E. Williams who immediately removed it to his place of business in Omaha. The contract was signed by Clyde Livingston in Des Moines, Iowa, where he resided. The record further shows that the machinery was not in a good state of repair, and that Williams, when he discovered this fact, went to Bertha E. Livingston, the

mother of the defendant, and told her he would not go through with the contract unless it was put in proper condition. Mrs. Livingston thereupon employed plaintiff to do the work and furnish the repairs. Williams later sold the machinery to one Locier, who subsequently defaulted on the payments due on the conditional sale contract held by Livingston and returned the property to him. Plaintiff demanded payment from Clyde Livingston on its account and payment was refused on the ground that he had not contracted for any such work nor had he authorized any one for him to so do.

The only question for determination is whether Bertha E. Livingston was the agent of Clyde Livingston with authority to bind him in the transaction, or, if she was without such authority, whether her acts in employing plaintiff were ratified by him.

The only evidence in the record tending to show that Bertha E. Livingston was the agent of Clyde Livingston is that of witnesses who testify to the declarations and actions of Bertha E. Livingston. This evidence was not properly admitted to show the relation of principal and agent between Clyde Livingston and Bertha E. Livingston. The rule of law applicable thereto is as follows:

"Evidence of a statement by an agent concerning the existence or extent of his authority is not admissible against the principal to prove its existence or extent, unless it appears by other evidence that the making of such statement was within the authority of the agent or, as to persons dealing with the agent, within the apparent authority or other power of the agent." Restatement, Agency, sec. 285.

"Evidence of the acts or declarations of a person alleged to be an agent is not admissible for the purpose of establishing the agency." *Frost, Curyea & Murtey v. Ronne*, 113 Neb. 655, 204 N. W. 387. See, also, *Farmers Cooperative Shipping Ass'n v. Adams Grain Co.*, 84 Neb. 752, 122 N. W. 55; *Fitzgerald v. Kimball Bros. Co.*, 76 Neb. 236, 107 N. W. 227.

There is evidence that Frank Yates, an attorney in

Omaha, made certain declarations indicating that he was the agent and attorney for Clyde Livingston. Such declarations were not competent to show the relation of principal and agent between Frank Yates and Clyde Livingston under the rule hereinbefore cited.

Appellee contends that there was a ratification of the contract by Clyde Livingston. The only evidence on this subject is a statement alleged to have been made by Clyde Livingston to Williams, the purchaser of the machinery, in the following language: "We would like to have you pay Le Bron and then I will pay mine, so you can get going and then you can pay on the contract and everything will be all set." This statement was denied by Livingston. The evidence does not show that Livingston had knowledge of any of the facts surrounding the transaction in question at the time of the alleged statement. It is clearly the rule that, since ratification rests upon assent, to be binding it must, as a rule, be made with full knowledge of all the facts necessary to an intelligent exercise of the right of election. Tiffany, Agency, secs. 16, 17.

"No doctrine is better settled, both upon principle and authority, than this—that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded in mistake or fraud." Story, J., in *Owings v. Hull,* 9 Pet. (U. S.) *607, *629, 9 L. Ed. 246. "Knowledge by the principal of the material facts is an essential element of an effective ratification by him of the unauthorized act of his agent." *O'Shea v. Rice,* 49 Neb. 893, 69 N. W. 308. The foregoing rule certainly is just as applicable where the ratification of the acts and declarations of a stranger is involved.

The case at bar was tried and submitted to the jury on the theory that Bertha E. Livingston was the agent of Clyde Livingston. The question of ratification of the acts of a stranger to the transaction was not submitted. The evidence is not sufficient to show a binding ratification on the

part of Clyde Livingston in the view of the rule hereinbefore expressed. The statement alleged to constitute a ratification is not definite or certain and contains nothing from which the knowledge of the facts required in order to constitute it a binding ratification could be inferred.

We have therefore concluded that the trial court erred in not sustaining defendant's motion for a directed verdict. The judgment of the district court is therefore reversed and the cause is remanded.

REVERSED.

E. H. LUIKART, RECEIVER, APPELLEE, V. JOHN O. GRAF ET AL., APPELLANTS.

FILED APRIL 15, 1936. No. 29735.

1. **Mortgages**: FORECLOSURE: MORATORIUM. Defendant in a foreclosure action is not entitled to the benefit of the moratory statute prior to sale, where the mortgage lien equals or exceeds the actual value of the mortgaged premises.
2. **Record** examined and judgment affirmed.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Lewis C. Westwood, for appellants.

Raymond B. Morrissey, Tunison & Joyner, Richard Travis and *Fred G. Hawxby, contra.*

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

GOSS, C. J.

Defendants appeal from an order denying the further continuance of a moratorium in a strict foreclosure of a contract.

On September 21, 1932, E. H. Luikart, as receiver of Columbus State Bank and of Silver Creek Bank, was granted a decree of strict foreclosure of a land contract on

the lands involved. Afterwards American Building Corporation succeeded to the rights of plaintiff and was substituted for him. And now L. L. Coryell Corporation has in turn succeeded to the rights of the receiver. The decree of strict foreclosure was not actually filed and entered until November 8, 1932. It provided for the absolute vesting of title in plaintiff if defendants failed to comply with the requirement to make certain payments by April 1, 1933, and stayed action until that date. On March 27, 1933, defendants applied for and obtained a stay under House Roll No. 600 of the 1933 session of the legislature (Laws 1933, ch. 65) now found in sections 20-21,159 to 20-21,164, Comp. St. Supp. 1933. On April 4, 1934, defendants applied for a further moratorium until March 1, 1935, which was allowed on April 13, 1934. June 22, 1935, defendants applied for another moratorium under House Roll No. 1 of the 1935 regular session of the legislature (Laws 1935, ch. 41, Comp. St. Supp. 1935, sec. 20-21,159), which amends section 20-21,159, Comp. St. Supp. 1933, so as to extend the moratorium until March 1, 1937, unless "good cause is shown to the contrary." On August 1, 1935, after objections filed and a full hearing, the court denied the application. The substituted plaintiff, American Building Corporation, was granted a writ of assistance. It is from this order defendants appeal.

The question at issue is whether the land is of sufficient value to pay the encumbrances for which defendants are liable if they were to redeem. Those encumbrances amounted, on August 1, 1935, to approximately $30,000. The farm consists of 276 acres. Some of the witnesses referred to it as the east 156 acres and the west 120 acres and in their appraisals they referred to it as two separate tracts.

All witnesses valued the farm by the acre. We compute the total value given by each witness. Plaintiff had two witnesses as to value. The first valued the farm at $22,080, the second at $25,500. Defendants had four witnesses as to value. The first, defendant John O. Graf, valued the farm at $36,960 to $40,740, the second valued it at $30,480,

the third at $30,480, and the fourth at $30,660 to $32,690.

Aside from the value placed on the land by defendant Graf, the other witnesses for defendants do not show the land to be of sufficient value now to cover the $30,000 encumbrances as of August 1, 1935, with the interest thereon. Plaintiff's witnesses place the value far too low to amount to the liens. Taking the average of all six witnesses, including the highest values estimated by any, they do not average much over $30,000.

The trial judge saw and observed the witnesses. He probably knows something of farm values himself. In the circumstances, we do not feel justified in disturbing his conclusion as to the real value of this farm. By the time the decree can become effective the encumbrances will equal or exceed the value of the land.

The following rule was adopted in *Clark v. Hass*, 129 Neb. 112, 260 N. W. 792: "Where, upon a hearing on an application for a moratory stay of proceedings under section 20-21,159, Comp. St. Supp. 1933, it appears that the amount of the mortgage lien exceeds the value of the lands secured by the mortgage, it is not an abuse of discretion on the part of the trial court to deny the application."

In *Erickson v. Hansen*, 129 Neb. 806, 263 N. W. 132, the syllabus says:

"Mere inadequacy of price will not preclude confirmation of foreclosure sale, unless shocking conscience of court, or amounting to evidence of fraud. * * *

"Defendant in a foreclosure action is not entitled to the benefit of the moratory statute where the mortgage lien equals or exceeds the actual value of the mortgaged premises, and where the premises are sold under decree for the full amount of the mortgage lien, interest and costs."

See, also, *First Trust Co. v. Hickey, ante*, p. 351, 264 N. W. 888.

Some other minor errors are assigned, but we do not deem them at all prejudicial.

The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF MARY E. SMITH.
R. A. SCOTT, APPELLANT, V. HENRY IMEL ET AL., APPELLEES.

FILED APRIL 15, 1936. No. 29553.

1. **Wills:** ATTESTATION. A will, other than nuncupative, to be valid, must be signed by the testator or by some person in his presence and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses.
2. ———: ———. The attestation required of witnesses to a will consists in their seeing that those things exist and are done which the statute requires to exist or to be done in order to make the instrument, in law, the will of the testator. 68 C. J. 673.
3. ———: ———. Statutory provisions regarding the manner in which wills must be executed are generally held to be mandatory and subject to strict construction, and if not substantially complied with, the will is inoperative.
4. ———: ———. No presumption of the due execution of a will arises from the presence of a perfect attestation clause, reciting the facts necessary to its due execution, where the subscribing witnesses testify positively that the facts, necessary to constitute due execution of the will, did not occur.

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

Beeler, Crosby & Baskins, for appellant.

J. T. Keefe and *Harold E. Coates, contra.*

Monsky, Grodinsky, Marer & Cohen, for Father Flanagan's Boys' Home.

Courtright, Sidner, Lee & Gunderson, for Midland College.

Floyd M. Lundberg, for Swedish Lutheran Mission.

Caldwell & Burns, for Sioux Falls College.

George B. Dent, Jr., for Mary Beasley *et al.*

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

GOOD, J.

This proceeding originated in the county court of Lincoln county, seeking admission to probate of an instrument purporting to be the last will and testament of Mary E. Smith, deceased. Certain of the heirs at law of Mrs. Smith filed objections to the probate of the instrument on the ground that it was not executed with the formality required by statute; that it was procured by undue influence, and that Mrs. Smith was incompetent at the time to make a will. The proceeding in the county court resulted in the admission of the instrument to probate. The heirs at law, hereinafter called contestants, appealed to the district court, where the cause was tried upon the same issues as presented in the county court, and resulted in a verdict finding generally that the instrument was not the last will of Mrs. Smith, and, to special interrogatories, the jury answered, first, that the will was not attested in the manner required by statute, and, second, that it was procured by undue influence. Proponent has appealed.

There is a voluminous record of the proceedings in the district court, the greater part of which relates to the question of undue influence alleged to have been practiced upon Mrs. Smith to induce the making of the will. The conclusion which we have reached renders it necessary to consider only the question of the due execution of the will.

The instrument purports to have been signed by Mary E. Smith in the presence of Mary F. Yates and S. G. Aden. There is an attesting clause above the signatures of the witnesses which recites all of the facts necessary to the legal execution of the will. However, Mrs. Yates testified as a witness that she was called to the home of Mrs. Smith on the evening of June 10, 1933, and when she arrived Mrs. Smith and Mr. Scott were there, sitting at the dining-room table conversing; that very shortly thereafter Mr. Aden came in; that Mr. Scott took the instrument and presented it to her with a request to sign at a particular place; that Mrs. Yates did so; that no announcement was made that the instrument was the will of Mrs. Smith, or anything of that

kind, in her presence; that Mrs. Smith did not sign the instrument in her presence, and that she did not see the signature of Mrs. Smith on the instrument until after Mrs. Smith's death. She testified that Mrs. Smith made no statement as to what the instrument was; that after she signed it, it was passed either to Mr. Aden or to Mr. Scott; that she did not know what it was that she was signing; that she did not read the instrument, and did not read the attesting clause. She did state, however, that after she and Mr. Aden signed the instrument Mr. Scott said something in a low tone, but that she did not hear or understand what he said, although her hearing was all right. Aden, the other witness, testified that Mrs. Smith did not sign the instrument in his presence; nor did he see her signature on the instrument until after her death; that Mrs. Smith made no statement as to what the instrument was, but that after the witnesses had appended their signatures Mr. Scott inquired of Mrs. Smith if that was her last will and she nodded her head. Do these facts show the due execution of the will?

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

The word "attested," as used in the quoted language of the statute, has received judicial construction in many of the courts and by text-writers. In *Elston v. Price*, 210 Ala. 579, 98 So. 573, it was held: "The essential thing in attestation of a will is that attestor by his signature shall affirm that testator executed the will in his presence; attestation consisting in the witness seeing that the things required by the statute exist and are done."

"The word 'attested,' under all of the authorities, carries the idea both of mental and mechanical act, and, as between it and 'subscription,' it is the more comprehensive term, and

includes the latter." *International Trust Co. v. Anthony*, 45 Col. 474, 101 Pac. 781. "The attestation required of witnesses consists in their seeing that those things exist and are done which the statutes require to exist or be done in order to make the instrument in law the will of the testator." 68 C. J. 673. The word "attestation" is defined in Bouvier's Law Dictionary as the act of witnessing an instrument in writing at the request of the party making the same and as subscribing as a witness.

In *Luper v. Werts*, 19 Or. 122, 23 Pac. 850, it was held: "To prove the attestation of the will, it must be shown that the witnesses who subscribed their names to it did so at the request of the testator; that they saw him sign it, heard him acknowledge it, or observed acts which unmistakably indicated that he had signed it. The acknowledgment, however, cannot be inferred from mere silence." See, also, *White & Co. v. Magarahan*, 87 Ga. 217, 13 S. E. 509.

The state of Minnesota has a statute, regarding the execution of wills, almost identical with that of Nebraska. In *Tobin v. Haack*, 79 Minn. 101, 81 N. W. 758, that court held: "A last will and testament must be signed by the testator in the presence of the subscribing witnesses, or, if not so signed, the testator must acknowledge to such witnesses that the signature thereto attached is his, or in some other way clearly and unequivocally indicate to them that the will about to be signed by them as witnesses is his last will, and has been signed by him." It is also a rule that statutory provisions, regarding the manner in which wills must be executed, are generally held to be "mandatory and subject to strict construction, and if not complied with, the will is void and inoperative." 68 C. J. 672.

Applying the rules to the situation disclosed by the evidence, the instrument appears not to have been attested by two witnesses, as required by the statute. Mrs. Yates and Mr. Aden, the supposed attesting witnesses, both testified that Mrs. Smith did not sign the instrument in their presence; nor did they see her signature attached thereto; nor did she make any statement that her signature was attached

thereto; and they had no knowledge that her signature was attached until after her death. Since the statute required the instrument to be attested by two disinterested witnesses, and it appears not to have been attested by either of the witnesses, and since there was no request on the part of Mrs. Smith that the witnesses sign their names as subscribing and attesting witnesses, clearly, we think, the will was not attested in the manner required by the statute.

Proponent cites and relies upon the case of *Holyoke v. Sipp*, 77 Neb. 394, 109 N. W. 506, and *Spier v. Spier*, 99 Neb. 853, 157 N. W. 1014. In the first case cited it was held: "A presumption of the due execution of a will arises from the presence of an attestation clause which recites the facts necessary to the validity of the will, and, in the absence of evidence discrediting the statements, the will should be admitted to probate." In the body of the opinion, quoting from Underhill, Law of Wills, it was said (p. 396): "When the subscribing witnesses are present at the probate and admit the genuineness of their signatures, but deny or are unable to recollect some or all of the facts which were attendant upon the execution, so that one or both of them are unable or unwilling to testify with positiveness and of their own knowledge that all the requirements of the statute were complied with, a presumption of due and proper execution will arise from the recitals of a perfect attestation clause."

We think that these cases are not applicable to the situation disclosed by the record. In the case before us, both of the subscribing witnesses said positively that the instrument was not signed in their presence by the testatrix; that they did not see her signature at that time, or until long afterwards; and one of the attesting witnesses testified positively that she had no knowledge or information as to the nature of the instrument to which her name was attached; nor was there any request from Mrs. Smith that she sign the instrument as an attesting witness to her will.

If in this case the subscribing witnesses had testified that they could not remember or did not know what occurred at the time of the supposed execution of the will, the

presumption of due execution would arise from the perfect attesting clause above their signatures, but this presumption disappears when the positive evidence of the subscribing witnesses is to the effect that the facts, necessary to constitute due execution of the will, did not occur. The evidence in the record is insufficient to support a finding that the instrument was duly executed as a will. The trial court would have been justified in directing a verdict for the contestants upon that ground alone.

The conclusion reached upon the question of the execution of the will makes it unnecessary to consider other questions presented in the briefs.

Since the instrument proposed as the will of Mrs. Smith was not executed in the manner required by statute, it follows that error, if any, committed by the trial court in its instructions to the jury or rulings on evidence, relating to undue influence, could not have been prejudicial to proponent. Judgment

AFFIRMED.

HELEN ROGERS WEDDLE, ADMINISTRATRIX, APPELLEE, V. PRUDENTIAL INSURANCE COMPANY, APPELLANT.

FILED APRIL 15, 1936. No. 29639.

1. Insurance: POLICY: "FACILITY OF PAYMENT" CLAUSE. A "facility of payment" clause in an industrial insurance policy providing in substance that the insurer may pay the benefit to any relative by blood or connection by marriage, or to any person appearing to it equitably entitled thereto instead of the beneficiary, generally does not give such a third party the right to maintain an action to compel insurer to make payment to him.
2. ———: ———: ———: DISCHARGE OF INSURER. The election of the insurer to pay the amount due under a policy according to the provisions of a "facility of payment" clause, which provides in substance that payment to a relative or any other person equitably entitled to the fund shall satisfy all claims thereunder, discharges the insurer from liability.
3. ———: ———: ———: ———. Where an insurer success-

fully defends an action brought by a third person to recover under the "facility of payment" clause, alleging that he is equitably entitled to the fund, the liability of the insurer is not thereby discharged.

4. ———: ———: LIABILITY. A provision that a policy shall not take effect unless the insured is in good health upon the date of issuance is a condition precedent without which there is no liability under the policy.

5. ———: ———: ———: BURDEN OF PROOF. The plaintiff has the burden of proving that the insured was in sound health on the date of the policy, where sound health at the time of issuance is a condition precedent to the assumption of liability by the insurer.

6. ———: ———: ———: PRESUMPTION. The delivery of a life policy, the acceptance of premiums, and the treatment of the policy by the insurer and the insured as a contract raises a presumption that insured was in sound health on the date of the policy.

7. ———: ———: ———: BURDEN OF PROOF. The burden of proving *as a defense* that insured at the date of the policy was not in sound health is upon insurer.

8. ———: ———: DEFENSES. Where a policy of life insurance provides that it shall not take effect if on the date thereof the insured be not in sound health, but the premiums shall be returned, the insurer, to defend under this provision, must allege and prove a return or a tender of the premiums.

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

Hall, Young & Williams, for appellant.

Max Fromkin and *Kelso A. Morgan, contra.*

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

DAY, J.

The plaintiff, as administratrix of her deceased husband's estate, seeks to recover upon two policies of industrial insurance issued by the defendant. At the close of all the testimony, the trial court directed a verdict in favor of plaintiff for the amount of the policies, $532, and interest. The insurance company appeals.

The policies provide that the company, in consideration of the payment of the premium, will pay immediately upon proof of death of the insured during the continuance of the policy the amount specified "to the executors or administrators of the insured, unless payment be made under the provisions of the next succeeding paragraph."

The next succeeding paragraph provides for "facility of payment" as follows: "It is understood and agreed that the said company may make any payment or grant any nonforfeiture provision provided for in this policy to any relative by blood or connection by marriage of the insured, or to any person appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, for his or her burial, or for any other purpose, and the production by the company of a receipt signed by any or either of said persons or of other sufficient proof of such payment or grant of such provision to any or either of them shall be conclusive evidence that such payment or provision has been made or granted to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied."

The insurance company alleged as a defense that, under the "facility of payment" clause, it had elected, because of an oral agreement with insured, to treat Gus Rogers, brother of insured, as the beneficiary. It is asserted that this agreement was made because insured was indebted to Gus Rogers and that said brother paid the premiums. It was also alleged that Gus Rogers brought an action against the company which resulted in a judgment in favor of the company, which is a bar to this action. The trial court upon motion of plaintiff struck the paragraphs containing these allegations from the defendant's answer. This is assigned as error.

The "facility of payment" clause provides that the company may or may not elect to pay to another equitably entitled to the benefit, rather than the beneficiary named in the policy. These industrial policies are written for small amounts and for small premiums. The "facility of pay-

ment" clause is to permit payment by the insurance company to one who has advanced money for the benefit of the insured. Sometimes the amount of the policy is insufficient to pay the expense of administration of the deceased's estate. Has a third person a right of action against the insurance company under the "facility of payment" provision? This question has generally been answered in the negative by the courts.

A facility of payment clause in an industrial insurance policy providing in substance that the insurer may pay the benefit to any relative by blood or connection by marriage, or to any person appearing to it equitably entitled thereto instead of the beneficiary, generally does not give such a third party the right to maintain an action to compel insurer to make payment to him.

A careful annotator gives this as the general rule and cites *Williard v. Prudential Ins. Co.*, 276 Pa. St. 427, 120 Atl. 461, and *Lewis v. Metropolitan Life Ins. Co.*, 178 Mass. 52, 59 N. E. 439.

However, the right of such a third party to maintain an action has been sustained in a few instances. We are inclined to follow the majority rule as announced herein as far as applicable to this case. The situation presented here is not similar to any other reported case. Under the terms of these policies, the administratrix as named beneficiary is entitled to maintain this action. Can that right be foreclosed by another equitably entitled to the fund, under the facility of payment clause, prosecuting an action against the company which resulted in a judgment for the company, except that it was required to return the premiums? It cannot be. The third party did not have a right to maintain the action. The administratrix did have that right. Under the terms of the policy, only the payment of the benefit to a third person equitably entitled to the fund would relieve the insurance company. The company may elect to pay to such a person and be relieved of liability. But it cannot elect not to pay and secure its release from such a party under the facility of payment clause.

The administratrix as beneficiary is entitled to maintain an action upon the policy. She cannot be deprived of this right by an action to which she is not a party. The defendant insists that, since the judgment against it was for the return of the premiums, and it elected to pay this judgment, it has been discharged, since this is all that is due under the policy. The election of the insurer to pay the amount due under a policy according to the provisions of a facility of payment clause which provides in substance that payment to a relative or any other person equitably entitled to the fund shall satisfy all claims thereunder discharges the insured from liability. But where an insurer successfully defends an action brought by a third person to recover under the facility of payment clause, alleging that he is equitably entitled to the fund, the liability of the insurer is not thereby discharged.

The other defense interposed by the defendant to this cause of action is founded upon the "Preliminary Provision" of the policy, which provides that the policies shall not take effect if on the date of issuance the insured be not in sound health. It is alleged in the answer that on said date the insured was not in sound health. A provision that a policy shall not take effect unless the insured is in good health upon the date of issuance is a condition precedent without which there is no liability under the policy. See *Van Dahl v. Sovereign Camp, W. O. W.*, *ante*, p. 181, 264 N. W. 454; *Fondi v. Boston Mutual Life Ins. Co.*, 224 Mass. 6, 112 N. E. 612; *Anders v. Life Insurance Clearing Co.*, 62 Neb. 585, 87 N. W. 331.

Does the burden of proving that the insured was in sound health at the date of the policy rest upon the plaintiff? There are cases which hold that such burden is upon the plaintiff where sound health is a condition precedent to the assumption of risk by the insurance company. However, the delivery of a life policy, and the acceptance of premiums, and the treatment of the policy by the insurer and the insured as a contract raises a presumption that insured was in sound health on the date of the policy. This presumption

is sufficient to sustain the burden of proof resting upon the plaintiff until the insurer introduces evidence to rebut it. 1 Cooley, Briefs on Insurance (2d ed.) 668; *Ruggiro v. Prudential Ins. Co.*, 113 N. J. Law, 561, 174 Atl. 882; *Mohr v. Prudential Ins. Co.*, 32 R. I. 177, 78 Atl. 554.

This is not in conflict with the rule that the plaintiff has the burden of proving that the insured was in sound health on the date of the policy, where sound health at the time of issuance is a condition precedent to the assumption of liability by the insurer. *Fondi v. Boston Mutual Life Ins. Co., supra.* This rule is suggested at least by *Anders v. Life Insurance Clearing Co., supra.*

Now, in this case, the policy was delivered and nine weekly premiums were paid to insurer. The policy was issued, delivered, and the premiums were all paid at the time the insured died. The insurer raised the issue that insured was not in sound health by its answer. The burden of proving that defense was, in face of the presumption, upon the defendant. The burden of proving *as a defense* that insured at the date of policy was not in sound health is upon insurer. *Layne v. Spot Cash Ins. Co.*, 136 Kan. 541, 16 Pac. (2d) 484; *Western & Southern Life Ins. Co. v. Spencer*, 95 Ind. App. 281, 179 N. E. 794; *Mid-Continent Life Ins. Co. v. House*, 156 Okla. 285, 10 Pac. (2d) 718.

The preliminary provision also provides that, if the insured is not in good health at the date of issuance, the premiums paid shall be returned. The premiums have not been returned or tendered to the beneficiary in this case.

Where a policy of life insurance provides that it shall not take effect if on the date thereof the insured be not in sound health, but the premiums shall be returned, the insurer, to defend under this provision, must allege and prove a return or a tender of the premiums. *Metropolitan Life Ins. Co. v. Moore*, 117 Ky. 651, 79 S. W. 219.

Other assignments of error relate to the exclusion of evidence by the trial court. It is sufficient to state that an examination does not reveal any reversible error in this connection. To discuss each alleged error would be to restate

well-established rules of law applicable thereto and would unduly and unnecessarily extend this opinion.

While this case involves less than $600, it has been ably and vigorously contested. The plaintiff has been represented by able and experienced lawyers. Important new questions of law have been presented both by briefs and oral arguments. The appellant's brief states that the case is important because of the large number of such policies in force in this state. The plaintiff is awarded attorney's fees in this court in the sum of $200.

AFFIRMED.

FIRST TRUST COMPANY OF LINCOLN, TRUSTEE, APPELLANT, V. ALBERT STENGER ET AL., APPELLEES.

FILED APRIL 15, 1936. No. 29644.

1. **Mortgages: FORECLOSURE: MORATORIUM.** Where, as in this case, the evidence establishes that the amount of the mortgage lien on the land exceeds the value, a moratory stay must be denied.
2. ———: ———: ———. Where the applicant has no valuable interest to protect, good cause is shown for a denial of an application for a moratory stay.
3. **Constitutional Law.** A statute will not be declared unconstitutional unless necessary to proper disposition of pending case.

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

Hall, Cline & Williams and *Lamont L. Stephens*, for appellant.

Robert H. Mathew, contra.

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

DAY, J.

This is a mortgage foreclosure suit in which a decree was entered June 12, 1934. The statutory nine months' stay

was taken, after which an order of sale was issued, and the property was sold to plaintiff, the highest bidder, on May 7, 1935, for $39,800. Thereafter, on June 11, 1935, one of the defendants made an application that all proceedings be stayed until March 1, 1937, under section 20-21,159, Comp. St. Supp. 1935, known as the mortgage moratorium law. Objections to this application were filed by the plaintiff, one of which is that the applicant has no equity in the land, and that the amount of the decree is in excess of the reasonable market value of the land. The trial court entered an order June 18, 1935, granting the application for a moratory stay.

It was stipulated by the parties at the time the matter was heard that the amount due under the decree at the time (June 11, 1935) was the sum of $40,191.94.

Two qualified and disinterested witnesses testified that the farm, consisting of 1,040 acres located in Sherman county, Nebraska, was worth as a top price, $27,000. These witnesses gave cogent reasons for their valuation. Another competent witness testifying for the applicant did not place a market value as of the time of trial. He expressed the opinion that this farm had future possibilities if an irrigation development made it possible to irrigate several hundred acres. There is no evidence to indicate any probability that this land would be made irrigable. As the record is, an opinion based largely upon such a conjecture is too highly speculative to be given serious consideration in a court of justice. The other witness for the applicant, whom the record does not reveal has any qualifications as an expert witness upon the value of farm land, places the same value upon the land, conditioned, "if the ditch would happen to go through." This witness, in response to a query as to the actual worth of the land on the market, stated: "Well, that's a hard question for me to answer."

Giving the testimony of the witnesses for the applicant a consideration to which it is not entitled, and taking an average of all witnesses, the average is only $38,500. *Luikart v. Graf, ante,* p. 736. We give the greater weight to the testimony of the objectors, and we are confirmed in our

judgment by certain statements in letters written by one of the defendants some time before this hearing, in which he stated: "I think you will agree with me that $20,000 will buy outright better producing properties than the ranch in question." Where, as in this case, the evidence establishes that the amount of the mortgage lien on land exceeds the value, a moratory stay must be denied. *Clark v. Hass,* 129 Neb. 112, 260 N. W. 792. The statute provides that moratory stays shall be granted unless "good cause is shown to the contrary." Where the applicant has no valuable interest to protect, good cause is shown for a denial of an application for a moratory stay. Comp. St. Supp. 1935, sec. 20-21,159.

The objections of plaintiff to the application for a moratory stay question the validity of the mortgage moratorium law, *supra,* asserting that it violates the provisions of both federal and state Constitutions.

This presents interesting and attractive questions for consideration. We must, however, brush aside the temptation to indulge in such a discussion because the rule is well established by a long line of authorities in this jurisdiction that a statute will not be declared unconstitutional unless necessary for a proper disposition of the pending case. *Lane v. State,* 120 Neb. 302, 232 N. W. 96; *War Finance Corporation v. Thornton,* 118 Neb. 797, 226 N. W. 454.

The conclusion of this court, therefore, is that the trial court erred in granting a moratory stay. The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

GEORGE WILSON V. STATE OF NEBRASKA.

FILED APRIL 15, 1936. No. 29513.

1. **Criminal Law: EVIDENCE.** A delay of nine days in delivering to the state chemist bottles of beer for examination as to alcoholic content is immaterial, if there is no question as to the identity of the beer.
2. **Intoxicating Liquors.** The legislature has power, within reason-

able limits, to declare what percentage of alcohol a beer may contain before it becomes an intoxicating liquor.

3. **Statutes:** REPEAL. The repeal of the prohibition amendment (Const. art. XV, sec. 10) did not repeal existing statutes on this subject.

ERROR to the district court for Cass county: DANIEL W. LIVINGSTON, JUDGE. *Affirmed: Sentence reduced.*

Raymond E. McGrath, for plaintiff in error.

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

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

PAINE, J.

George Wilson was prosecuted for selling two bottles of beer on August 11, 1934, in the village of Elmwood, Cass county, without first having obtained a license from the village board; and upon a verdict of guilty he was fined $500 and costs.

The plaintiff in error, hereinafter called the defendant, seeks to set aside his conviction on the ground that there was prejudicial error in the admission in evidence of the two bottles of beer. The defendant insists that the penalty imposed of $500 is excessive, and unwarranted by the evidence, and should be set aside or reduced by the court, and that the court erred in overruling defendant's demurrer.

The testimony discloses that J. H. Miller, a resident of Lincoln since 1915, an employee of the state sheriff's office, on August 11, 1934, went to the defendant's café in Elmwood at 2:00 p. m. and purchased two bottles of beer from the defendant personally. He took the bottles of beer out to his car, unopened, and put on the seals and labels that appeared upon the exhibits when they were introduced in court. Mr. Miller delivered these two bottles of beer to the state chemist's office, and R. B. Willard, who has charge of the laboratory, testified that the exhibits were examined by him, and that each contained 2.6 per cent. alcohol by volume, and that the beer was capable of being used as a beverage.

The clerk of the village of Elmwood testified that he had been acquainted with the defendant for many years, and that the defendant had made application to the village board for a beer license, but none had been granted to him.

The defendant testified that he operated a café in Elmwood, and in October, 1933, secured a federal license, which license was still in force on the day he sold this beer; that after October 1, 1933, he made several applications to the village board for a beer license, but same was refused by the board because there was no ordinance whereby they could issue him a license for the sale of beer; that at the time of his arrest he had been selling beer about 11 months in his place of business next to the post office, in a building owned by the state banking board.

The defendant's objection to the admission of the two bottles of beer is based on the fact that the beer was purchased on August 11 and that it was not delivered to the office of the state chemist until August 20, and no reason is given for this delay. The objection was that no proper and sufficient foundation had been laid. The court's ruling in admitting these exhibits in evidence was correct, for there was no doubt whatever that the identical beer purchased by the deputy state sheriff was the beer delivered to and analyzed by the state chemist.

We will next consider the alleged error in the overruling of the demurrer, based on the ground that certain sections of the Laws of 1933, hereinafter set out, are void and unconstitutional because they contain conflicting provisions with reference to the definition of the term "intoxicating liquor." Section 10, art. XV of the Nebraska Constitution, being the prohibition amendment, was adopted by popular initiative vote in 1916, and took effect on May 1, 1917, and absolutely prohibited the manufacture and sale of intoxicating liquor except for medicinal, scientific, mechanical, or sacramental purposes. This prohibition amendment to our state Constitution was repealed on November 6, 1934, but, the year before the prohibition amendment was repealed, the legislature of 1933 had passed a beer licensure law,

found in chapter 93, Laws 1933, which repealed section 53-101, Comp. St. 1929, which had defined intoxicating liquor as one containing over one-half of one per centum of alcohol, and gave a new definition, as follows: "The words 'intoxicating liquor' or 'intoxicating liquors,' as used in this act, shall be construed to embrace vinous or spirituous liquors, wine, or any other drink, mixture or preparation of like nature, and all other beverage mixtures or preparations, whether patented or not, which will produce intoxication, *or* which contain over three and two-tenths (3.2%) per centum of alcohol by weight." Comp. St. Supp. 1933, sec. 53-101.

The defendant's first attack is that this definition is cast in the alternative so as to embrace all liquors which are intoxicating in fact, even though they do not contain 3.2 per cent. of alcohol, as well as every kind of liquor which contains more than 3.2 per cent. alcohol, and defendant claims that this alternative, as set out by the word "or," italicized above, makes the law so indefinite and vague as to leave the reader uninformed as to what the legislature meant. In our opinion, the defendant has stated very clearly just what the law says and the meaning to be drawn therefrom, and we do not find that the law leaves any uncertainty as to what it means, for there can be no doubt that the defendant understands it perfectly. It is not indefinite or vague.

The defendant next insists that this section of our law under which his conviction occurred was vulnerable to his demurrer, for it is unconstitutional and void for the reason that it permits the sale of intoxicating liquor in violation of the Nebraska prohibition amendment, which was still in force, and in support thereof cites us to three cases, to wit, *Kerkow v. Bauer,* 15 Neb. 150, 18 N. W. 27, *Peterson v. State,* 63 Neb. 251, 88 N. W. 549, and *Sothman v. State,* 66 Neb. 302, 92 N. W. 303, in each of which this court holds that the courts of this state will take judicial notice that beer is an intoxicant. These three Nebraska cases just cited were all decided before 1903, and these decisions of this court were in line with many decisions of the federal courts

at about that period, as well as with those from other states, all of which decisions at that time uniformly held that beer was an intoxicating liquor.

This was doubtless due to the fact that the beer sold before the time of the World War had a much higher alcoholic content. A full discussion of this matter is found in the opinion rendered June 16, 1933, in *Louisville & N. R. Co. v. Falls City Ice & Beverage Co.*, 249 Ky. 807, 61 S. W. (2d) 639, in which a manufacturer of beer with an alcoholic content not exceeding 3.2 per cent. brought action to compel a common carrier to accept such beer for transportation, the carrier having refused on the ground that such beverage was an intoxicating liquor, and prior to March 22, 1933, the transportation of such beer was a violation of the Volstead act, which forbade the transportation in either intrastate or interstate commerce of all beverages exceeding one-half of one per cent. of alcohol by volume, but congress on March 22, 1933, passed a resolution repealing certain portions of the Volstead act and declaring that beer and other liquors containing not more than 3.2 per cent. of alcohol by weight were not intoxicating liquors. It is set out in this decision that many nationally-known beers manufactured previous to the World War had an alcoholic content in excess of 4.81 per cent. of alcohol by weight, and that intoxication does not set in until the blood contains 0.134 to 0.153 per cent. of alcohol, and saying that it is held by many to be a physical impossibility, in view of the fluid capacity of the human stomach, to raise the alcoholic content of the blood to those figures by drinking beer of low alcoholic content.

It appears that in *Ruppert v. Caffey*, 251 U. S. 264, being an opinion by Justice Brandeis, and *National Prohibition Cases*, 253 U. S. 350, it was held that congress had the power, within certain limits, to declare what percentage of alcohol a beer might contain without being deemed intoxicating. Likewise, we hold that the legislature of Nebraska has a wide discretion in defining an intoxicating liquor. The legislature having now declared what beer is an intoxicant, this court will no longer take judicial notice that beer

of an alcoholic content of not more than 3.2 per cent. is intoxicating, as it did in the earlier cases, and the demurrer was rightly overruled in the instant case.

The legislature of 1933, by chapter 93, acting in line with congress, authorized the sale of fermented and brewed beverages containing more than one-half of one per cent. of alcohol; provided the seller first obtained a license from the city council or village board, paying a small fee therefor. This license the defendant had failed to get, and was convicted of selling beer without first securing such license. In our opinion, the demurrer was rightly overruled.

The defendant's fifth assignment of error is to the overruling of a demurrer based on the contention that, when the prohibition amendment, section 10, art. XV of the Constitution, was repealed without reservation by a vote of the people on November 6, 1934, it nullified the law set out in chapter 93, Laws 1933, under which this defendant was convicted by verdict of jury returned December 13, 1934. The defendant insists that the act under which this conviction took place was a special act, dependent upon the prohibition amendment, citing *Fitch v. State,* 102 Neb. 361, 167 N. W. 417. This act, found in chapter 93, Laws 1933, could have been enacted, under the police power of our state, for the licensing of the sale of beer, entirely independent of our prohibition amendment. By its repeal this law did not fall, and the cases cited from the federal courts (*Massey v. United States,* 291 U. S. 608; *United States v. Chambers,* 291 U. S. 217) are not in point, for when the Eighteenth Amendment to our United States Constitution was repealed it left the acts of congress which had been based thereon no foundation whatever upon which to stand, which is not true of acts of our legislature, for that body has the general power, when no prohibition amendment exists, to safeguard temperance, promote obedience to law, and prevent or regulate the manufacture and sale of alcoholic beverages. *Delamater v. South Dakota,* 205 U. S. 93; *Feibelman v. State,* 130 Ala. 122, 30 So. 384; *Clark v. Kansas City,* 176 U. S. 114; *United States v. Gibson,* 5 Fed. Supp. 153; *Zimmerman*

v. State, ante, p. 269, 264 N. W. 668. The ruling of the trial court on the demurrer was right in the case at bar.

The last contention of the defendant is that a fine of $500 and costs for selling two bottles of beer without first securing a license is an excessive punishment. The evidence discloses that defendant was born on a farm near Elmwood, and had lived in the community all his life, and he testified that this was the first time he had ever been in trouble of any kind. Under section 29-2308, Comp. St. 1929, it is the duty of this court to render such sentence as in our opinion may be warranted by the evidence. The court is unanimous in declaring that the sentence should be reduced. The sentence is, therefore, fixed at a fine of $200 and costs, and, as so modified, the judgment is affirmed.

AFFIRMED: SENTENCE REDUCED.

CARL PLESSMAN V. STATE OF NEBRASKA.

FILED APRIL 15, 1936. No. 29703.

1. **Criminal Law**: PROSECUTORS. Prosecutors are not partisans against the accused, and should handle all prosecutions without bias or prejudice as between the public and the defendant.
2. ———: INSANITY: BURDEN OF PROOF. If, in the trial of a criminal case, definite evidence of the insanity of defendant appears in the admitted testimony, then the burden is upon the state to prove the sanity of the defendant beyond a reasonable doubt as one of the elements necessary to establish guilt.
3. ———: DEFENSE OF INSANITY. "No form of insanity is recognized in this state as a defense to a criminal act unless it affects the mind of the accused to such an extent that it renders him incapable of distinguishing between right and wrong with reference to the act committed." *Torske v. State,* 123 Neb. 161, 242 N. W. 408.

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

G. E. Hager and *James L. Brown,* for plaintiff in error.

William H. Wright, Attorney General, Daniel Stubbs and *Lester A. Danielson, contra.*

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

PAINE, J.

Carl Plessman was convicted of arson and sentenced to four years in the penitentiary, which conviction and sentence he seeks to reverse in this court.

The information charged that the plaintiff in error, Carl Plessman, hereafter called the defendant, set fire to the barn of a neighboring farmer, John V. Juricek, on May 13, 1935, with intent to burn it. On May 15 defendant was brought into court by the sheriff, waived a preliminary examination in the municipal court, and about an hour later was arraigned in the district court, entered a plea of guilty, and was thereupon sentenced to two years in the penitentiary. Relatives of the defendant having employed counsel, the plea of guilty was withdrawn on May 25, and the sentence vacated. Thereupon, trial was had to a jury, which returned a verdict of guilty, and a sentence to four years at hard labor followed.

The errors relied upon for reversal are as follows: (1) Misconduct of the county attorney; (2) the verdict is contrary to the evidence; (3) error in giving instruction No. 8; (4) that the sentence is excessive.

The misconduct alleged against the county attorney consisted in failing to call Dr. Beverly A. Finkle as an expert witness after the county attorney had directed him to make an examination of the defendant, and it is charged that he reported to the county attorney that the defendant was insane and suffering from paranoia psychosis, but the county attorney did not call him as a witness during the trial, and defendant's counsel did not learn of these facts until after the verdict had been returned, as the defendant did not tell his attorney he had been examined by Dr. Finkle.

It is true that prosecutors are not partisans against the accused, and owe no greater obligation to the public than to the defendant, for a prosecutor acts in such matters without bias or prejudice. *Leahy v. State*, 31 Neb. 566, 48 N. W.

390; *Liniger v. State,* 85 Neb. 98, 122 N. W. 705; *Flege v. State,* 93 Neb. 610, 142 N. W. 276; *Swogger v. State,* 116 Neb. 563, 218 N. W. 416.

It is quite possible that there were perfectly satisfactory reasons why the prosecuting attorney felt that he was not justified in calling Dr. Finkle as a witness for the state.

It is charged that the verdict in this case is contrary to the evidence. The only defense offered was insanity. The defendant's counsel called as his expert witness Dr. B. F. Williams, who is an alienist of experience, and was superintendent in charge of the Nebraska state asylum at Lincoln for ten years. This witness was examined and cross-examined at great length. He had studied this defendant's mental condition carefully for several days, obtained his full family history, anl positively testified that he was a typical paranoid-psychosis case. His testimony is clear and convincing. The state on its part did not call to the witness-stand any witness to testify that the defendant was sane, in opposition to Dr. Williams' testimony.

Insanity is not ordinarily an issue by itself, to be passed on separately from the other issues in a criminal case, but is involved in the defendant's plea of not guilty. *Davis v. State,* 90 Neb. 361, 133 N. W. 406.

All men are presumed to be sane, but if, in the trial of a criminal case, any definite evidence of defendant's insanity appears in the evidence offered by either the state or the defense, then the burden is upon the state to convince the jury of the sanity of the defendant beyond a reasonable doubt as one of the elements necessary to establish guilt. *Torske v. State,* 123 Neb. 161, 242 N. W. 408; *Snider v. State,* 56 Neb. 309, 76 N. W. 574; *Shannon v. State,* 111 Neb. 457, 196 N. W. 635.

The presumption of sanity was rebutted in the case at bar, and it devolved upon the state to show by evidence beyond a reasonable doubt that the accused was capable of distinguishing between right and wrong with respect to the act committed in order to secure his conviction. The evidence in this respect was not rebutted, and fails to support the verdict rendered.

Instruction No. 8, which is attacked in this appeal, must be read in connection with the preceding instruction. Instruction No. 7 reads as follows: "In substance the defendant asserts the defense of insanity, or insanity to some degree, and in this connection you are instructed that one who is insane or insane in certain particulars and because of that commits a felony, he cannot properly be found guilty of such crime and punished as a felon therefor. You should consider the defendant in connection with all of the evidence for the purpose of ascertaining whether or not he was so or in such wise insane at the time of the firing of the barn in question, and if you find that he was, and that he fired the barn under the influence of such insanity, then in that case your verdict should be not guilty."

Instruction No. 8 reads as follows: "On the other hand, if you find from the evidence, that the defendant was not so unsound of mind as to be unable to distinguish between right and wrong in connection with setting fire to the barn, or not to know and understand what he was doing when he fired it, supposing you find from the evidence that he did fire it, or the general nature and effect of what he was doing in that connection, then and in such case you should find against him upon his defense of insanity."

It is charged that instruction No. 8 is open to serious criticism as being ambiguous in that it contains a double negative, and the jury were told that if from the evidence the defendant is not so unsound of mind as to be unable to distinguish between right and wrong, or not to know and understand what he was doing, or the general nature and effect of what he was doing, then they should find against him.

There are two distinct elements in connection with the crime charged. The first is, whether the accused knew that applying a flame will destroy the barn. This may be called the quality of the act; but the second element involves the question whether the accused understood the difference between right and wrong with respect to that act. To state it another way, the jury are told in instruction No. 8 to find

against the defendant upon his defense of insanity if he knew the general nature and effect of what he was doing. Without doubt this defendant, who had harbored a fancied grudge against his neighbor for some 15 years, knew that his act would start a fire, and endeavored to be quite clever in attempting to carry it out during the night, but the dogs barked in the barn and Mr. Juricek went down and put out the fire, which had been started in the haymow.

This court has said: "No form of insanity is recognized in this state as a defense to a criminal act unless it affects the mind of the accused to such an extent that it renders him incapable of distinguishing between right and wrong with reference to the act committed." *Torske v. State,* 123 Neb. 161, 242 N. W. 408. See, also, *Wright v. People,* 4 Neb. 407; *Hart v. State,* 14 Neb. 572, 16 N. W. 905; *Burgo v. State,* 26 Neb. 639, 42 N. W. 701; *Shannon v. State,* 111 Neb. 457, 196 N. W. 635; *Wilson v. State,* 120 Neb. 468, 233 N. W. 461.

In *Knights v. State,* 58 Neb. 225, 78 N. W. 508, Judge Sullivan, in reversing the conviction, said: "Ordinarily, insane persons comprehend the nature of their acts. When they take life or destroy property they usually know what they are doing, and often choose means singularly fitted to accomplish the end in view. The jury in this case may have believed that the defendant applied a lighted match to the property in question understanding well that combustion would follow and that the store building and its contents would be reduced to ashes, and they may have refused, for that reason, to acquit him, although reasonably doubting his capacity to distinguish between right and wrong with respect to the act."

Instruction No. 8 is erroneous, for the instruction says that the defendant must be so insane as not to know and understand what he was doing, but that is not the law. He may have known exactly what he was doing, but not have been able to know whether his act was right or wrong.

The state failed to produce any evidence at all to rebut the positive and direct evidence tending to prove that the defendant was insane. In the brief the state attempts to

excuse this lack of evidence by saying: "At the most, testimony by Dr. Finkle would have been merely cumulative."

For the prejudicial errors indicated herein, the judgment and sentence are hereby

REVERSED.

M. D. KELLER ET AL., APPELLEES, V. ARTHUR C. BOEHMER, ADMINISTRATOR, ET AL., APPELLEES: W. E. HEGINBOTHAM, APPELLANT.

FILED APRIL 15, 1936. No. 29572.

1. Mortgages: FORECLOSURE: SALE: CONFIRMATION. Mere inadequacy of price will not preclude confirmation of a foreclosure sale unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud.
2. ———: ———: REDEMPTION. After a decree for the foreclosure of a prior mortgage has been rendered in an action to which a junior encumbrancer was a party, the latter cannot then redeem from the prior mortgage and claim a decree of subrogation. As a mere junior mortgagee, his rights are sufficiently protected by the opportunity to purchase at the sale, or to pay off the prior encumbrance before the sale.

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

Hastings & Hastings, for appellant.

E. E. Jackman, Bruce K. Lyon and *W. C. Conover, contra.*

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

CARTER, J.

This is an appeal from an order of the district court confirming the sale of 320 acres of land in a foreclosure action in Perkins county. After the appeal was perfected, the appellant, as owner of the second lien under the decree of foreclosure, made application in this court to redeem from

the sale, and for an order subrogating himself to the rights of the purchaser at the sale.

It is contended that the trial court erred in confirming the sale for the reason that the sale price was so inadequate as to make it appear that it was the result of fraud or mistake. The record shows that this land sold for $5,225. The testimony of appellant's witnesses was to the effect that the land was worth $25 an acre. We believe, after a consideration of all the evidence, that the finding of the trial court that the premises sold for a fair value and would not bring more at a subsequent sale is supported by the evidence. The following rule is controlling: Mere inadequacy of price will not preclude confirmation of a foreclosure sale unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud. *Erickson v. Hansen,* 129 Neb. 806, 263 N. W. 132; *First Nat. Bank v. Hunt,* 101 Neb. 743, 165 N. W. 139; *Lindberg v. Tolle,* 121 Neb. 25, 235 N. W. 670; *Lemere v. White,* 122 Neb. 676, 241 N. W. 105.

The only remaining question is whether the appellant has a right to redeem from the sale and become subrogated to the rights of the purchasers in this court pending an appeal from the order of confirmation. The record shows that appellees Keller and Jackman were the owners of the first mortgage in the amount of $4,500, upon which a decree was entered in the case at bar for $4,869.79 and adjudged to be a first lien. The appellant was the owner of a second mortgage on the premises in the amount of $3,200, upon which a decree was entered for $4,641.40 and adjudged to be a second lien. The premises were subsequently sold at judicial sale to appellees Keller and Jackman for $5,225, the amount of their lien plus interest and costs. The appellant did not bid at the sale. The trial court confirmed the sale and appellant perfected his appeal. He then filed his application in the supreme court to redeem from the sale and for an order subrogating himself to the rights of the purchasers if redemption was allowed. Has a second lien holder a right to redeem and to a decree of subrogation under such circumstances?

The redemption statute of this state makes no provision for a redemption by the owner of a junior mortgage. Comp. St. 1929, sec. 20-1530. The property in the case at bar was sold under a decree rendered in favor of the appellant. While it is true that the owners of the first mortgage commenced the foreclosure action, nevertheless the appellant, as the owner of the second mortgage, was made a party defendant and, under such circumstances, the decree is as much that of one as the other.

In the case of *McCullough v. Rose,* 4 Bradw. (Ill. App.) 149, the court said: "The property was sold by virtue of a decree rendered in favor of appellants, Lemon Fouts, James Bell and Alexander Brown. It is as much the decree of one as the other. The moieties of the different creditors were declared by the court, and the master was directed as to which claims he was to pay first. This did not in any respect change the character of the decree. It was as much the sale of one as the other. A party cannot redeem from his own sale. Redemption is a statutory right, favored, it is true, by the courts, because it is desirable that the debtor's land should pay as many of his debts as possible, but there is no authority anywhere for a party to redeem from his own sale. The sale already made is for his benefit. The decree is specifically against that property, to that extent a proceeding *in rem.* In case the specified property is sold and the proceeds do not pay the various claims, in that event the plaintiffs would be entitled to executions on their judgments against the property of the defendants. The parties may and ought to protect themselves by being present at the sale. The record in this case shows the property to have been valued at more than twelve hundred dollars, yet there is no pretense but what the sale to appellant was fair and honest."

In the case of *Bloomingdale v. Barnard,* 7 Hun (N. Y.) 459, the court said: "First, then, as subsequent encumbrancer; and in that view, as to piece number one. The defendant holds a judgment of foreclosure and sale for $2,000, to which the plaintiff was a party; the defendant holds the

next lien, a mortgage which is unpaid, $53,000. The plaintiff holds the third mortgage, given to him before the foreclosure was commenced, and in respect to which undoubtedly he was made a party to the foreclosure. The equity of redemption was cut off by the foreclosure. If he had any defense or ground of equitable relief he should have set it up in that action. As a mere third mortgagee there is no reason why he should stay the sale. The same person holds the first and second mortgages. The holder of the third mortgage clearly cannot as such claim to be subrogated to the first. If he could, then, after he asserted that claim the holder of the second mortgage could claim the same right and could be subrogated back again. As mere third mortgagee, especially after a judgment of foreclosure to which he was a party, his rights are protected by the opportunity to purchase at the sale or to pay up beforehand."

In the case of *Lauriat v. Stratton*, 6 Saw. (C. C. A.) 339, the court ably considered the proposition now before us, and, in part, said:

"The lien of the Cooke mortgage having been extinguished by the sale upon the decree to enforce the lien thereof, the defendant Stratton, as the assignee of Cooke, had no lien upon the property sold, and therefore no right of redemption under the statute. If he wanted the property at any figure beyond the amount due Swegle he should have overbid him at the sale.

"The policy of the statute is to make the property pay the debts of the owner as far as possible. To this end it is provided, that as to all the creditors who are parties to the decree, the property shall be absolutely disposed of at one sale to the highest bidder upon an execution, which is, in legal intendment and effect, the process of all of them. By this means the interest of the creditors is made to promote a healthy competition at the sale for the benefit of the debtor. But to allow the property to be sold to any one of the creditors for the amount of his debt and costs, upon the understanding that the other creditors whose liens are subsequent in point of time, may protect themselves by redeem-

ing from him and one another, would be to provide in effect that the property should be knocked down to the prior lien creditor for not more than the amount of his debt and costs, subject to the right of redemption by the junior creditors.

"Besides, if the lien of the subsequent encumbrancer is not extinguished by the sale, what is there to prevent him from enforcing the decree as to himself by execution? It appears to follow as a logical and legal consequence from the premises, that if his lien is neither extinguished nor satisfied by the sale, and the decree has ascertained the fact and amount of his lien, and directed the premises to be sold to satisfy it, he has his remedy by execution against the property, and may resell it subject to prior encumbrances. And this process may be repeated under like circumstances by every other encumbrancer. But the statute certainly never contemplated such an absurdity, let alone injustice, as this.

"The right of redemption is only given as a protection against a sale to which the redemptioner is not a party and therefore cannot control, but which may result to his injury. In the very nature of things the right to redeem is inconsistent with the right to sell."

Also, in the case of *Horn v. Indianapolis Nat. Bank,* 125 Ind. 381, 25 N. E. 558, the court said: "As the law contemplates a final decree adjusting all rights and equities, and as such a decree was rendered in the foreclosure suit involved in this case, it necessarily results that a sale upon that decree was a sale on all the judgments embodied in it. This being true, it must also be true that none of the claimants in whose favor a judgment was incorporated in the decree of the court can redeem from the sale made on the decree."

In *Western Land & Cattle Co. v. National Bank,* 28 Ariz. 270, 236 Pac. 725, the court said: "We think the true rule is laid down by the supreme court of California, and which was followed in the *Horn* case, in a long line of decisions to the effect that where a number of liens are foreclosed in one suit and there is one judgment and an order of sale thereon directing the payment of the liens in a certain order, none

of the holders of such liens are entitled to redeem, but if the junior liens are not foreclosed the right of redemption still exists."

To like effect is the holding in *San Jose Water Co. v. Lyndon,* 124 Cal. 518, 57 Pac. 481, wherein the court said: "The only facts necessary to be stated are these: An action was brought to foreclose a mortgage upon the land in question, and the said Levy, who was a junior mortgagee, was made a party to the foreclosure suit; Levy, by a cross-complaint, set up his junior mortgage, and prayed for a foreclosure of his mortgage and sale of the premises; the court decreed a foreclosure of both mortgages and a sale under them; the proceeds of the sale were merely sufficient to pay the senior mortgage; and Levy had a judgment docketed, but did not pray for nor was there any deficiency judgment, at least in form, entered. The facts in *Black v. Gerichten,* 58 Cal. 56, were similar to those in the case at bar, except that in the former case the junior mortgagee had a deficiency judgment entered—but the latter fact does not alter the rule there declared. A mortgagee cannot redeem from the sale made upon the foreclosure of his mortgage; and it makes no difference whether the foreclosure is in a suit originally brought by him, or upon a cross-complaint in which he prays for and obtains a foreclosure in a suit brought by another mortgagee. In the case above cited the court say: 'Whether such mortgagee was foreclosed in the action in which the mortgagee was plaintiff, or defendant, is immaterial, for in the latter case he filed a cross-complaint and prayed a foreclosure of his mortgage. It is quite clear that the plaintiff in this case had no mortgage lien on the property subsequent to that on which the property was sold. For it was sold upon his mortgage lien, and his mortgage was merged in the judgment under which it was sold.' "

A text-writer has aptly stated the rule as follows: "After a decree for the foreclosure of a prior mortgage has been rendered in proceedings to which the junior encumbrancer was a party, the latter cannot then claim a decree of subro-

gation, or prevent the sale of the premises, unless he can show that the payment of the prior mortgage or its enforcement by foreclosure and sale would work him an injustice; his application comes too late; as mere junior mortgagee, his rights are sufficiently protected by the opportunity to purchase at the sale, or to pay off the prior encumbrance before the sale." Sheldon, Subrogation (2d ed.) sec. 18.

We are therefore driven to the conclusion that the appellant has no right to redeem and be subrogated to the rights of the purchasers. His application will therefore be denied.

AFFIRMED.

EDITH B. STONE, APPELLANT, V. PHYSICIANS CASUALTY ASSOCIATION OF AMERICA, APPELLEE.

FILED APRIL 15, 1936. No. 29596.

1. **Insurance: CONTRACT: CONSTRUCTION.** In construing a contract of insurance, words used therein will be considered as used in their ordinary and popular sense.
2. ———: ———: ———. Where an assured suffered death as a result of accidental monoxide gas poisoning, the beneficiary under an accident insurance policy cannot recover in excess of $300 where the policy contains a provision exempting the insurance company from liability in excess of that amount for death "resulting from accidental suffocation by illuminating or other gases."

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

Harley G. Moorhead, William G. Brown and *Thomas, Thomas & Folts,* for appellant.

Frank H. Woodland, contra.

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

CARTER, J.

This was an action brought by plaintiff in the district

court for Douglas county to recover death benefits of $10,000 on two policies of accident insurance issued by the Physicians Casualty Association of America on the life of William Franklin Stone, husband of the plaintiff, in which policies the plaintiff was named as the beneficiary. At the close of all the evidence the trial court sustained defendant's motion to withdraw from the jury the question of liability over and above $600. Defendant thereupon consented to the entry of a judgment for plaintiff for $600, which was entered by the court. From the overruling of her motion for a new trial, plaintiff appeals.

The record shows that William Franklin Stone, the insured, was a dentist in Chattanooga, Tennessee. On May 3, 1933, Dr. Stone mailed applications for two $5,000-policies of accident insurance to the defendant which were received on May 6, 1933, and the policies issued on that date. On May 9, 1933, Dr. Stone was found in his garage overcome by the fumes escaping from the motor of his automobile. He died a few minutes later of carbon monoxide poisoning.

The sole question to be determined is whether death by carbon monoxide poisoning comes within the exception in the policies which limits recovery to $300 on each. The exception in question reads as follows: "(2) For death occurring in the following manner, the amount payable shall be limited to Three Hundred Dollars ($300.00): * * * Third: Death resulting from accidental suffocation by illuminating or other gases or the accidental taking of any poison."

It must be conceded that an accident insurance company may limit its liability in any reasonable manner, and it may, therefore, provide that no liability will arise from death resulting from accidental suffocation by illuminating or other gases or the accidental taking of poison. The only question is whether the gas herein involved caused death by accidental suffocation.

The medical testimony is to the effect that carbon monoxide gas is a colorless, odorless and tasteless gas; that after inhalation it does not stay in the lungs and does not, therefore, act as a mechanical barrier, but acts upon the

respiratory center only. Death is caused when there is a sufficient concentration of carbon monoxide combined with the hemoglobin or red blood cells, which disposes of the oxygen. It acts as a poison by producing a chemical reaction which displaces the oxygen in the hemoglobin or red blood cells. The testimony is that it is generally accepted in the medical profession to be a deadly poison that paralyzes the respiratory system when taken into the lungs.

It is not disputed that Dr. Stone's death, in the case at bar, was the result of his inhaling the fumes from the exhaust of his automobile, commonly called monoxide gas. That death was therefore caused by the inhaling of gas cannot be denied. In *Birss v. Order of United Commercial Travelers,* 109 Neb. 226, 190 N. W. 486, this court said: "The term 'gas' is, in a sense, a generic term and is broad and sweeping in its meaning. In Webster's Unabridged Dictionary it is defined as 'an aeriform fluid; a term used at first by chemists as synonymous with air, but since restricted to fluids supposed to be permanently elastic, as oxygen, hydrogen, etc., in distinction from vapors, as steam, which become liquid on a reduction of temperature. In present usage, since all of the supposed permanent gases have been liquefied by cold and pressure, the term has resumed nearly its original signification, and is applied to any substance in the elastic or aeriform state.'"

Plaintiff contends that the expert testimony shows that the insured did not die as a result of accidental suffocation by illuminating or other gases. In construing the contract of insurance, words used therein will be considered as used in their ordinary and popular sense. The definitions or constructions placed upon them by the scientist or the expert cannot control. In the case of *Lewis v. Ocean Accident & Guarantee Corporation,* 224 N. Y. 18, 120 N. E. 56, 7 A. L. R. 1129, Mr. Justice Cardozo said: "To the scientist who traces the origin of disease, there may seem to be no accident in all this. * * * But our point of view in fixing the meaning of this contract, must not be that of the scientist. It must be that of the average man. * * * This test—the one

that is applied in the common speech of men—is also the test to be applied by courts."

What is the ordinary meaning of the words "suffocation by gas?" "Suffocate" has been defined as "to kill by stopping respiration, as by strangling or asphyxiation." "Asphyxiation" has been defined as "a state of asphyxia; suffocation." "Asphyxia" has been defined by the same authority as "apparent death, or suspended animation, in living organisms, due to deficiency of oxygen and excess of carbon dioxide, specif. in the blood, as in interruption of respiration from suffocation or drowning, or from the inhalation of irrespirable gases." Webster's New International Dictionary. The word "suffocation" is defined in Dorland's American Illustrated Medical Dictionary (16th ed.) as "the stoppage of respiration, or the asphyxia that results from it." The same authority defines "asphyxia" as follows: "Suffocation; also suspended animation from suffocation or a deficiency of oxygen in the blood. It is attended by a feeling of suffocation, cyanosis, and coma. * * * *Carbonica,* suffocation from the inhalation of coal gas, water gas, or carbon monoxide. * * * *Livida,* asphyxia in which the skin is livid from the presence of carbon dioxide in the blood, but the circulation continues."

In *Kingsley v. American Central Life Ins. Co.,* 259 Mich. 53, 242 N. W. 836, the court said: "There are, we think, few persons, except those who have received a medical education, or those who have given the matter due consideration, who would ascribe a death resulting from the inhalation of monoxide gas as due to poison."

Counsel for plaintiff contend that the policy is ambiguous and uncertain, and that as it was written by the insurance company it ought to be construed against it. This contention is best answered by the holding of the court in *Gorman v. Fidelity & Casualty Co.,* 55 Fed. (2d) 4, wherein the court said:

"The decisions of this court are in harmony with the elementary principle that doubt and ambiguity in an insurance policy should be resolved in favor of the insured and

against the insurer. It does not follow, however, that the terms of an insurance policy may be distorted from their natural meaning, or that the agreed liability of the insurer should be enlarged into one which only a new contract could have imposed, nor, indeed, that a court should indulge in scholastic subtleties to extend the rights of the insured. In the words of the late Judge Sanborn, referring to this rule of construction: 'But this rule ought not to be permitted to have the effect to make a plain agreement ambiguous, and then to interpret it in favor of the insured.' * * *

"Courts should not be 'cunning and astute to evade, rather than quick to perceive and diligent to apply, the meaning of the words,' as manifestly intended by the parties."

We have come to the conclusion, after a consideration of the definitions hereinbefore referred to, that a person suffers death as a result of suffocation by gas whether death was due to a deficiency of oxygen in the blood or to an interruption of the physical act of breathing that would prevent the inhalation of sufficient oxygen into the lungs. In the ordinary and popular sense, either results in death by suffocation by gas. It therefore falls within the exception contained in the insurance policy.

We therefore hold that the trial court did not err in withdrawing from the jury the question of liability over and above $600, and the judgment of the trial court in entering judgment for that amount is

AFFIRMED.

FRANK N. WELLS, APPELLEE, V. CARL C. CARLSEN: JOHN A. REICHENBACH ET AL., APPELLANTS.

FILED APRIL 17, 1936. No. 29567.

1. Trusts. "The violation by a trustee of a duty laid upon it by law, whether wilful and fraudulent, or done through negligence or arising through mere oversight or forgetfulness, is a breach of trust." *Masonic Bldg. Corporation v. Carlsen*, 128 Neb. 108, 258 N. W. 44.

2. ———. "All persons who knowingly participate or aid in committing a breach of trust are responsible for the wrong, and may be compelled to replace the fund which they have been instrumental in diverting. Whether or not the defendants knowingly participated or aided in committing a breach of trust is a question of fact for the jury to determine under proper instructions and the evidence." *Masonic Bldg. Corporation v. Carlsen*, 128 Neb. 108, 258 N. W. 44.
3. ———. "Where it appears that a trustee has practiced concealment, evasion or misrepresentation, thereby depriving the *cestui que trust* of material information relative to the subject-matter of the trust to his injury, the trustee, together with the persons participating in the wrong, may be required to respond in damages." *First Trust Co. v. Carlsen*, 129 Neb. 118, 261 N. W. 333.
4. Corporations: PARTIES. "The officers of a corporation are responsible for the fraudulent acts of the corporation in which they participate, and in a suit for fraud, if fraud is proved, the law will look through the corporation to the officers who acted in the matter, and the officers who acted in the premises are proper parties defendant." *First Trust Co. v. Carlsen*, 129 Neb. 118, 261 N. W. 333.
5. Trusts: BREACH: REMEDY. A beneficiary of a trust is not barred from suing at law for damages for a breach of the trust because he has first undertaken to follow his remedy against the trust *res* which has vanished.
6. ———. The assignments by the bondholders to plaintiff conferred upon plaintiff every right the assignors had, including their right to sue defendants as responsible in damages for the breach of trust.
7. Evidence examined and *held* (1) to furnish competent proof of the signatures of all assignors and (2) to be free from error as to the evidence of the insolvency of the mortgagor.
8. Instructions given by the court, and instructions of defendants requested and refused, examined. *Held*, that there was no prejudicial error as to the instructions.

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

Perry, Van Pelt & Marti and *Herbert W. Baird*, for appellants.

Beghtol, Foe & Rankin, contra.

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

GOSS, C. J.

Defendants appeal from a judgment on a verdict against them for $23,130.25 and costs, entered December 14, 1934.

Plaintiff brought the suit as assignee of 19 owners of bonds assigned to him for the purpose of collecting the bonds and of collecting damages from defendants.

The Lincoln Trust Company was organized as a trust company under the Nebraska statutes. Its affairs were controlled by a board of directors, an executive committee, a loan committee, and various officers, including a president, vice-president and trust officer. Defendants held these offices: Carl C. Carlsen was president, director and a member of the executive and loan committees; John A. Reichenbach was vice-president, director and a member of both committees; Paul H. Holm was a director and a member of both committees; and William R. Mellor was trust officer, a director and a member of both committees.

The Lincoln Safe Deposit Company was also a Nebraska corporation. It had among its powers the right to buy, own, manage or encumber real estate. The evidence shows it was used as a holding company for the Lincoln Trust Company and was managed and owned by the officers, directors and stockholders of that company. Both of these companies were adjudicated bankrupts on July 9, 1932.

At all dates concerned with this suit, A. D. Eigenbroadt was the owner of the fee title of lot 11, block 37, Lincoln, which is the real estate upon which the mortgages involved here were made. March 30, 1932, he leased it for 99 years to Central Tire and Repair Company by a written lease. The lessee was to pay $50 a month to start and these payments were graduated upwards until they reached $200 a month. The tenant agreed also to pay all rates and taxes. Failure to pay promptly called for a forfeiture. By assignment, Milburn C. Shurtleff became the lessee and was such when, on April 1, 1926, Shurtleff and wife made a mortgage, due in 10 years, on the real estate, not described as a leasehold but as if they owned the fee, in favor of Lincoln Safe Deposit Company for $20,000, securing 45 notes or bonds.

At the time this loan was made the Lincoln Trust Company was advised by opinions of the attorney who examined the abstract that the borrower had only a 99-year lease and that Eigenbroadt owned the fee title. Carlsen and Reichenbach signed the approval sheet approving the loan and on that sheet was a call for Shurtleff's assignment of the 99-year lease and a call for an assignment of a $20,000 life insurance policy. The assignment of the life insurance policy was taken as additional security, but it was not mentioned in the mortgage nor in the bonds. A commission of $600 was charged and retained for making this loan. The bonds were sold to the public—in many instances to the assignors of plaintiff.

There was evidence that, at the time Shurtleff acquired title to the leasehold, his sister-in-law, Tillie C. McDonald, had an undisclosed 15 per cent. interest in it, John Ledwith had an undisclosed 42½ per cent. interest and Shurtleff had a like interest. In 1926 they began the erection of a two-story, practically fireproof ramp garage on the lot. When the garage was completed it was leased to Mr. Pinney for what became and still is known as "Pinney's Garage." At first this tenant paid $5,500 a year on a five-year lease, but at the time of the trial he was paying $150 a month. Some time after 1926 Shurtleff dropped out and John Ledwith and Tillie C. McDonald each owned a half interest in the 99-year lease, though only McDonald evidently appeared of record as owner.

By May 1, 1929, the loan was defaulted as to principal in a considerable sum. It had been in default almost from the beginning. Taxes also were in default. The bondholders had never been notified by the trust company of these defaults. Instead, the Lincoln Safe Deposit Company paid from its own funds all interest coupons as they became due. As of May 1, 1929, defendants all signed an approval sheet, approving a "new loan" of $22,500 on this same real estate, but in reality on the 99-year lease, which was now standing in the name of Tillie C. McDonald, and she executed new bonds in that sum. Mr. Ledwith testified he made a written

guaranty of the loan. This guaranty was surrendered to him without notice to the bondholders. It was not disclosed to them that Mr. Ledwith ever had an interest in the leasehold. The attorneys examining the abstract for the trust company furnished a written opinion to the trust company that Eigenbroadt was the record owner of the fee and T. C. McDonald the record owner of the 99-year lease. The mortgage was recorded, the former mortgage was released, a commission of $400 was paid to the trust company, its advancements were repaid, and $3,754.91 was paid to Tillie C. McDonald. Some time later the holders of Shurtleff's bonds were advised that a new loan had been made and that their old ones could be exchanged for new, which in most instances was done.

The bonds secured by the new mortgage were in default almost from the first, and, up to the payments maturing November 6, 1932, interest and principal due the bondholders were paid by the trust company without any notice to the bondholders that the funds were not paid by the maker and with no notice that general and special taxes were not being paid by the owner of the leasehold, as required by the terms of the lease. The property had been sold for taxes for 1930 and 1931 and a tax sale certificate had been issued. In the meantime the companies had been adjudicated bankrupt and the First Trust Company of Lincoln had been appointed as successor trustee for all the trusts of the Lincoln Trust Company.

On April 22, 1933, the First Trust Company, after advising with the bondholders and informing them of the true situation and receiving their recommendations, commenced foreclosure of the mortgage on the 99-year leasehold interest. It went to decree and sale to plaintiff, but before confirmation it was learned that Mr. Eigenbroadt had given all necessary parties notice of the termination of the 99-year lease in accordance with its terms. Thereupon the First Trust Company called the bondholders together and informed them of the defaults necessary to be cleared up before the 99-year lease would be available to them, if they or

their trustee secured title to it. It was disclosed that the taxes totaled about $3,200. The trust company was instructed to have its bid canceled, which was done, and the motion to confirm the sale was withdrawn by order of court.

February 3, 1934, Mr. Eigenbroadt commenced his action in the district court for Lancaster county against all parties having an interest therein, to quiet his title and to cancel the 99-year lease. On March 16, 1934, a decree was entered, canceling the lease and quieting the title in Eigenbroadt.

The instant suit was commenced February 24, 1934, by the trustee to recover against defendants because of their alleged fraudulent and negligent conduct in allowing securities to be sold to bondholders of the company based upon a mortgage upon a leasehold estate, but purporting to be a mortgage upon the fee, contrary to their duty to the customers of the company.

The pleadings occupy more than 100 pages of the transcript. The facts we have stated were in evidence and respond to the allegations of the petition. The chief issue of law raised was as to whether defendants were legally responsible for any fraud operating on the bondholders by reason of the mortgage being upon a leasehold interest rather than upon the fee. On their part it was claimed that they merely approved the loan on the Pinney Garage property, that they did not know that the mortgage was actually made only upon the leasehold interest, that they were not responsible for clerical acts which followed their approval, nor for any fraud upon the bondholders or negligence in keeping them advised of the status of the title and of other things that affected the securities for which the trust company was a trustee.

There are 23 assignments of error. The first one argued is that it is reversible error to permit both negligence and fraud to be alleged in the same cause of action. We think defendants overlook the true analysis of the petition. Plaintiff alleges that defendants entered upon a scheme of dealing with the trusteeship so as to cause the trustee to commit breaches of trust for the benefit of the trustee and defend-

ants. It is further claimed that the breaches of trust were both fraudulent and negligent on the part of the trustee. For example: It was a fraud to breach the trust by failing to advise the bondholders that the trust company received a commission of $400 for making the second mortgage that took up the first one before it was due in order to pay the trustee its advancements it had concealed from the bondholders and to pay Tillie C. McDonald the excess money derived from an enlarged loan; it was a fraud for the trust company to sell bonds purporting to be first mortgage bonds which the trust company knew were not such. But it might be either fraud or negligence on the part of the trustee to fail to collect the Shurtleff mortgage or later to fail to require Tillie C. McDonald to pay the taxes and thus keep the only security behind the fraudulent notes in good standing.

The same claim about joinder of fraud and negligence was made in *Masonic Bldg. Corporation v. Carlsen,* 128 Neb. 108, 258 N. W. 44, and the court quoted from 3 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1079, as follows: "It is well settled that every violation by a trustee of a duty which equity lays upon him, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. The term therefore includes every omission or commission which violates in any manner either of the three great obligations already described—of carrying out the trust according to its terms, of care and diligence in protecting and investing the trust property, and of using perfect good faith."

In the case just cited the court further said, on page 132: "The defense offered by defendants to the foregoing may be summarized as follows: That an officer of a corporation is not liable for an error of judgment or for a failure to perform the duty which the corporation owes third persons. This principle of law is not disputed by plaintiff. In view of the instructions given by the trial court, in which it instructed as to the law relative to the liability of defendants, we believe that defendants were held not solely because of the Lincoln Trust Company's duty to plaintiff, but because

they were the parties who caused the trust company to make the breach. The record presents a case for the jury to decide as between the evidence of plaintiff and the claims of defendants."

In the syllabus it was said:

"The violation by a trustee of a duty laid upon it by law, whether wilful and fraudulent, or done through negligence or arising through mere oversight or forgetfulness, is a breach of trust. * * *

"All persons who knowingly participate or aid in committing a breach of trust are responsible for the wrong, and may be compelled to replace the fund which they have been instrumental in diverting. Whether or not the defendants knowingly participated or aided in committing a breach of trust is a question of fact for the jury to determine under proper instructions and the evidence."

See, also, *First Trust Co. v. Carlsen,* 129 Neb. 118, 261 N. W. 333; *Walker v. Howell,* 209 Ia. 823, 226 N. W. 85; *Prudential Trust Co. v. McCarter,* 271 Mass. 132, 171 N. E. 42.

We think it was the duty of the trial court, as was done, to submit to the jury for decision as to whether there were breaches of the trust, whether defendants participated and aided in the breaches, and whether plaintiff was damaged.

The second point argued as error is that nineteen causes of action were joined, each being based on the claim of a bondholder assigned to plaintiff, and that as to six of these causes of action the proof has failed as to any misrepresentation or failure to disclose any fact or as to reliance upon any representation. The evidence as to the breach of trust was not confined to any one cause of action. It applied to all. The scheme alleged and proved against defendants was not that they conspired to defraud any particular person, but that their plan was to defraud a class of persons, to wit, those who should become the owners of the fraudulent bonds fabricated under defendants' orders. For the evidence of defendants themselves shows that their bare approval of the loan was such that clerks would thereby be directed to draw up real estate mortgage bonds. The inference from the

evidence is that those bonds would be secured by a mortgage as if on the fee, when the slightest investigation by these defendant officers would show to them that the only title the borrowers had was a leasehold title. It is true that all the assignors of the bonds were not called as witnesses, but it is not necessary that a beneficiary himself be a witness to prove the breach of trust. It can be, as it was here, proved in other ways. When the McDonald mortgage and bonds supplanted the Shurtleff loan, letters were written by the trust company on September 27, 1929, to the bondholders, telling them the company was calling the Shurtleff bonds for payment October 1st, and was pleased to advise that they could supply the holders with an "equal amount of the new loan" on the same property, "occupied by Pinney's Garage and in our opinion is an exceedingly desirable loan," etc. The evidence shows that these bonds were in default almost from the start and that the taxes were not paid, but that these things were concealed from the bondholders. This applied to all the causes of action.

In *First Trust Co. v. Carlsen,* 129 Neb. 118, 261 N. W. 333, it was said:

"Where it appears that a trustee has practiced concealment, evasion or misrepresentation, thereby depriving the *cestui que trust* of material information relative to the subject-matter of the trust to his injury, the trustee, together with the persons participating in the wrong, may be required to respond in damages. * * *

" '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.' *Dickinson v. Lawson,* 125 Neb. 646. * * *

"The officers of a corporation are responsible for the fraudulent acts of the corporation in which they participate, and in a suit for fraud, if fraud is proved, the law

will look through the corporation to the officers who acted in the matter, and the officers who acted in the premises are proper parties defendant."

The trial court took the precaution to instruct the jury that, if they found plaintiff had sustained damages because of "fraudulent and deceitful breach of trust in not disclosing the true condition of the bonds," then the entire damages suffered by plaintiff could be recovered; but, if the jury did not find for plaintiff on account of such breach of trust but merely on the grounds of the representations as to the character of the bonds and their security, then they should proceed to find from the evidence which, if any, of the bondholders have been proved to have relied and acted upon the representations and to award plaintiff only such damages as were sustained on those particular bonds. It is clear from the evidence and the verdict that the jury found there was a breach of the trust, and that all bondholders were damaged, irrespective of whether specific fraudulent representations were made to all of them. We think this instruction and this discussion effectually answers the particular charge of error on this point.

It is claimed that the attempt of First Trust Company to foreclose on the mortgage of the 99-year lease bars this action. When the bondholders learned that the trust had been breached and their trustee had been adjudicated bankrupt, they directed the successor trustee to follow such trust *res* as was left. It was followed until it vanished when the owner of the fee asserted his rights. Having demonstrated that the security fraudulently given them was worthless, they followed their perfectly legal remedy of pursuing the officers of the trustee whom they alleged to be responsible for the fraudulent breach of trust. Perhaps both remedies might have been pursued at the same time if the parties saw fit. We do not have to decide that here. But it is fundamental that they still had the right to sue for damages at law when their quest for satisfaction or partial satisfaction of their debt ended in the destruction of the *res*. See *McWilliams v. Excelsior Coal Co.*, 208 Fed. 884, cited with

approval in *Masonic Bldg. Corporation v. Carlsen,* 128 Neb. 108, 135, 258 N. W. 44. See, also, *Oliver v. Piatt,* 3 How. (U. S.) *333; Perry, Trusts (2d ed.) p. 474; *Prondzinski v. Garbutt,* 10 N. Dak. 300, 86 N. W. 969. In *Federal Trust Co. v. Ireland,* 124 Neb. 369, 246 N. W. 707, it was said:

"Plaintiff argues that Baxter is entitled to pursue but one of two remedies, either to pursue the trust property, or an action in damages, but may not resort to both at the same time, and insists that, in seeking a judgment against plaintiff for the amount of the Johnson lien, he is seeking to pursue both remedies.

"The contention is unsound. Baxter has sought to recover the land from his recreant trustee in the condition that it was at the time the trustee acquired it, and, in asking for the cancelation of the mortgage, or, in lieu thereof, a judgment for an amount sufficient to cancel all of plaintiff's mortgages, he is seeking only to recover the trust property as it was at the time acquired by the trustee."

A beneficiary of a trust is not barred from suing at law for damages for a breach of the trust because he has first undertaken to follow his remedy against the trust *res* which has vanished.

Defendants' next assignment of error is that, having commenced a foreclosure action and prosecuted it to judgment, the bonds were merged in the decree, and the bondholders are estopped from prosecuting this action. They cite cases to the effect that, when a holder of promissory notes secured by a mortgage commenced foreclosure, he cannot also sue at law for a judgment on the notes. But there is no attempt here to recover on the notes as such. This suit is for fraud in connection with the notes, but not any claim on the notes themselves. Such a claim on the notes would be against Tillie C. McDonald, the maker of the notes. The evidence shows that she became insolvent years ago. The suit against defendants is not on the notes, but because of their conduct in aiding or causing the trustee to breach its trust to the bondholders, for which they are personally responsible. The suit was properly brought to enforce a right plaintiff had.

Defendants assert that the assignors did not have a cause of action against defendants or that the assignments to plaintiff did not confer a right to sue any one but the mortgagor. Each assignment from a bondholder described and assigned the bond to plaintiff for collection, together with "all claims, choses in action and rights which I have growing out of the issuance of said bond and because of said bond." It is perfectly clear from a reading of these assignments that the bondholders intended to vest Wells, the assignee, who is plaintiff here, with all their rights either to collect of the maker, or through the property mortgaged, or of any one responsible for any claim or right growing out of the issuance of the bonds or because of the bonds. The court submitted to the jury as a question of fact whether or not the assignments had been executed by the bondholders with the intention of assigning this cause of action to plaintiff.

Defendants claim that, as to six of the assignments, there was no competent proof of signature. The evidence contains competent proof of the signature of every one of the six assignors.

It is also claimed that error was committed in receiving evidence as to the solvency of Tillie C. McDonald at the time of the trial. She testified that she thought herself a rich woman at the time she executed the mortgage and bonds. Testimony was admitted and received, over objections of defendant, that she was insolvent at the time of the trial. If she had still been solvent, it would have been the duty of the bondholders to mitigate their losses by collecting from her. If she had paid, there would have been no loss to plaintiff which could have been collected from defendants. There is no merit to this claim of defendants.

The next and last claim of error presented in the brief is that 15 of the great number of instructions requested were refused by the trial court. The instructions are not set out in the brief and the argument is very brief on this point. We have examined the instructions given by the court and the instructions refused and the refusals com-

plained of, and find that there was no prejudicial error in refusing instructions. The giving of various instructions was assigned as error, but these were not argued in the brief. The instructions given by the court were very complete and covered every phase of the case. They evidently adopted the principles set forth in the following cases in this court, in all but two of which the acts of the same companies were under consideration: *Masonic Bldg. Corporation v. Carlsen,* 128 Neb. 108, 258 N. W. 44; *First Trust Co. v. Carlsen,* 129 Neb. 118, 261 N. W. 333; *Carlsen v. State,* 127 Neb. 11, 254 N. W. 744; *Paul v. Cameron,* 127 Neb. 510, 256 N. W. 11; and *Ashby v. Peters,* 128 Neb. 338, 258 N. W. 639.

Defendants seek to avoid liability on the ground that their duty ended when they approved mortgage loans upon the real estate and that they had no knowledge of any fraud or of any further facts after their approval. The court correctly instructed the jury that, if defendants knew of fraudulent representations or had such knowledge of facts in connection with such matters as would have led them to full knowledge of all the facts, had they acted in exercise of their duty as such directors or committee members, then they would become personally liable for the breach of trust. The jury found from a preponderance of the evidence, and the evidence was sufficient to support the verdict, that defendants were liable.

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

AFFIRMED.

FIRST TRUST COMPANY OF LINCOLN, TRUSTEE, APPELLEE, V. IDA C. BLORE ET AL., APPELLANTS.

FILED APRIL 17, 1936. No. 29625.

Record examined and judgment affirmed.

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

Herbert W. Baird, Fred C. Foster and *Edward C. Fisher,* for appellants.

H. J. Whitmore and *H. B. Muffly, contra.*

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

GOSS, C. J.

Defendants Ida C. Blore and Walter L. Blore, wife and husband, appealed from a decree of foreclosure because it did not (1) allow them a certain credit for $1,900.37, and (2) did not uphold their claim to a release of certain saline lands (which were included as collateral security to the bonds and mortgage upon city property) when the total mortgage should be reduced to $17,500.

December 27, 1930, the Blores executed and delivered to the Lincoln Safe Deposit Company 48 notes, totaling $24,000 or $500 each, due two at a time each six months beginning June 27, 1931, until June 27, 1935; the remainder of the bonds becoming due December 27, 1935. The bonds were secured by a mortgage on Lincoln property. They were also further secured by collateral described in the bonds as an assignment of a certain saline land sale certificate of 160 acres in Lancaster county. If any defaults occurred as to the bonds, the Lincoln Trust Company was authorized by both parties as trustee for the bondholders to declare the whole amount payable and to proceed to collect by foreclosure or otherwise.

July 9, 1932, both Lincoln Safe Deposit Company and Lincoln Trust Company were duly adjudged bankrupts, and later L. A. Ricketts was appointed trustee of their estates. July 21, 1932, plaintiff was appointed as successor-trustee to both companies in relation to the bonds and mortgage here involved, duly qualified, and is here acting as such.

On May 9, 1931, Sanitary District No. 1 of Lancaster county, without exercising its right of eminent domain, took an easement through a portion of the saline land farm for its drainage ditch. It dealt with the Lincoln Safe De-

posit Company and the Blores. The Blores gave a deed for an easement for a ditch through the land. The Lincoln Safe Deposit Company released the mortgage as to the land covered by the easement, for a consideration of $5,300, which was paid in the first instance by an order of the district, dated May 23, 1931, drawn by its chairman and secretary on the county treasurer in favor of the grantors. This order was indorsed by the Blores and by Lincoln Safe Deposit Company and Lincoln Trust Company, was deposited in the First National Bank, and was stamped paid on June 2, 1931. So the Lincoln Safe Deposit Company actually got the money.

Elinor Elder, who from 1922 was secretary to Mr. Carlsen, the president, and assistant secretary of Lincoln Safe Deposit Company and Lincoln Trust Company, and continued with the trustee in bankruptcy, testified as to the $5,300 item. She brought on the witness-stand, from the custody of the trustee, the ledger sheet of the Lincoln Safe Deposit Company. She testified that the Lincoln Safe Deposit Company, for the $5,300, issued to Walter L. Blore a "certain check," which was really an order on the First National Bank, dated November 3, 1931, for $2,000, and another "cashier's check" on the same day to the same bank, drawn to the order of "Ourselves (Blore)" for $3,300; that the $2,000 check was never credited to the ledger sheet, but that the $3,300 was credited by showing on the ledger sheet the payment of interest due December 27, 1931, $454.98, principal due December 27, 1931, $1,000, and paid on principal and interest, $1,845.02, a total of $3,300. So there was satisfactory evidence that the Blores got credit with the Lincoln Safe Deposit Company for $3,300 paid them out of the $5,300 paid by Sanitary District No. 1 of Lancaster county. As to the $2,000 balance, the check or order shows that it was indorsed by Walter L. Blore, the payee, was paid through the clearing house to the Continental National Bank, where Blore either deposited or cashed it November 4, 1931, and was paid November 4, 1931, by First National Bank, on which it was drawn. The witness testi-

fied the $2,000 was never thereafter credited on the ledger sheet. The inference is that Blore used it. This satisfactorily accounts for the $5,300 received from the Sanitary District for the right of way.

Walter L. Blore was a witness. He testified that Mr. Carlsen told him he would not be allowed to take all of the money received from the Sanitary District, but that the bondholders would get a part of it and he the rest. The witness could not remember just how it would be divided. This corroborated Miss Elder and the ledger sheet. He got the $2,000 and it was never used to pay the bondholders and so cannot be charged to the amount due them on this foreclosure.

In their answer defendants Blore alleged that $1,900.37 of the proceeds of the Sanitary District money still remained in the hands of the Lincoln Trust Company, but we have traced that particular money and have shown that $3,300 of it was paid to the bondholders and $2,000 was taken by Blore. It is true one can find from the ledger sheet that Blore's credits exceed his debits by $1,900.37, but no evidence charges the bondholders of the present plaintiff with that amount as applicable to the payment of the mortgage under foreclosure. That balance, if it be a true balance arising out of transactions between the Blores and the Lincoln Safe Deposit Company, may have arisen out of something other than the mortgage. Until it is clearly shown, it cannot be credited here. The trial court did not err on this point.

Defendants Blore claim a right to a surrender of the saline land contract when the mortgage shall have been reduced to $17,500, and that the court erred in not putting such a provision in the decree. In each of the bonds issued, the saline land was expressly made security. There was no limitation in the language. It must be considered security until every bond is paid, unless this security should be released by authority competent to do it. There was found in the files an unsigned paper which, if signed by the president, would have purported to be an agreement of the Lincoln

Safe Deposit Company to execute a release of the assignment of the saline land certificate when the mortgage was reduced to $17,500. The evidence is incompetent to prove that any such agreement was ever made and that it is binding on plaintiff or on the bondholders whose mortgage is being foreclosed.

The judgment of the district court is

AFFIRMED.

ALBERT J. BLOCHOWITZ, SPECIAL ADMINISTRATOR, APPELLANT, V. FRANK J. BLOCHOWITZ ET AL., APPELLEES.

FILED APRIL 17, 1936. No. 29402.

1. **Executors and Administrators.** Under the facts in the present case, involving the rights of heirs in property derived from the ancestral estate, where all parties in interest are related to the deceased in equal degree, all indebtedness of the estate having been heretofore discharged, and all claims against the same finally barred by proper judicial order, the heirs represented by the administrator with the will annexed are sole beneficiaries of the litigation and real parties in interest. The right of the administrator to recover in equity is necessarily limited to and by the individual rights of such heirs so formally represented by him.
2. ———. In this case, to the extent that contracts, conveyances, deeds, and judgments, and the conclusive implications and estoppels arising therefrom are binding upon the real parties in interest as individuals, they are in this proceeding equally binding upon such administrator.
3. **Judgment:** RES JUDICATA. "Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not." 34 C. J. 742.
4. ———: ———. Record in *Blochowitz v. Blochowitz*, 122 Neb. 385, 240 N. W. 586, examined, and the determination therein *held* conclusive as to certain issues involved in the instant case.
5. **Wills:** CONSTRUCTION. The four warranty deeds executed by

Joseph Blochowitz and wife on April 4, 1929, together with the last will on that day executed by Joseph Blochowitz, construed together, in the light of surrounding circumstances, as required by section 76-109, Comp. St. 1929, and *held* that the words, "All of my four sons, Frank J., John, Albert, and George, are entitled to no further part of inheritance as all each and every one of them have received all that they are entitled to," clearly expressed the intent of Joseph Blochowitz, deceased, in the execution of said deeds as well as said will, which it is the duty of the court to carry into effect, and are thus operative to preclude each of the four sons, after acceptance of such deeds, from further participation as heirs of their father's estate.

6. **Evidence** in the record also examined, without reference to the effect of the previous decision, and *held* ample to support the judgment of the district court.

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

John J. Ledwith, Hall, Cline & Williams and *Perry, Van Pelt & Marti,* for appellant.

Ginsburg & Ginsburg, contra.

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

EBERLY, J.

This is a suit in equity prosecuted by Albert J. Blochowitz as administrator with the will annexed of the estate of Joseph Blochowitz, deceased, to recover from Frank J. Blochowitz, John A. Blochowitz, and George Blochowitz, personal property consisting of securities and mortgages belonging to the estate of Joseph Blochowitz, deceased, and for an accounting of the amounts alleged to be due from these defendants to the estate of plaintiff's decedent. The defendants answered challenging the plaintiff's right of recovery. After the introduction of evidence and hearing on the merits and also on special defenses pleaded, the district court found "generally in favor of the defendants and against the plaintiff" and dismissed the action. The plaintic appeals.

The property involved, at one time owned by Joseph

Blochowitz, has been the subject-matter of three separate actions in this tribunal. Joseph Blochowitz, then a resident of Lancaster county, Nebraska, died on February 20, 1930, leaving as his survivors, four sons, Frank J. Blochowitz, John A. Blochowitz, George Blochowitz, and Albert J. Blochowitz; two daughters, Lena M. Yankton (nee Blochowitz) and Anna Geistlinger (nee Blochowitz), and also his wife and widow, Rosalia Blochowitz.

It appears that the elder Blochowitz and wife had migrated to the United States in 1880, and purchased the quarter section of land in Lancaster county in 1884, and on which the family thereafter resided. His daughter Lena was married when 18 years of age, and the daughter Anna was married when 15 years of age. These daughters, after their respective marriages, left their parental home with their husbands, and thereafter lived apart from their parents. Under the leadership and direction of the father, the real estate holdings were increased to a total of 640 acres of land in Lancaster county, and certain real estate situated in South Dakota, and in addition certain real estate mortgages and bonds had been purchased from the proceeds of the common toil. About the year 1920, the plaintiff in the instant case left the parental home and control, conducted his business affairs on an individualistic and wholly independent basis, and thereafter ceased to contribute to the family fortune. The defendant sons, Frank J., John A., and George, remained at home, and, under the father's direction, continued to labor in large degree each for the benefit of all. The proceeds of this labor thus performed was invested, by the directions of the father, in real estate and high grade securities. The title to the real estate thus acquired by the joint endeavors was first taken in the name of the father. Commencing prior to 1917, it was the custom of the father to have the bonds, real estate loans, etc., purchased, or as renewed, to be transferred to or renewed in the names of certain of these sons. By 1929 practically all of the personal property thus acquired was held by and in the name of the several sons as their individual property.

On April 4, 1929, Joseph Blochowitz and his wife executed four warranty deeds which were deposited in escrow. These deeds, by their terms, conveyed to each of the sons, Frank J., John A., George, and Albert J., certain of the lands in Lancaster county, in each deed described, subject to certain payments to be made to the grantors and the survivor of them. Also, on April 4, 1929, Joseph Blochowitz formally executed his last will and testament. This instrument contained no formal or express residuary clause. It provided for the payment of the testator's funeral expenses and debts, and a legacy of $500 to each of his two daughters. This will also contained the following: "All of my four sons, Frank J., John, Albert, and George, are entitled to no further part of inheritance as all each and every one of them have received all that they are entitled to." By the judgment of the county court of Lancaster county, made and entered on February 27, 1931, in a proceeding to which all parties to the present litigation were parties, this will was duly admitted to probate, which final order remains in full force and effect.

On March 12, 1930, Albert J. Blochowitz, Lena M. Yankton, and Anna Geistlinger, as plaintiffs, commenced an action in the district court for Lancaster county, against Frank J. Blochowitz, et ux., John A. Blochowitz, George Blochowitz, and Rosalia Blochowitz, the object and prayer of which was that each of the deeds hereinbefore referred to be declared null and void, and be set aside, etc.

The fourth paragraph of this petition is in the following words:

"That said deeds were executed on April 4, 1929, and plaintiffs allege that at the time said deeds were purported to have been made Joseph Blochowitz was 85 years of age and because of his extreme age and the condition of his health he was mentally incompetent to execute such conveyances and that said conveyances were procured by fraud and undue influence, practiced by the defendants John A. Blochowitz, Frank J. Blochowitz and George Blochowitz upon the said Joseph Blochowitz; that for many years prior

to April 4, 1929, and thereafter until his death the defendants John A. Blochowitz and George Blochowitz lived with the said Joseph Blochowitz and said defendants, together with Frank J. Blochowitz, transacted his business and advised with him regarding his business and stood in a confidential relation to him, and that said three defendants, with the intention of cheating and defrauding said Joseph Blochowitz and these plaintiffs of their shares of their father's property, fraudulently and unduly induced the said Joseph Blochowitz to execute said deeds and by fraudulent acts attempted delivery of said deeds; that on account of the facts alleged, Joseph Blochowitz at the time said deeds were executed did not understand the nature and extent of said transactions and said deeds were never delivered in his lifetime."

On this petition, issue was joined by the defendants, and from an adverse judgment in the district court, they appealed to the supreme court, where, on a hearing *de novo,* a judgment was entered, in effect finding against the plaintiffs as to each allegation quoted, and sustaining the validity of said deeds, reversing the judgment of the district court, with directions to that court "to enter judgment in favor of defendants and against plaintiffs in conformity with this opinion." It further appears that these directions were complied with by the district court for Lancaster county. For the terms of this opinion, and the decision announced thereby, reference is made to *Blochowitz v. Blochowitz,* 122 Neb. 385, 240 N. W. 586.

As hereinbefore stated, the present suit is one in equity brought by plaintiff, Albert J. Blochowitz, as administrator with the will annexed of the estate of Joseph Blochowitz, deceased. Frank J., John A., and George Blochowitz are the defendants. The petition alleges that Albert J. Blochowitz, Lena M. Yankton, Anna Geistlinger, and the defendants, are the only children of Joseph Blochowitz surviving him, and, with his widow Rosalia Blochowitz, are his sole heirs at law and next of kin, and the only persons interested in his estate. It further alleges that at the time of the death

of Joseph Blochowitz on February 20, 1930, he was 85 years of age, and that for more than 10 years prior to his death, because of his advanced years, ill health and infirmities, he was mentally incompetent to transact business during that period of time. The petition then sets out at length the creation and existence of confidential relations between the father and the three defendants, and that in furtherance of a conspiracy to defraud "the other children" by fraud, undue influence, and in violation of the trust reposed in them, these defendants, it is alleged, secured and now retain possession of all the personal property of the said Joseph Blochowitz, except an interest in a small amount of wheat due to Joseph Blochowitz. The amount and value of this property thus obtained, and now possessed, by the defendants is alleged to exceed the sum of $300,000. Plaintiff further alleges that in addition to the property last referred to the defendants also had in their possession and control, in trust for Joseph Blochowitz, "certain other personal property or the proceeds of the same;" that said other items of personal property of said deceased came into the possession of the defendants in a fiduciary capacity, as such confidential agents and trustees, and the same was by said defendants fraudulently sold and conveyed and transferred into other forms of personal property, or into cash, and was then reinvested in other property and now stands in their names or in some of their names, and that possession of the same has been demanded of and refused by the defendants. Certain personal property is then referred to and partially described as being the property covered by these charges. The prayer of this petition is, in substance, that a decree be entered adjudging that the plaintiff, as administrator of the estate of Joseph Blochowitz with the will annexed, is the owner of and entitled to immediate possession of all the personal property of the said deceased referred to and described, and to each and every part thereof, and ordering that the defendants deliver all of said property and each and every part thereof to the plaintiff, and for other relief.

These allegations were separately traversed by each of the defendants, and, in addition, certain affirmative defenses were by them alleged. To these answers the plaintiff joined issue by replies filed.

In the first action herein referred to, involving real estate alleged to be the actual property of the decedent's estate, Albert J. Blochowitz and his sisters, Lena M. Yankton (nee Blochowitz) and Anna Geistlinger (nee Blochowitz) were the sole plaintiffs, and Frank J., and wife, John A., George Blochowitz, and Rosalia Blochowitz were the sole defendants. In the present proceeding, which concerns personal property only, likewise alleged to be the actual property of decedent's estate, Albert J. Blochowitz, as administrator with the will annexed, is plaintiff, and the other brothers are defendants. The petition alleges that the acts of the defendants therein complained of were done and performed by the defendants with the intention to cheat and defraud Albert J. Blochowitz, Lena M. Yankton and Anna Geistlinger of any share in their father's estate. No similar charge is made in the petition with reference to the mother, Rosalia Blochowitz. The petition alleges that the six named are the only children of Joseph Blochowitz surviving him, and that they, with his wife, are his sole heirs at law and next of kin, and the only persons interested in said estate. The petition fails to allege the existence of unpaid debts, legacies, allowances or bequests. The answers each separately allege, and the proof establishes, that there are no unpaid claims against this estate, that the time for filing claims against said estate has expired, and that the county court of Lancaster county had duly made and entered an order in the matter of the estate of Joseph Blochowitz, deceased, then and there pending, barring all claims against that estate. These facts so alleged, and the evidence in the record, disclose that the real parties in interest to the present litigation are Albert J. Blochowitz, Lena M. Yankton and Anna Geistlinger, now represented by the administrator, on the one side, and Frank J., John A., and George Blochowitz, on the other.

In this litigation, Rosalia Blochowitz, the mother, though not a party to the suit, in effect sustains the contentions of the defendants as to the issues presented for trial. The demands of the administrator are thus, in truth and in fact, wholly based on the claim that Albert J. Blochowitz, Lena M. Yankton and Anna Geistlinger, as heirs of their deceased father, are each entitled to an aliquot portion in and to the property in suit, and as to which, if this theory is correct, the defendants and the mother must be deemed to possess rights of inheritance in dignity and importance equal to those of claimant. From this situation certain conclusions follow.

The general rule appears to be: "Where there is an administrator, and the heirs or parties beneficially entitled thereto are in possession of personal property, the administrator will not be allowed to recover if it appears that the debts are all paid." 2 Woerner, American Law of Administration (3d ed.) 662. The following cases support the rule just quoted: *Abbott v. People*, 10 Brad. (Ill. App.) 62; *Lewis v. Lyons*, 13 Ill. 117; *Richardson v. Cole*, 160 Mo. 372, 61 S. W. 182; *Woodhouse v. Phelps*, 51 Conn. 521; *Robinson v. Simmons*, 146 Mass. 167, 15 N. E. 558; *Diem v. Drogmiller*, 158 Mich. 380, 122 N. W. 637. See, also, *Pritchard v. Norwood*, 155 Mass. 539, 30 N. E. 80; *Langley v. Farmington*, 66 N. H. 431, 27 Atl. 224; *Moore v. Brandenburg*, 248 Ill. 232, 93 N. E. 733.

In *Succession of McBurney*, 162 La. 758, 111 So. 86, where there was no indebtedness of the succession, the rule was announced that executors of a solvent succession are without interest or authority to champion rights of heirs. The reason for the rule was thus stated: "It is not for him (executor or administrator), it is true, to assail the validity of acts done by the decedent, unless necessary for the protection of creditors; and if he have already settled all the debts and charges of the succession, it is improper for him to institute new actions, because the objects of his agency have been fulfiled and he should give way to the heirs who are the only persons interested and may assert their own

rights." See, also, *Hofmann v. Tucker,* 58 Neb. 457, 78 N. W. 941; *Goodman-Buckley Trust Co. v. Poulos,* 124 Neb. 697, 248 N. W. 64.

Our statute pertaining to probate and administration of estates, originally, was largely a reenactment of the statutes of Wisconsin. In *Eisentraut v. Cornelius,* 134 Wis. 532, 115 N. W. 142, the plaintiff sued as administratrix of the estate of Carl Nitzsche for an accounting and to recover from the defendants money, notes, and property which it is alleged they wrongfully obtained from Carl Nitzsche by the exercise of undue influence. Theresa Cornelius was one of six surviving daughters of the deceased, who, together with two grandchildren of a deceased son of Nitzsche, constituted the only heirs. The trial court awarded judgment for the entire amount of the properties received by the defendants. This judgment was reversed on appeal. On the point here under consideration the supreme court of Wisconsin said: "The (trial) court may upon a final accounting require defendants to account to the administratrix for any part of the estate found to be in their possession, and direct them to pay to the administratrix the amount thereof required for administration of the estate and the payment of the amounts found due the other distributees. It would be a useless and an idle ceremony to require defendants to turn over to the administratrix any property or money which may be found due them upon distribution of the estate."

Section 30-406, Comp. St. 1929, vests the executor or administrator with "a right to the possession of all the real as well as the personal estate of the deceased * * * until the estate shall have been settled, or until delivered over * * * to the heirs or devisees."

We have sustained the right of the executor and administrator, under this statutory provision, as a general rule, to maintain ejectment for real estate, pending payment of debts and settlement of the estate. *Carson v. Dundas,* 39 Neb. 503, 58 N. W. 141; *Tillson v. Holloway,* 90 Neb. 481, 134 N. W. 232; *Dobney v. Chicago & N. W. R. Co.,* 120 Neb. 824, 235 N. W. 585.

But we also determined that the administrator is not entitled, as against an equitable owner, to possession of property, real or personal, of the estate except upon showing priority of creditors' claims. *Koslowski v. Newman,* 74 Neb. 704, 105 N. W. 295; *Tyrrell v. Judson,* 112 Neb. 393, 199 N. W. 714.

Sections 30-1301 to 30-1308, Comp. St. 1929, provide for the distribution of the estate of a decedent. These provisions in effect require that at any time after the debts, allowances and necessary expenses have been paid or provided for (including the giving of a proper bond), upon proper application the county court shall by a decree for that purpose assign the residue of the estate to such other persons as are by law entitled to the same. While these statutory provisions necessarily operate to modify the general rule heretofore quoted, it is not wholly abrogated. Thus, our probate enactments do not contemplate that under all circumstances or conditions executors and administrators are vested with a continuing and exclusive right of possession and control of the real and personal estate of their decedents.

We have held that heirs may, even during the pendency of administration, and prior to final settlement, maintain an action in ejectment for real estate of their ancestor against any one except the administrator. *Lewon v. Heath,* 53 Neb. 707, 74 N. W. 274; *Clark v. Fleischmann,* 81 Neb. 445, 116 N. W. 290; *Tunnicliff v. Fox,* 68 Neb. 811, 94 N. W. 1032; *McManus v. Burrows,* 89 Neb. 250, 131 N. W. 211; *Jetter v. Lyon,* 70 Neb. 429, 97 N. W. 596; *Gillespie v. Truka,* 104 Neb. 115, 175 N. W. 883; *Jackson v. O'Rorke,* 71 Neb. 418, 98 N. W. 1068.

We have also announced the principle that a devisee of real estate "may maintain an action for the partition thereof against the executor and the other devisees, at any time after the expiration of the time for filing claims against the estate, although the estate has not been settled and there has been no decree of distribution, provided the personal assets, in the hands of the executor, are sufficient to dis-

charge the debts of the estate and the charges enumerated in section 289, chapter 23, Compiled Statutes (Comp. St. 1929, sec. 30-1302)." *Schick v. Whitcomb,* 68 Neb. 784, 94 N. W. 1023. See, also, *Hughes v. Langdon,* 111 Neb. 515, 199 N. W. 832.

So, as to personal property of a decedent, in *Cox v. Yeazel,* 49 Neb. 343, 68 N. W. 483, we announced the rule, as: "Generally, an action to recover a debt payable to a deceased intestate must be brought by the administrator of the estate." That pronouncement was qualified by the further declaration: "Such an action cannot be maintained by the heirs at law, unless there be no demands against their decedent ancestor and there has been no administration, or the administration has been closed."

In *Tecumseh Nat. Bank v. McGee,* 61 Neb. 709, 85 N. W. 949, where an improvident settlement of pending litigation had been made by an administrator, this court announced the rule that the trial court may properly, under the circumstances, permit the complaining heir at law to be substituted to prosecute the action in her own name.

In *Prusa v. Everett,* 78 Neb. 251, 113 N. W. 571, an action in equity was prosecuted by the only heirs at law and beneficiaries under the will of Anton Prusa, deceased, to obtain a decree against the defendants for an accounting, and a judgment for the amount found due was sustained by this tribunal notwithstanding the administrator *de bonis non* refused and neglected to bring the action. The reasons for this action, as stated in the opinion formally approved by this court, are: "From the petition herein it appears that there are no outstanding claims against the estate; that the interests of all concerned have been settled; that the beneficiaries under the will are the only persons interested; that but for the claim alleged to be due from the defendants nothing remains but the statutory and formal proceedings to settle the estate. Personally the administrator *de bonis non* has no interest in this claim. Were he to sue, it would be solely for the benefit of the plaintiffs herein. Under these circumstances, we think * * * that a court of equity should

entertain the action." See, also, *Hughes v. Langdon*, 111 Neb. 508, 196 N. W. 915.

As applied to the instant controversy, the controlling underlying principles, developed by application of the foregoing precedents thereto, invoke and prefigure as controlling therein these maxims: "Equity regards substance rather than form;" "Equity delights to do justice and not by halves;" and, "He who seeks equity must do equity."

It may be conceded that the equities expressed by these maxims must arise from and belong to the transactions in which relief is sought. Here, the real and sole parties in interest are the wife and six surviving children of Joseph Blochowitz, deceased. There is no unpaid ancestral indebtedness. No claims against the deceased's estate have been filed in the probate court of competent jurisdiction, and by a proper, final order of that court, duly made and entered, all possible existing claims against the same have been regularly barred. As was recognized in *Prusa v. Everett, supra*, so there exists in the instant case the fact that officially and personally the administrator with the will annexed has, as such administrator, no interest in the cause of action. In fact, he sues solely for the benefit of himself and two sisters as individuals. His right as administrator to recover in equity, if the maxims above quoted be given due force and effect, is necessarily limited to and by the rights of the real parties in interest which are so formally represented by him. Under such circumstances, it follows that to the extent that contracts, conveyances, deeds and judgments, and the conclusive implications and estoppels arising therefrom are binding upon the real parties in interest as individuals, they are in this proceeding equally binding upon such administrator.

As a defense to the plaintiff's demand, the defendants have each separately and severally pleaded as *res judicata* the determinations made and the final judgment heretofore entered in the case of Albert J. Blochowitz, Lena M. Yankton and Anna Geistlinger v. Frank J. Blochowitz, et ux., John A. Blochowitz, George Blochowitz and Rosalia Blocho-

witz (122 Neb. 385, 240 N. W. 586), a proceeding to which we have already had occasion to refer.

"The doctrine of *res judicata* * * * embodies two main rules, which may be stated as follows: (1) The judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal. (2) Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not." 34 C. J. 742.

It is with the application of the second rule that we are concerned in the present case. The doctrine in question, including the distinction above outlined, has been accorded due recognition in this jurisdiction. See *Slater v. Skirving,* 51 Neb. 108, 70 N. W. 493; *Triska v. Miller,* 86 Neb. 503, 125 N. W. 1070; *Federal Trust Co. v. Baxter,* 128 Neb. 1, 257 N. W. 368; *State v. Newman Grove State Bank,* 128 Neb. 422, 259 N. W. 170.

In *Hanson v. Hanson,* 64 Neb. 506, 90 N. W. 208, we announced the rule: "A former judgment is conclusive when the parties and the question involved in the two suits are the same, although the property claimed in them may be different."

Recurring to the analysis and comparison of the issues presented and determined in the adjudication pleaded by the defendants as *res judicata,* it is to be noted that they included these questions: That because of old age and condition of his health Joseph Blochowitz was mentally incompetent to execute the conveyances in suit; that for many years prior to April 4, 1929, John A. Blochowitz and George Blochowitz lived with the said Joseph Blochowitz, and, together with their brother Frank J. Blochowitz, transacted

the father's business and advised him concerning the same; that they stood in confidential relations to their father, and, taking advantage thereof, fraudulently induced said Joseph Blochowitz to execute said deeds, etc.

In the present case the foregoing allegations as to the mental capacity of Joseph Blochowitz, the relation of trust and confidence sustained by the three sons to the father, their fraudulent intent and conspiracy to cheat and defraud Albert J. Blochowitz and his two sisters of their share in their father's inheritance are set forth substantially as alleged in the first case, but somewhat enlarged and amplified. As to the ultimate facts established by the evidence relied upon by the parties in each case, so far as they apply to the question of mental capacity of Joseph Blochowitz, and the alleged fraudulent acts of the three defendants, and the relations sustained by each of them to their father, they are substantially identical. In other words, the testimony presented by the plaintiffs in both cases is addressed to the same acts of alleged fraud, and the exercise of identical undue influence during the period of time between 1917 and 1930, which is claimed to have resulted in depriving them of their inheritable share of the father's real estate, and likewise their distributable share of the father's personal property. These questions of evidence were all resolved against the plaintiffs in the first case.

In the first action, brought to annul the deeds and recover the land conveyed, the evidence wholly failed to establish the mental incapacity of the father, or establish fraudulent acts or influence on the part of the defendant sons, and undue influence upon the mind of the father was negatived. As to the existence of confidential relations, it was expressly held in the first case, as follows (122 Neb. at page 406): "It is quite obvious that, notwithstanding the advancing years and the delegation of certain matters to others, Joseph Blochowitz was, and ever continued, the master mind and the occupier of the relatively dominant position, and at no time, in comparison with his sons, could he be deemed the weaker party. The situation fully justifies the application of the

rule that, 'Even where the donor and donee stand in confidential relations, the presumption of undue influence arises only when the weaker party is the donor, being always against the party having the superior dominant position or control, though who was the dominant spirit is always a question of fact.' 8 R. C. L. 1033, sec. 89."

Thus, it is to be observed that substantially the same questions were presented by almost identical evidence in both cases, which were necessarily determined in the first decision. The decision thus made is here controlling. All questions of mental capacity of the father, and alleged fraudulent acts on the part of the defendant sons, in view of the doctrine announced in *State v. Newman Grove State Bank, supra,* are foreclosed by the determinations necessarily made in *Blochowitz v. Bochowitz,* 122 Neb. 385, 240 N. W. 586.

It may be said in passing that, irrespective of the force and effect of the previous decision, a careful consideration of all the evidence adduced in the present action compels the decision here announced.

But, still another reason is presented by the record. The evidence unmistakably discloses that on April 4, 1929, Joseph Blochowitz and his wife, both then endowed with requisite mental capacity, with the evident purpose to complete a matured plan for the distribution of their world possessions, which for many years they had consistently followed, went to the city of Lincoln and sought the assistance of a friend in whom they had confidence. Alone with this friend, evidently pursuant to his advice, they formally expressed their intent and plan in five written instruments, duly executed by them, which together set forth and carried into effect their present purpose. The result was strictly in harmony with the course they had previousy followed, and proceeded on the basis of the confirmation of what they had previously done, and to render certain the complete fruition of the plans originally adopted by them. Accordingly, and substantially contemporaneously, four warranty deeds conveying parcels of their Lancaster county lands to

each of their four sons were executed and acknowledged by the father and mother, and likewise a last will was duly executed by the father. Together these five instruments then expressed the intent and purpose of Joseph Blochowitz and wife. These four deeds and the will, after due execution, were placed in one and the same envelope, and were then delivered to a competent party with the positive direction, "Here are these papers. Take care of them for the boys and girls." These four warranty deeds were adjudged to be valid in all respects in *Blochowitz v. Blochowitz,* 122 Neb. 385, 240 N. W. 586. The will has been duly admitted to probate in a court of competent jurisdiction, and the testamentary capacity of the testator thus finally determined. The terms of these instruments are now finalities so far as the parties to this litigation are concerned. The true intent and the effect accomplished thereby is to be determined by the proper construction of these five instruments as five inseparable parts of a single whole. Comp. St. 1929, sec. 20-1215.

In the absence of statute, "in certain instances, a nontestamentary instrument of the testator, such as a contemporary document, and his will may be construed together to ascertain his intention." 69 C. J. 124.

In the present case, the contemporary deeds delivered in escrow, created a situation to which the will expressly attached conditions and consequences, and by necessary implication referred thereto, and therefore the case is within the province of the further rule: "A will may be construed in connection with writings annexed or referred to therein." 69 C. J. 124. For cases supporting this rule, see *Bacon v. Nichols,* 47 Colo. 31, 105 Pac. 1082; *Snyder v. Greendale Land Co.,* 48 Ind. App. 178, 91 N. E. 819; *Traughber v. King,* 235 Ky. 658, 32 S. W. (2d) 8; *Hall v. Hall,* 153 Ky. 379, 155 S. W. 755; *Jennings v. Reeson,* 200 Mich. 559, 166 N. W. 931; *Ray v. Walker,* 293 Mo. 447, 240 S. W. 187; *White v. Reading,* 293 Mo. 347, 239 S. W. 90; *Lawrence v. Burnett,* 109 S. Car. 416, 96 S. E. 144.

However, in this state, the statute requires: "In the con-

struction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is consistent with the rules of law." Comp. St. 1929, sec. 76-109. This statute is applicable alike to wills, deeds, and contracts to convey. *Heiser v. Brehm,* 117 Neb. 472, 221 N. W. 97; *Reuter v. Reuter,* 116 Neb. 428, 218 N. W. 86.

Therefore, we are required to ascertain and enforce the expressed intention of Joseph Blochowitz, as gathered from the five instruments referred to, construed as an entirety, giving to each word and sentence such significance as will carry into effect the true intent of the makers thereof as expressed therein. So construed, it is obvious that the words, "All of my four sons, Frank J., John, Albert, and George, are entitled to no further part of inheritance as all each and every one of them have received all that they are entitled to," whether considered in the nature of a contemporaneous charge of an equitable advancement by ancestor to heirs, or as a condition inhering in the deeds of gift, or as substantially a part of the consideration of such deeds, clearly express the intent of the makers which it is the duty of this court to carry into effect, and are thus operative to preclude each of the four sons from further participation as heirs of their father's estate.

It follows that no recovery can be sustained in the present case on any cause of action of which Albert J. Blochowitz is the ultimate beneficiary.

There remains only the question of whether the gifts of personal property made by the father, especially those occurring after April 4, 1929, and prior to his death on February 20, 1930, with mental capacity established, and the existence of fraud and undue influence negatived under the circumstances disclosed by the record, constituted valid transfers of property to the donor's sons. All of the negotiable securities involved, except such as may have been

payable to order, were either indorsed by the father, and delivered, or were made out in the names of the sons as payees, and such instruments delivered or placed in their possession and control by the father, or at his direction. This was ample to vest the title. In so far as the claim of rights and benefits claimed to have been retained by the donor are concerned, it may be said, in view of all the evidence, and particularly in view of the practical construction of this claimed power for a period of more than 13 years by the parties concerned, that the validity of the transfers is in no manner affected thereby. *In re Estate of Sides,* 119 Neb. 314, 228 N. W. 619; *In re Estate of Dayton,* 121 Neb. 402, 237 N. W. 303; *Kennedy v. Nelson,* 125 Neb. 185, 249 N. W. 546.

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

AFFIRMED.

EDWARD E. CARLSON, APPELLANT, V. CLARENCE L. PETERSON ET AL., APPELLEES.

FILED APRIL 17, 1936. No. 29651.

1. **Partnership.** The existence of a partnership is a question of fact under the evidence.
2. ———. More convincing evidence is required to prove existence of partnership where alleged partners are the only litigants than where the controversy is between a third party and the partners.
3. ———. The existence of a partnership depends upon the agreement of the parties, and their intention is to be ascertained from all the evidence and circumstances.

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

William Ritchie, Hawthorne Arey and *M. J. Flannigan,* for appellant.

Johnsen, Gross & Crawford and *John A. Rine, contra.*

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

DAY, J.

This is a suit in equity for an accounting. The trial court entered a judgment in favor of plaintiff for $1,500 and canceled two of plaintiff's notes held by defendant in the aggregate $1,322.50, $1,022.50 of which represented part of purchase price of membership in the Omaha Live Stock Exchange. The court also decreed that, upon payment of above sum and cancelation of notes, the partnership was terminated and plaintiff deprived of all further interest in the O. K. Commission Company and its assets. The plaintiff appeals from this decree.

The plaintiff alleges in his petition, as a first cause of action, an oral agreement of partnership between the plaintiff and the defendant for the conduct of a live stock commission business to start January 15, 1934; that the partnership continued in business until March 20, 1935; that plaintiff advanced, pursuant to the oral agreement, $3,000 capital for the use of said business and was to receive $200 a month as a salary and was to share the profits equally; that defendant Peterson managed the partnership, handled the funds, kept the books, and has failed and refused to account to the plaintiff for capital advanced or for the profits of the partnership; that $3,500 of partnership funds are secreted in a safety deposit box of Clarence L. Peterson, Jr., son of defendant.

For a second cause of action, plaintiff alleges that he purchased a membership in the Omaha Live Stock Exchange, paying $500 cash and giving his note for the balance, $1,650, which was to be paid at the rate of $50 a month from plaintiff's salary, and that said note was paid by defendant with funds of the firm.

The defendant, Clarence L. Peterson, denied all the allegations in the plaintiff's petition, and alleged that the membership in the Omaha Live Stock Exchange is his sole and exclusive property. Clarence L. Peterson, Jr., denied all the

allegations relative to him, and alleged that the $3,500 in his safety box was his sole and separate property and not that of plaintiff or the O. K. Commission Company. This last named defendant disclaimed all interest in the membership.

At the outset, it is necessary to determine whether or not a partnership existed. The existence of a partnership is a question of fact under the evidence. *Blue Valley State Bank v. Milburn,* 120 Neb. 421, 232 N. W. 777. More convincing evidence is required to prove existence of partnership where alleged partners are the only litigants than where the controversy is between a third party and the partners. *Sanley v. Davies,* 113 Neb. 614, 204 N. W. 385; *Norton v. Brink,* 75 Neb. 566, 106 N. W. 668.

Much testimony and many exhibits were introduced in evidence. Only the parties know whether there was a partnership agreement. Their testimony as to the alleged partnership is conflicting and irreconcilable. In such a case, the court must look for evidence which is not disputed, which will corroborate the testimony of one or the other party and indicate the probable truth of the situation. Litigants cannot reasonably complain if the court is unable to arrive at what they consider a just finding, when they enter upon important business transactions under such uncertain circumstances as the record reveals inaugurated the business of this firm. This alleged partnership was formed by an oral agreement. If the parties had made an effort to surround with secrecy the details of this venture, they could not have succeeded better. More uncertainty as to the nature of the business transaction could not have been obtained. Carlson alleges that the O. K. Commission Company was from January 15, 1934, a partnership between himself and Peterson. Peterson claims that he was doing business under the trade-name of O. K. Commission Company, and that Carlson was merely an employee at a salary of $150 a month. Neither the books nor the business transactions establish one claim to the exclusion of the other.

The formation of this partnership was more or less

casual. The concrete suggestion, according to Carlson, was expressed by Peterson in the following language: "Why don't you come into the commission business with me; you know you can make a lot more money in the commission business than in farming. I will tell you what we will do; if you can raise a bond, we will go into the commission business fifty-fifty as partners."

At the time, September, 1933, Peterson had a business connection in the same line of business with R. M. Laverty under the name Laverty-O. K. Commission Company. He did not want it generally known that he was making different arrangements for conducting his business after January 1, 1934. This is offered as a reason why so much secrecy surrounded the conception of the new firm. Peterson also owned a ranch which was in the process of foreclosure, and he was fearful of a deficiency judgment which would handicap him in his business. Under the circumstances, we are invited to enter into a maze of evidence and are challenged to determine the terms and conditions of the partnership agreement, if one existed. We start with undisputed facts which are very meager. There was an O. K. Commission Company engaged in the live stock commission business at the Omaha Live Stock Exchange, and both plaintiff and defendant were connected with it in some capacity.

The corroborating evidence which the plaintiff relies upon to establish a partnership will be related briefly.

An account was opened with the Live Stock National Bank, and the bank was informed that the O. K. Commission Company was a partnership between Carlson and Peterson, and each was authorized to sign firm checks. The bank was informed by Peterson that the O. K. Commission Company was a partnership, and that Carlson and Peterson were the partners. The signature card prepared at Peterson's direction authorized both Carlson and Peterson to draw checks.

On January 13, 1934, the defendant Peterson filed a sworn statement with the Omaha Live Stock Exchange re-

specting the ownership and the persons having interest in the profits and losses of the firm. He stated that these persons were Peterson and Carlson.

During the same month Peterson filed an application with the Bureau of Animal Industry of the United States government, for registration of the O. K. Commission Company, which he signed C. L. Peterson, partner, and stated that the O. K. Commission Company was a partnership and that the partners were Ed Carlson and Clarence L. Peterson.

An application for a bond was made in January, 1934, which was signed O. K. Commission Company, by Ed Carlson by Clarence L. Peterson, and by both individually and personally.

Carlson claims that he furnished $3,000, the original capital stock of the O. K. Commission Company. Peterson also claims that he furnished this capital of $3,000. Each claims that he furnished it in cash. Their testimony is not corroborated by that of any other witness who knew the facts. Cash is rather difficult to trace. These facts are established however: Carlson went to the bank with Morrill, bookkeeper for Peterson, on September 16, 1933, and deposited $3,000 in cash in an account of Carlson's. Morrill was to countersign checks on the account. Carlson at the same time issued a check for $3,000 countersigned by Morrill, payable to Peterson. This check was held by Peterson until January 13, 1934, when it was deposited in the Packers National Bank to the account of the O. K. Commission Company.

Peterson gives as a reason for the deposit in the name of Carlson his necessity for secrecy in the transaction. Morrill, the only one outside of the parties who may have had some knowledge of the source of this $3,000, is deceased. There is no way to determine definitely the source of this money from the record. But the fact that Peterson sent Morrill with Carlson to make the deposit and was immediately given a check by Carlson for the entire amount is persuasive that it was in fact Peterson's money.

In the fall of 1933, preparatory to launching in business

in January, Carlson purchased a membership in the Omaha Live Stock Exchange. It was purchased from the Stock Yards National Bank for $2,150, and $500 in cash was paid, and a note for $1,650 given the bank. An argument is presented here as to the ownership of this membership. Again there is no degree of certainty attainable as to who paid the $500. The record does not answer that Carlson did. There were some payments certainly made by Peterson ($175) between September and December, 1933. Carlson said he was to make these payments because of the delay in starting business. Thereafter, the payments on the note were paid with funds of the O. K. Commission Company. The final note of $1,022 was paid in such a manner, and Peterson took the membership which was held as collateral for the note, and the note. This is one note that is canceled by the decree of the trial court.

The O. K. Commission Company, whether a partnership or Peterson's trade-name, paid most, if not all, of the purchase price, and should own the membership. This court is unable to determine that either Carlson or Peterson made the original payments. The disposition of the membership is determined by our determination as to whether Carlson is a partner in a partnership known as the O. K. Commission Company.

The evidence that would corroborate Peterson's claim that there was no partnership is briefly stated. Carlson never drew a check on the firm account and never exercised any control over the affairs of the O. K. Commission Company. While Peterson was the manager and Carlson worked in the cattle yard, the evidence is that Carlson never employed or discharged a man or exercised any supervision or control over any employee. Carlson asked to draw his salary in advance at one time, but Peterson refused to permit him to do so. In February, 1935, Carlson gave Peterson a note for $300, which he had borrowed in February, 1934, to pay a doctor bill. This note was executed just prior to the demand for an accounting in this suit. In February, 1935, Carlson filed an income tax report in which he re-

ported his salary from the O. K. Commission Company, but made no report of profits or losses from the partnership. Every one of these acts of Carlson is inconsistent with his claim that he was a partner in the O. K. Commission Company. In addition to this, we find that he did not put up the capital of $3,000 or purchase with his private funds the membership in the Omaha Live Stock Exchange. In January, he states that he invested $3,000 in the capital of the firm and purchased a membership. In February, he borrowed money to pay a past-due doctor bill. Such inconsistent testimony cannot establish a partnership. The evidence tending to establish a partnership consists entirely of Peterson's statements, sufficient to create an estoppel to deny a partnership as to a third party, but not to establish the contractual relation between the parties.

These admissions are accounted for by the fact that Peterson required secrecy to surround this business arrangement so that his then business relation should not be prematurely disturbed. It was necessary to secure a bond to do business. Carlson could get the bond only if he had a bank account. Therefore, the original capital money of the firm was placed in his name. Furthermore, Peterson had another use for Carlson. He owned a ranch upon which a mortgage was being foreclosed, and he feared a deficiency judgment. He had no bank account at the time except the firm account. He was dealing with cash in rather large and unusual amounts.

The existence of a partnership depends upon the agreement of the parties, and their intention is to be ascertained from all the evidence and circumstances of a case. *McAlpine v. Millen,* 104 Minn. 289, 116 N. W. 583; *Shirley v. Straub,* 50 N. Dak. 872, 198 N. W. 675; *Sander v. Newman,* 174 Wis. 321, 181 N. W. 822. In this, a suit between the parties, we conclude that the evidence does not show the intention of the parties to contract a partnership, and that, therefore, the plaintiff's suit fails.

However, the plaintiff is entitled to some relief in equity. The trial court awarded him a judgment for $1,500 and the

cancelation of two notes, one for $300 and one for $1,022. The one for $300 was a loan from Peterson, and its cancelation amounted to an award of $300 plus the $1,500. The note for $1,022 was a renewal note signed by Carlson in payment of the balance due on the membership in the Omaha Live Stock Exchange. This should be canceled. There is evidence in the record that Peterson agreed with Carlson that he was to have an equal salary. The testimony is to the effect that the salaries of both Peterson and Carlson were to be $200 a month. Peterson, however, paid himself $300 a month. Carlson served Peterson's purpose for 15 months and is entitled to be paid for his service at the same rate as Peterson. He drew $150 a month only, leaving the sum of $2,250 due him, from which we subtract the amount of the $300 note, which leaves $1,950. The judgment of the trial court was $1,500. The decree is modified to this extent and, as modified, affirmed.

AFFIRMED AS MODIFIED.

PENN MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. KARL E. LINDQUIST ET AL., APPELLANTS.

FILED APRIL 17, 1936. No. 29518.

1. Insurance: CONTRACT: CANCELLATION. False answers by the applicant in an application for life insurance, in regard to matters which are shown to be within the knowledge of the applicant and are material to the risk, will support an equitable action to cancel a total disability agreement founded thereon.
2. ———: ———: ———: ESTOPPEL. An insurance company is not estopped from seeking the cancelation of a total disability agreement attached to the policy on the ground of false statements given the medical examiner, and attached to the written application therefor, by the fact that the agent who wrote the application for the policy may have known the true facts.
3. ———. The incontestability clause in the policy itself was not applicable to the total disability agreement in this case by reason of its terms and the Nebraska law as set out in subdivision 5, sec. 44-602, Comp. St. 1929.

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

Brown, Fitch & West, for appellants.

Montgomery, Hall & Young, contra.

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

PAINE, J.

This is an action in equity, brought by the Penn Mutual Life Insurance Company, plaintiff and appellee, against Karl E. Lindquist, the insured, and his wife, as beneficiary, defendants and appellants, to cancel a supplemental agreement providing for total disability on the ground of false answers made by insured to deceive plaintiff in his application for insurance. The trial court canceled the agreement. Insured appeals.

The Penn Mutual Life Insurance Company filed a petition in equity June 22, 1934, against defendants, alleging that Karl E. Lindquist signed a written application for life insurance on September 21, 1930, which application stated: "My statements and answers made in this application are full, complete and true and shall be part of the contract of insurance when issued;" and just above the signatures of the medical examiner and the insured, and under the answers given to the medical examiner, appeared this statement: "I hereby agree that all the foregoing statements and answers made to the company's medical examiner are a part of my application for insurance, are declared to be full, complete and true, and are offered to the company as a consideration for the contract." That pursuant to such application a policy of insurance in the sum of $10,000, payable to Anna M. Lindquist, wife and beneficiary, was issued on October 14, 1930, and attached thereto was a supplemental agreement for total and permanent disability benefits, for which an extra premium was charged in the sum of $54.70 a year. A photostatic copy of the application, including answers to the medical examiner, and the policy, including the supplemental agreement for total disability, were at-

tached to the petition. Question 11-A in the application signed by the insured was: "Are you now in good health?" To which the insured answered, "Yes." Question 11-B: "When were you last attended by a physician or consulted one?" The answer given by the insured was: "1925." Question 11-C: "For what disease?" and the answer: "Influenza." Question 11-D: "Give details in full." The answer: "Ill three days." To question 11-E, asking the name of the physician who attended him, the answer was: "Dr. S. N. Hoyt, Omaha, Nebr." Question 15: "Has there been any suspicion of, or have you ever had or been treated for any of the following diseases or ailments * * * G. Or any other disease of the brain or nervous system * * *?" To which insured answered, "No." Question 16: "Have you ever had illness, disease, injury or operation other than as stated by you above? If so, give full particulars, date, duration, severity, etc., of each. Use reverse side if necessary." The answer of the insured was, "No."

It is charged in the petition that the answers were false, in that the insured had consulted a physician during July and August, 1928, for a serious mental and nervous disorder termed psychoneurasthenia; that his answers were material to the risk, were made knowingly by the insured, with intent to deceive the plaintiff; that the plaintiff relied upon the answers, and would not have issued the policy, or the supplemental agreement for total disability, if the questions had been correctly and truthfully answered. Upon learning that the insured had not completely and truthfully answered the questions in the application, the plaintiff, before instituting this action, tendered to the insured the premiums paid on the supplemental agreement, with interest thereon, amounting to $261.65, which tender was renewed in court and said amount deposited with the clerk of the district court. By reason of the false statements, plaintiff asks that the supplemental agreement for total disability be canceled and held for naught, and that the insured be enjoined from prosecuting any action based upon said supplemental agreement.

The defendant filed an answer and counterclaim, admitting that the insured signed the written application; denies that insured applied for the supplemental agreement for total disability; admits that the insured consulted a doctor during July, 1928, but denies that he was suffering from any illness of a serious nature, and that after a vacation of about a month he was able to continue his occupation until his present illness in January, 1934; alleges that the agent of the company who solicited the insurance was well acquainted with and knew all the facts in relation to his having consulted a doctor in July, 1928, and the plaintiff is therefore estopped, and asks that the plaintiff's petition be denied; and for a counterclaim set out that the insured became totally disabled on January 15, 1934, and has continued to be totally disabled since that time, and that there are eight months' payments of $100 a month due, with interest, under the total disability clause, and asks that the same be tried as a law action before a jury. The plaintiff filed a reply to the amended answer and an answer to the amended counterclaim, and denies liability under the total disability supplemental agreement because of false answers in the application for insurance. The case was tried to the court, and a decree was entered for the plaintiff company. Notice of appeal was given, and the insured assigns as errors the overruling of the demurrer, the trying of the cause as an equity action instead of a law action, the dismissing of defendant's counterclaim, and finding that the insured did not give true answers to material questions, and that such suppression entitled company to a rescission and cancelation of the supplemental agreement. It is also charged that the court erred in finding that the incontestability clause contained in the policy itself was not a part of the supplemental agreement.

We will first consider the error alleged in the finding by the trial court that the insured did not give true answers to material questions, and that the nervous breakdown of the defendant in 1928, and his treatment therefor, were facts material to the risk involved in the supplementary contract,

and were wholly suppressed by the insured in his answers to direct questions, and that such suppressions entitle plaintiff to a rescission and cancelation of the supplemental agreement for total disability. The evidence of the insured was to the effect that he went to Dr. Kelley in the summer of 1928, and at his suggestion he laid off from work about a month and went up to the woods on an island in Lake Superior, and came back about the 10th of September and then worked steadily.

On the other hand, the evidence of Dr. Ernest Kelley was to the effect that he was connected with the Norfolk state hospital for the insane between 1907 and 1910, and that from 1910 he had been located in Omaha, where his practice consisted of nervous and mental diseases; that insured consulted him nine times in July and August, 1928; that he complained of nervousness, insomnia, night sweats, poor appetite, fear of disease, a pressure feeling in his lower chest, was worried about business affairs, and that he had been troubled this way for about six weeks. His blood pressure was 110/90. He appeared anæmic, with some pallor, and technically his condition was psychoneurasthenia. Dr. Kelley further testified that he gave him three prescriptions, one for a tonic to build him up, one was a sleeping tablet, and one a nerve sedative to take when he was nervous, and he directed him to lay off his work and rest for a time. That insured came to him on the nine different days in July and August, 1928, and then an opportunity came for him to take a trip, and Dr. Kelley advised him to take it, and when he came back he was normal.

Dr. Kelley also testified that he again had occasion to treat Mr. Lindquist in January of 1934, beginning on January 15, 1934, and saw him continuously up to June 23, 1934, and saw him the day before he testified, and that Mr. Lindquist has been suffering from total disability.

Exhibit No. 3-A is a claim for total and permanent disability, received in evidence and stamped by the claim department of the Penn Mutual Life Insurance Company on May 24, 1934. This exhibit, signed by Dr. Kelley on May

14, states that the insured began with a feeling of melancholia; could not concentrate, developed into an acute mental depression, with suicidal tendencies; constantly depressed and emotional; diagnosis—cyclothymic depression. He further answers that the date of the first symptoms of present disability was on November 1, 1933, and that he had treated the insured from July 3 to August 3, 1928, for "psychoneurasthenia with insomnia, tiredness, anorexia, phobias, loss of weight," etc., and that he cannot work and is totally disabled.

The insured testified that, when Dr. Ensor was writing out the answers on the application for insurance, he explained to Dr. Ensor that a couple of years before he had consulted Dr. Kelley because he was not able to sleep, and Dr. Ensor said, "Well, is that all?" And insured said, "Yes." "Well," he said, "that is immaterial."

Dr. R. R. Ensor, called in rebuttal by the plaintiff, testified that in his examination of the defendant he wrote down each answer as given by the defendant, and denied that the insured had informed him that he had ever consulted Dr. Ernest Kelley or been treated by him prior to the medical examination that he was giving him, and that if the insured had made any such statement to him it would have been noted on the application.

Dr. Samuel B. Scholz, Jr., testified by deposition that he was the medical director of the insurance company, and testified that the company would not have granted the disability agreement had it known in 1930, when it issued the policy, that Mr. Lindquist had been treated two years before for the impairment disclosed in the answers made by Dr. Kelley in exhibit 3-A in the claim for total disability.

Now let us examine the law in reference to such a state of facts. In *Royal Neighbors of America v. Wallace,* 73 Neb. 409, 102 N. W. 1020, it was held: "An untrue answer in an application for life insurance in regard to matters which are shown to be within the knowledge of the applicant and are material to the risk will avoid the policy."

In *Prudential Ins. Co. v. Ashe,* 266 Mich. 667, 254 N. W.

243, the insured's statement to agent was that he was in good health, and he concealed the fact that he had been ill with pleurisy, was being treated for fistula, had finished treatment for lumbago, and had a condition indicating tuberculosis. The court held that such misrepresentation of facts voided reinstatement of life policy.

In *Damgaard v. South Dakota Benevolent Society,* 62 S. Dak. 533, the insured certified in her application: "I am in good health. That I have no ailment that I know of that will shorten my natural life." November 1, 1932, policy was issued. December 26, 1932, she died of a heart ailment, with which she had been afflicted for more than a year, and for which she had been taking medicine, and a week prior to signing the application she had been in bed and attended by a physician. Deceased was not in good health, and the representation to that effect was knowingly false. To permit a recovery under all the circumstances shown by this record would be to sanction a fraud.

In the case of *Muhlbach v. Illinois Bankers Life Ass'n,* 108 Neb. 146, 187 N. W. 787, we find a reversal of a judgment for plaintiff, based upon fraud in that the insured denied, in answer to a question, that his parents or sister had ever been afflicted with insanity, which was false, and it is stated that untrue answers in reference to matters of opinion or judgment will not avoid a policy if made in good faith and without intention to deceive, but if such untrue answers are shown to be within the knowledge of the applicant, and are material to the risk, such answers will avoid a policy. In this and other cases it is material to examine the question whether, if a true answer had been made, the policy of insurance would have been written. *Souza v. Metropolitan Life Ins. Co.,* 270 Mass. 189, 170 N. E. 62; 4 Cooley's Briefs, 3293; *Stanulevich v. St. Lawrence Life Ass'n,* 228 N. Y. 586, 127 N. E. 315.

In *Jefferson Standard Life Ins. Co. v. Stevenson,* 70 Fed. (2d) 72, the application, made a part of the policy, had the answer that the applicant had not suffered from any disease of the lungs; had not consulted a doctor for any other cause

within the past five years. The testimony showed that in July preceding she made five visits to a doctor's office, and he told her she had lung trouble, and advised her to stay in bed and keep the children away from her. The court say: "It was error to refuse to give the peremptory instruction. * * * The answer to the crucial question was not partial or imperfect; it was full and complete." See, also, *Kaffanges v. New York Life Ins. Co.*, 59 Fed. (2d) 475; *New York Life Ins. Co. v. Stewart*, 69 Fed. (2d) 957; *Shaner v. West Coast Life Ins. Co.*, 73 Fed. (2d) 681; *Mutual Life Ins. Co. v. Hilton-Green*, 241 U. S. 613.

It is held that representations that the applicant has had no medical attention in the five years preceding, and has never received or applied for treatment at any hospital, are representations that are material to the risk, so that their falsity invalidates the policy. *Minsker v. John Hancock Mutual Life Ins. Co.*, 254 N. Y. 333, 173 N. E. 4, 81 A. L. R. 829. In the notes to this case in the A. L. R. appears an exhaustive discussion of every phase of this subject, with abundant citations of authorities, and in the notes appears: "Is an insurance policy so distinctive among contracts, either in the manner of its inception, or in the purpose which it fulfils, that the law will not apply to it the principle that a person should be held to a signed statement, when he is seeking to enforce a right against another who has not been guilty of any fraud towards him in procuring the signature? * * * Insurance is considered as one of the necessities of life. As now organized and conducted, the losses paid by an insurance company fall ultimately upon the policyholders. It is in the interest of all insured persons to have their insurers safeguarded in their right to select risks upon adequate and truthful information."

In this case the trial court was justified in believing from all the evidence that the insured made the answers as written, and that the answers made were false and fraudulent; that the answers did not relate to a passing indisposition, but related to treatment for a serious nervous malady; that the total disability agreement would not have

been entered into by the company if it had known the true facts; that the defendant is now claiming total disability payments of $100 a month for the same or a very similar disease to that for which he concealed being treated nine times from the medical examiner when the application was being written.

The following authorities support the position of the court in this case: *Hews v. Equitable Life Assurance Society,* 143 Fed. 850; *Johnson v. American Nat. Life Ins. Co.,* 134 Ga. 800, 68 S. E. 731; *Bowyer v. Continental Casualty Co.,* 72 W. Va. 333, 78 S. E. 1000; *Joseph v. New York Life Ins. Co.,* 219 Ill. App. 452; *Metropolitan Life Ins. Co. v. Jennings,* 130 Md. 622, 101 Atl. 608; *Mutual Life Ins. Co. v. Long,* 12 Ohio App. 252; *Seaback v. Metropolitan Life Ins. Co.,* 274 Ill. 516, 113 N. E. 862; *Wingo v. New York Life Ins. Co.,* 155 S. Car. 206; *National Life & Accident Ins. Co. v. Nagel,* 260 Mich. 635, 245 N. W. 540.

The insured defends the application for cancelation on the further ground that the agent who sold him the policy knew all about the attack of psychoneurasthenia that he suffered in July and August, 1928, and claims that this knowledge of the agent is imputed to the company. There is no proof, however, that the agent knew the answers made to the examining physician.

Edward G. Gehrman was called as a witness by the defendants, and testified that he was 42 years of age, had worked 27 years in the Stock Yards National Bank; that he wrote life insurance for the plaintiff as part time work for about five years; that he solicited the defendant for about three months before he finally wrote him this policy; that he saw him during those three months about once or twice a week, and finally got an application signed for $7,500, but telephoned the state agent to send an additional $2,500, and also send a $10,000 policy with all the trimmings, and that he finally sold the larger policy; that he knew that in the summer of 1928 the insured had been sick, but he did not know how often he was going to a doctor; that he got a

regular commission upon the $10,000 policy he delivered; that the insured's position in the bank was transit manager, and witness Gehrman was paying teller in the bank. Witness said he had not been at the insured's house more than a dozen times, and that the insured had not been in his house more than three or four times during the 25 years that they both worked in the bank.

In the case of *Morrissey v. Travelers Protective Ass'n*, 122 Neb. 329, 240 N. W. 307, it was held that, where an applicant made untruthful statements in an application for insurance, which statements were material to the risk of insurance, the insurance association is not estopped to deny its liability, even though the member who solicited said applicant knew of the untruthfulness of the statements so made by the applicant. See, also, *Metropolitan Life Ins. Co. v. Freedman*, 159 Mich. 114, 123 N. W. 547. The United States supreme court has considered a very similar case, *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. Ed. 934.

The trial court held that the incontestability clause was not a part of the total disability agreement. We find the policy provided in section 6 that it should be incontestable after it had been in force, during the lifetime of the insured, for a period of one year from its date of issue, except for the nonpayment of premiums. The defendants contend that the supplemental agreement upon the subject of total disability was attached to and made a part of the policy, and thereby became subject to the incontestability clause referred to, and the year having elapsed, the agreement could not be attacked. On the other hand, the plaintiff contends that the contract of insurance consisted of three parts, the application, the policy of $10,000 life insurance, and the supplemental agreement for total disability benefits, which agreement provided in its terms that it should include certain provisions of the policy relating to change of beneficiary, assignment, payment of premiums, etc., and then provided: "No other provisions of said policy shall be deemed to apply to this agreement;" and, therefore, by its

own terms the incontestability clause after one year did not apply to this disability rider. This is clearly in accordance with subdivision 5, section 44-602, Comp. St. 1929, which provides that the company may except the incontestability clause from such riders, and that was clearly the intention of the plaintiff company in this case. Under the terms of the total disability contract and the provision of the Nebraska statute cited, it is clear that the trial court was right in holding that the supplemental agreement was expressly exempt from the incontestability clause of one year. *Penn Mutual Life Ins. Co. v. Hartle*, 165 Md. 120, 166 Atl. 614; *Greber v. Equitable Life Assurance Society*, 28 Pac. (2d) (Ariz.) 817.

We have carefully examined each of the errors set out by the appellants, but cannot discuss them in greater detail, for this opinion is already long. We have endeavored to point out that the incontestable clause was not a part of the disability rider attached to the policy, and that the $10,000 policy is in no way affected by this action; that the plaintiff had no adequate remedy at law, and that the appellants have shown no prejudicial error in the judgment of the trial court.

AFFIRMED.

A. R. OLESON, APPELLANT, V. GUSTAV ALBERS, APPELLEE.

FILED APRIL 17, 1936. NO. 29545.

1. **Principal and Agent:** AUTHORITY OF AGENT. Where a principal voluntarily places an agent in such a situation that a buyer of ordinary prudence, conversant with the nature of the particular business, is justified in presuming that such agent has authority to sell and collect payment for commodities placed in his possession by the principal, such buyer will be protected in relying upon the appearances of authority.
2. **Equity.** Whenever one of two innocent persons must suffer by the acts of a third, he who enabled such third person to occasion the loss must sustain it.

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

A. R. Oleson and *Fred S. Berry,* for appellant.

Zacek & Nicholson, contra.

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

PAINE, J.

This is an action at law to recover the purchase price of corn owned by the plaintiff and delivered to the defendant by a trucker, who collected the full purchase price from defendant, but did not pay the plaintiff, who is appellant in this court.

The plaintiff filed a petition in the county court alleging that prior to March 12, 1934, defendant agreed to purchase corn belonging to plaintiff at 40 cents a bushel, and, in addition, the defendant was to pay two cents a bushel more for the trucking charges; that under this agreement 843¼ bushels of corn were delivered to and accepted by the defendant on May 12 and 14, 1934, and that the amount due from the defendant to the plaintiff at 40 cents a bushel is $337.30; that no part of the same has been paid, and that said amount is now due, with interest from May 14, 1934. The plaintiff also alleges in his petition that the defendant has paid the trucker the charges of two cents a bushel for delivering the corn, but has failed and refused to pay the plaintiff 40 cents a bushel, as he agreed and promised to pay.

The defendant filed an answer in the county court, denying every allegation in the petition, and alleging that on May 14 the defendant agreed with one George Worrell to purchase corn of him at an agreed price of 42 cents a bushel, delivered at the farm of the defendant; that said Worrell was then and there engaged in the business of buying and selling corn, and was the owner and operator of a motor truck; that Worrell delivered corn to the defendant

in the quantity set out in the plaintiff's petition; that thereupon, without notice or knowledge of any right or ownership of plaintiff in and to said corn, and upon the demand of the trucker, Worrell, the defendant paid Worrell the agreed price of the corn, to wit, $354.15; that he paid $75 of said sum on May 14, and the balance on May 19, 1934. The defendant alleges that Worrell either purchased the corn from the plaintiff and resold it to the defendant, or that he was the agent of the plaintiff in the transaction; and that the plaintiff, by placing him in possession of the corn and by vesting him with the power of sale, is estopped from denying his power to receive and collect the purchase price.

A trial was held in the county court of Wayne county, Nebraska, on July 20, 1934, and the court entered a judgment for the plaintiff and against the defendant in the sum of $341, with interest at 6 per cent. from July 20, 1934, and costs of suit. Thereupon, the defendant appealed to the district court, and the parties, by a written stipulation duly filed, agreed to try the case in the district court upon the same pleadings filed in the county court. A jury was impaneled in the district court, and at the conclusion of the evidence of the plaintiff the defendant moved for an instructed verdict on the ground that the evidence fails to sustain the plaintiff's cause of action. Upon this motion the court ruled as follows: "The motion of the defendant is sustained and the jury so instructed, but the court states that the motion is sustained upon the theory that the petition is a declaration upon an express contract and that the evidence fails to support that cause of action; and the court further states that the evidence thus far does show that the truck driver in this transaction was the agent of neither party." The plaintiff appeals to this court, setting up as the prejudicial error the above ruling of the district judge.

It will be necessary to briefly review the evidence to determine the question submitted to this court. Plaintiff testified that he had known the defendant for 20 years, and that he was engaged in the business of feeding stock; that

he had known George Worrell, who had been engaged in the trucking business, for two years previous to this transaction; that several days prior to this occurrence the trucker came to plaintiff and asked if he had any corn to sell, and said he had a man who wanted to buy corn, and plaintiff said that he would sell 800 or 900 bushels for 40 cents at his place. The trucker said he could then deliver the corn at 42 cents. Worrell said he would get in touch with his man and let plaintiff know. A few days later Worrell again asked him the price of corn, and plaintiff said there had been no change, and Worrell, the trucker, said that he had a man who would take the corn at 40 cents and pay Worrell two cents for delivering it. Plaintiff asked the name of the purchaser, because he did not want the corn delivered to a man who could not pay for it, and Worrell said it was Gus Albers. Worrell then hauled two loads on Saturday and the balance on Monday, making 843 bushels of corn in all. The trucker gave the plaintiff the weights, and plaintiff told Worrell to tell Albers to give plaintiff a check for his corn when it was convenient. A few days later plaintiff wrote a letter to Albers, asking for a check for the corn, and later Albers telephoned and said he had paid the trucker in full for the corn. Plaintiff then drove out to Albers' farm, and Albers said he had paid the trucker, Worrell, for the corn, and supposed it was his, and there was considerable conversation back and forth between plaintiff and defendant. Plaintiff came back to town and found that the trucker, Worrell, had not only left town but had left the country for good, and no one knew where he had gone, and plaintiff ascertained that he had been bankrupt for several years. A witness testified that he heard the conversation when Worrell, the trucker, met the defendant in front of the hotel, and he heard the trucker say to the defendant that he wanted the rest of the money so he could straighten up with Andy, meaning the plaintiff. The corn was weighed at the elevator in Wisner, and when the trucker drove on the scales with the first load he was asked about the corn, and said, "Corn from Oleson to Albers,"

and that is the way it was put on all of the scale tickets. This is a very brief summary of the evidence.

When the court dismisses the action at the close of the plaintiff's case, this court will assume the existence of every material fact which the evidence of the plaintiff tends to establish, together with all proper inferences therefrom. *Kimble v. Roeder,* 115 Neb. 589, 214 N. W. 1; *Zielinski v. Dolan,* 127 Neb. 153, 254 N. W. 695.

The burden was, of course, upon the plaintiff to establish the essential elements of his cause of action, and plaintiff attempted to establish that Worrell was the agent of the defendant by testifying to statements that Worrell had made to him. If the plaintiff had been able to produce the trucker, Worrell, on the witness-stand, such witness could have testified to facts and circumstances which might possibly have proved that he was the agent of the defendant, but the plaintiff's evidence lacks much of establishing that the trucker was the agent of the defendant, empowered by the defendant to purchase the corn of the plaintiff for the defendant. It may be admitted, as plaintiff claims, that the plaintiff did not seek out the trucker to sell his corn for him, but this does not make the trucker the agent of the defendant.

It is stated as the general rule, in the notes in 8 A. L. R. 203, that an agent authorized to sell commodities has no implied authority to receive or collect payment therefor (*Ketelman v. Chicago Brush Co.,* 65 Neb. 429, 91 N. W. 282), but this rule is subject to several well-recognized exceptions. It is established by a long line of authorities that an agent, having possession of commodities which he is authorized to sell, has implied authority to receive or collect payment therefor. One of the earliest cases establishing this rule is that of *Pickering v. Busk* (1812) 15 East 38, 104 Eng. Rep. 758, wherein a broker sold hemp stored in a warehouse in his name for the benefit of an undisclosed principal, and it was held that a payment made to such broker bound the principal, although the agent proved unfaithful and did not account therefor to his employer.

In 1 Restatement, Law of Agency, 25, sec. 8 reads as follows: "Apparent authority is the power of an apparent agent to affect the legal relations of an apparent principal with respect to a third person by acts done in accordance with such principal's manifestations of consent to such third person that such agent shall act as his agent." See *Harrison Nat. Bank v. Williams*, 2 Neb. (Unof.) 400, 89 N. W. 245.

"Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to collect sums due to the principal, the debtor will be protected in case he relies upon the appearances of authority. It is undeniable that an agent to whom merchandise has been entrusted with authority to sell and deliver it is authorized to receive the price." 21 R. C. L. 867, sec. 42. This has been stated in another form by this court: "Ostensible authority to act as agent may be inferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." *Holt v. Schneider*, 57 Neb. 523, 77 N. W. 1086. See, also, *Thomson v. Shelton*, 49 Neb. 644, 68 N. W. 1055; *Bliss v. Falke*, 125 Neb. 400, 250 N. W. 250.

In the case at bar the plaintiff gave the trucker possession of the corn knowing that it was being sold and delivered by the trucker to the defendant. Plaintiff made no inquiry of the defendant as to what the transaction was, although both parties had telephones on the same system. It was clearly the plaintiff who placed Worrell, the trucker, in a position such that an innocent purchaser of this corn had a right to assume that the trucker was authorized to sell and collect the purchase price of the corn, and while it is unfortunate that the plaintiff was deceived in the confidence that he placed in the trucker, yet the law has many times been laid down: "Whenever one of two innocent persons must suffer by the acts of a third, he who has

enabled such third person to occasion the loss must sustain it." Broom's Legal Maxims (9th ed.) 463.

We find this statement in a very early decision: "Where the owner of property (a span of mules) is induced by the fraud of another to part with it, an innocent purchaser from the party in possession will take a good title." *Homan v. Laboo*, 2 Neb. 291.

We have carefully examined the record and, finding no prejudicial error therein, the judgment is hereby

AFFIRMED.

J. W. HARDIN, APPELLEE, V. HENRY PAVLAT, COUNTY CLERK, ET AL., DEFENDANTS: HENRY VICK ET AL., INTERVENERS, APPELLANTS.

ANNA K. GILGREN, APPELLEE, V. HENRY PAVLAT, COUNTY CLERK, ET AL., DEFENDANTS: HENRY VICK ET AL., INTERVENERS, APPELLANTS.

HATTIE M. BLOME, APPELLEE, V. HENRY PAVLAT, COUNTY CLERK, ET AL., DEFENDANTS: HENRY VICK ET AL., INTERVENERS, APPELLANTS.

FILED APRIL 17, 1936. No. 29642.

1. **Municipal Corporations.** A village is a public corporation, created by and existing subject to the legislative will.
2. ———: BOUNDARIES. Any person dealing with such a corporation does so with the knowledge that its territory may be enlarged or diminished in the manner prescribed by the law in existence at the time.
3. ———: ———. A bondholder or other creditor of such a corporation has no vested right on that account to have the territorial boundaries thereof remain constant so long as the corporation continues to exist with a substantial part of its original territory unimpaired.
4. ———: CONTRACTS: IMPAIRMENT. Where a bondholder became a creditor of a village at a time when section 17-412, Comp. St. 1929, was in force, the disconnecting of lands from the village under the provisions of that statute is not an impairment of the bondholder's contract, within the purview of section 16, art. I of

the Nebraska Constitution, or section 10, art. I of the Constitution of the United States.

5. ———: TAXATION. Taxes cannot be levied upon property for village purposes, in the absence of statutory authority, after it has been disconnected from the village by the judgment of a court having jurisdiction thereof.

6. ———: ———. A village can tax for village purposes only property within the village territorial limits. Property is taxed when the tax is levied, and not when it is valued by the assessor. *State v. Nickerson*, 99 Neb. 517, 156 N. W. 1039, followed.

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

William H. Wright, Attorney General, Daniel Stubbs and *R. P. Kepler,* for appellants.

Paul L. Martin, contra.

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

CARTER, J.

These are actions for injunctions to restrain the county clerk and county treasurer of Cheyenne county from certifying and collecting taxes levied by the village of Dalton to pay the existing bonded indebtedness of the village. The state of Nebraska, as an owner of some of the bonds of the village, obtained leave and filed petitions in intervention in each of the three suits. The appellants Vick, Pankau, Carey and Friede, as residents and property owners in the village, also obtained leave and filed their joint petitions in intervention. The trial court granted injunctions to the plaintiff in each case and dismissed the petitions in intervention. Interveners have appealed to this court from the adverse judgment entered against them. All three cases were consolidated and tried together in the district court and will be similarly disposed of on this appeal.

The record in this case shows that the lands of the plaintiffs involved in this action were within the corporate limits

of the village of Dalton on May 26, 1914, on which date water-works bonds of the village were issued in the amount of $8,000. On May 15, 1921, the village issued electric light bonds in the amount of $14,000, and on January 2, 1922, additional water-works bonds in the amount of $14,500 were issued. All of the foregoing bonds were refunded on and prior to July 1, 1926, and refunding bonds remaining unpaid at the date of filing this suit amount to $34,500, all of which were issued while the lands of these plaintiffs were within the corporate limits of the village, and $26,000 of which are owned and held by the state of Nebraska.

On June 23, 1931, the district court for Cheyenne county, in an action then pending before it, entered a decree disconnecting the lands of plaintiffs from the village of Dalton, which decree has become final.

The record further shows that, in August of each of the years 1931, 1932 and 1933, the county commissioners of Cheyenne county made the annual tax levy for that county, including the village of Dalton. In 1931 the total levy of 14.61 mills for village purposes was assessed against the lands of plaintiffs, while in 1932 and 1933 plaintiffs' lands were assessed for village purposes for the payment of bonds and bond interest only.

Plaintiffs contend that, their lands having been disconnected from the village by the decree of the district court as provided by law, such lands are not subject to village taxes for any purpose. Defendants and interveners contend that the judgment is contrary to law in that it fails to accord to the state's contract the protection against impairment given by section 16, art. I of the Nebraska Constitution, and section 10, art. I of the Constitution of the United States.

The question for decision is whether the acts of the plaintiffs in causing their lands to be disconnected from the village of Dalton impair the obligation of the contracts between the village and the bondholders contrary to the provisions of the state and federal Constitutions.

There can be no question that a bond issued by a village constitutes a contract between the village and the bond-

holders. It has also been repeatedly held that a legislature may not impair the obligation of such a contract. In *Smith-Courtney Co. v. Board of Road Commissioners,* 182 N. Car. 149, 108 S. E. 443, it was held: "While we will not enter upon a full or elaborate discussion of the constitutional question raised here, but leave it for the hearing on the merits if the case comes back to us, we may refer, at this time, to a few of the many cases decided by the federal supreme court, which is the one of last resort upon this phase of the matter in controversy. It has been held by that court that a legislature may, at any time, restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, provided its action in that respect shall not operate directly upon the contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result directly by operating upon those means, is prohibited by the Constitution, and must be disregarded. The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the state, and to those of its agents acting under its authority, as well as to contracts between individuals. The courts, treating as void the legislation abrogating or restricting the power of taxation delegated to a municipality, upon the faith of which contracts were made with it, and upon the continuance of which alone they can be enforced, can proceed and by mandamus compel, at the instance of parties interested, the exercise of that power, as if no such legislation had ever been attempted."

Also, in *Mobile v. Watson,* 116 U. S. 289, the court said: "Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature, or, if they are changed, a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law

which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void."

However, our present statute, section 17-412, Comp. St. 1929, providing the procedure for disconnecting lands from the village, has been in force since 1901. Laws 1901, ch. 20. It was therefore in effect at all times when the bondholders purchased the bonds they now hold. In view of the fact that the bondholders purchased the bonds at a time when the statute in question was in force, it is necessarily a part of the contract. When the state purchased the bonds it purchased them knowing that the legislature had provided for the disconnecting of lands from the village that, in justice and equity, ought not to be a part of the village. Clearly, the bondholders in dealing with the village did so with constructive or implied knowledge that its boundaries might be diminished or enlarged in the manner that the statute provides. It seems, therefore, that a bondholder has no vested right to have the territorial limits of the village to remain unchanged so long as the original municipal corporation remains with a substantial part of its original territory unimpaired. Under these circumstances, we fail to see how the statute which was in force prior to the issuance of the bonds by the village could in any way impair the obligation of the contract subsequently entered into.

It must be borne in mind that bondholders do not have a lien upon the property of a village to secure the payment of their bonds. All they have is the promise of the village to pay them when due. While the legislature may not impair the bondholder's contract by subsequent legislation, it does not necessarily mean that the property of the village and the territorial boundaries thereof shall remain constant until the bonds are paid where, as in the case at bar, there was an existing statute providing for the annexation and detachment of real estate from the village.

Appellants rely upon the case of *Erickson v. Nine Mile Irrigation District*, 109 Neb. 189, 190 N. W. 573. It will be

noted that in that case the statute, section 3471, Rev. St. 1913, which was in effect when the bonds were issued, provided that "all the real property of the district *shall be and remain* liable to be assessed for such payments." The legislature *subsequently* passed an act exempting certain of the district's property from the district. Laws 1917, ch. 80, sec. 1. (Italics ours.) It might well be said that this was an impairment of the bondholder's contract with the district and still not be authority for the contention of the appellants in the case at bar.

In the case before us, the statute provided, at the time the water-works bonds were issued, that the village could "levy and collect a general tax * * * to an amount sufficient to pay the interest and principal of said bonds as the same mature, on all the property within such city or incorporated village as *shown and valued upon the assessment rolls.*" Comp. St. 1929, sec. 17-442. (Italics ours.) With a statute in force at the time the bonds were issued that permitted a change in the assessment rolls by the successful termination of an action to detach real estate from the village, we conclude that the reasoning in *Erickson v. Nine Mile Irrigation District, supra,* is not applicable in this case. The record fails to show that any of the bonds were issued under a statute containing provisions that were any different.

We know of no rule of law that would permit the levy of a village tax on property outside of the corporate limits of the village. Our statute makes no provision for such a proceeding. In the absence of statute, the authorities clearly hold that the power to levy a village tax on property outside the corporate limits of the village is lacking.

In a similar case, the supreme court of Kentucky said:

"The question involved in this case is whether the property which was within the corporate limits of the city of Pineville at the time the bonds were issued, and which is now outside of the city limits by reason of the proceedings under sec. 3483, Ky. Stats. 1903, can be assessed and made to pay taxes for the purpose of aiding in paying the bonds.

"Neither the organic nor the statutory law of the state

provides that the property within the territory stricken from cities of the fourth class shall be required to pay any taxes to the municipality for any purpose. Municipalities are arms of the state government. Their charters are granted by the legislature. The right to grant the charters implies the right to alter, change or amend them. If too much territory is embraced within the limits of a city, the right to reduce it or to prescribe the manner of doing it is vested in the authority which created it." *Miller v. City of Pineville,* 121 Ky. 211, 89 S. W. 261.

In *State v. Nickerson,* 99 Neb. 517, 156 N. W. 1039, this court said: "Taxes cannot be levied upon property for city purposes after it has been detached from the city by the judgment of a court of competent jurisdiction."

We therefore come to the conclusion that the property disconnected from the village is not liable for any of the village debts. It cannot therefore be taxed for any village purpose in the absence of a statute authorizing such a tax to be levied. The complaint made by bondholders in the case at bar is one that can be addressed to the legislature, but one which the courts are powerless to afford relief.

It appears from the record that the levies of the taxes in question were made by the county board of Cheyenne county after June 23, 1931, the date the property was disconnected from the village. There was no power therefore to levy the taxes in question. In *State v. Nickerson, supra,* this court said:

"Property 'within the city' can be taxed for city purposes. This property was 'within the city' until July 1. After that time it was not within the city. The question is, then: When was it 'taxed?' Is the property taxed when the assessor lists it and it is valued for taxation, or is it taxed when the levy is made? The levy was made by the county board about 10 days after the property was put out of the city. * * *

"In *Wood v. McCook Water-Works Co.,* 97 Neb. 215, the company was held liable for the tax, whether it transferred its property after assessment to one who could be taxed or

to one who could not be taxed. There was no difference in that respect, and it was held that transferring the property to the city itself, which could not be taxed, did not relieve the company from payment of the tax for that year. It was held to be a question of ownership, and not a question of power to tax. When it is a question of ownership, it is the ownership on April 1 that controls. When it is a question of power to tax, that power must exist when it is assumed to exert the power; that is, when the property is taxed. The property is taxed by the city when the city levies the tax."

The record shows that the 1931 taxes were levied by the county board of Cheyenne county on August 4, 1931. Clearly, therefore, the property of these plaintiffs was not subject to the taxes for 1931 and subsequent years.

The judgment of the trial court is therefore in all respects correct and is

AFFIRMED.

FRED BARTELS, APPELLANT, V. EARL WADE ET AL., APPELLEES.

FILED APRIL 24, 1936. No. 29658.

Evidence. A complete, unambiguous written contract may not be varied or modified by a contemporaneous oral agreement between the parties.

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

Russell W. Bartels, for appellant.

C. H. Hendrickson, contra.

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

GOSS, C. J.

By a judgment following a verdict, plaintiff was denied recovery on a note. Plaintiff appealed.

The note was for $500, dated October 31, 1931, due January 1, 1933, bearing interest after maturity. It was given by defendants to plaintiff on the same day they joined plaintiff in a written lease of plaintiff's 240-acre farm for one year from March 1, 1932. The lease provided for a rental of $1,400, payable $300 in cash, $300 due March 1, 1932, $300 due October 1, 1932, and $500 due January 1, 1933, the last three payments evidenced by promissory notes. The evidence shows that the first three items were paid.

Defendants' answer admitted that they signed the note sued upon, but pleaded that, at the time the lease was executed, they had a contemporaneous oral agreement with plaintiff "that in the event of hail, poor prices, or what is termed a 'bad year,'" he would cancel $500 of the rent. They plead facts which would satisfy the conditions named. Plaintiff's reply was a general denial.

Over objections of plaintiff, the trial court allowed defendants to introduce evidence varying and modifying the terms of the lease and the terms of the note sued upon so as to show to the satisfaction of the jury that the alleged oral agreement was operative to defeat plaintiff's action on the note. This was duly assigned as erroneous.

Not only the pleadings but the evidence show that no other parties than plaintiff and defendants were concerned or involved in the written contract or in the alleged oral contemporaneous contract. There had been no reformation of the written contract to make it conform to the terms of the alleged contemporaneous oral agreement. The written contract was on the face of it complete. It was, so far as it shows, unconditionally delivered with the intention that it should take effect as a legal obligation according to its terms. It is admitted that the written lease was executed and delivered, but it is claimed by defendants that it was executed and delivered upon the oral agreement that it would be modified as heretofore shown if the conditions arose requiring modification. In these circumstances, is parol evidence admissible to vary, modify or contradict the

written obligation set forth in the lease and note described therein, on which note the action was based?

It should be noted that there is nothing ambiguous in either the written lease or in the note—nothing requiring parol evidence to explain or clarify.

In *Security Savings Bank v. Rhodes,* 107 Neb. 223, 185 N. W. 421, it was held: "When a written contract has been unconditionally delivered in the sense that it is intended to take effect as a legal obligation, a contemporaneous oral agreement, providing that the contract is not to be performed if a certain condition or contingency occurs, cannot be shown, as such testimony would have the effect of adding to, varying or contradicting the express terms contained in the writing"—citing cases, distinguishing cases, and overruling certain of our cases in so far as they were inconsistent with the rule announced.

In a recent opinion of this court a rule, similar in principle, was announced in these words: "Parol evidence is inadmissible to prove that grantor in a warranty deed conveying real estate to grantee without exception, condition or reservation retained a life estate therein by a contemporaneous oral agreement." *Erwin v. Kuhlman, ante,* p. 249, 264 N. W. 676.

In *Spiegal & Son v. Alpirn,* 107 Neb. 233, 185 N. W. 415, we held: "The rule that parol evidence is admissible to prove that contemporaneously with, or preliminary to, the execution of a written contract the parties entered into a distinct oral agreement on some collateral matter or as a condition on which the performance of the written contract is to depend, does not apply where the written contract is complete in itself and unambiguous, and where it expresses a contractual consideration."

In the argument appellee placed much reliance upon *Seminole Bond & Mtg. Co. v. Investors Realty Co.,* 127 Neb. 193, 254 N. W. 732. But there the parol agreement was a condition precedent upon which the written obligation was executed. The syllabus expressly states: "Parol evidence is inadmissible to vary the terms of a written agreement, complete on its face."

We therefore conclude that the district court erred in allowing parol evidence as to the alleged contemporaneous oral agreement claimed to have been made at the time the written agreement was entered into. The rule applicable to this case is that parol evidence is inadmissible to prove a contemporaneous oral agreement which modifies a complete and unambiguous written contract between the same parties and provides that the written contract is not to be performed if a certain condition or contingency occurs.

Our conclusion makes it unnecessary to discuss other errors assigned by plaintiff.

The judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

HARRY A. SIDES, APPELLEE, V. ADDIE O. SIDES, APPELLANT.

FILED APRIL 24, 1936. NO. 29657.

Evidence examined and *held* insufficient to establish an oral contract that plaintiff would reconvey to defendant the land in controversy.

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

William P. Warner, for appellant.

George W. Leamer, contra.

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

GOOD, J.

This is an action for the partition of a 20-acre tract of land in Dakota county. Plaintiff alleged that he and the defendant were each the owner of an undivided half interest therein and prayed for partition in kind. Defendant answered, claiming ownership of the entire tract. A trial

of the issues resulted in a finding that plaintiff was the owner of an undivided half interest, and awarding partition in accord with prayer of petition. Defendant has appealed.

Prior to March 1, 1928, defendant was the owner of 220 acres of land in Dakota county. He was a widower and had two sons, one of whom is the plaintiff. One hundred and sixty acres of the land were encumbered by a mortgage for $12,000; a 40-acre tract encumbered by a mortgage for $4,500, and the 20-acre tract in controversy in this action was unencumbered. March 1, 1928, defendant and his two sons entered into a written contract whereby defendant agreed to convey to each of his sons a particularly described portion of the encumbered land. In that agreement it was provided that they should assume the existing mortgages, and provision was made as to the particular portion of the mortgage that each of the sons should assume. They also agreed to pay to the father $150 an acre for the land, less the amount of the encumbrance thereon, and each of the sons was to pay annually to the father $500, pursuant to the terms of the contract. The time of the last annual payment by each of the sons to the father would extend far beyond his expectancy of life. The contract further provided that, if any portion of the agreed price should remain unpaid at the time of grantor's death, each of the sons should be relieved of further payments.

Pursuant to this agreement, on the 5th of March, 1928, deeds were executed and delivered by the father to each of the sons, and mortgages were prepared and executed by the sons, securing the unpaid portion of the purchase price. On the 5th day of March another deed was executed by the father whereby he conveyed, without consideration, the 20-acre tract, involved in this action, to his two sons as tenants in common. At a later time, not disclosed by the record, Porter Sides, one of the sons, reconveyed his half interest in this 20-acre tract to his father.

It appears that the father and son Porter were engaged in cutting and marketing the timber on this 20-acre tract and had cut practically all of the timber on the north half

thereof when this action was begun. The trial court awarded the plaintiff the south half of the land on which the timber had not been cut and awarded to defendant the north half of the land on which he and his son had cut and marketed the timber.

It is the contention of the defendant that at the time he executed and delivered the deed to the 20 acres to his sons, without consideration, they at the same time orally agreed that they would reconvey to him this 20-acre tract whenever he needed or wanted the land, and that he had requested reconveyance from plaintiff, which plaintiff refused.

Defendant asserts that the decree of the trial court is not sustained by the evidence and is contrary to law. It is defendant's theory that the oral contract was proved; that there was a confidential relation existing between defendant and his sons; that they held title to the property in trust for him, and that refusal of the plaintiff to reconvey constituted at least a constructive fraud; that plaintiff, therefore, holds the title in trust and is bound to reconvey upon defendant's request.

There are a number of legal questions involved which we find it unnecessary to discuss or decide. The evidence respecting the oral contract to reconvey is in conflict. The contract, deeds and mortgages were drawn and signed in the office of Sidney Frum, a reputable practicing lawyer in Dakota county. Defendant testified that the oral agreement to reconvey was made in the presence of Mr. Frum in his office. The testimony of plaintiff's brother, Porter Sides, tends to support, to some extent at least, the contention of defendant. However, his evidence is so conflicting and contradictory that it is entitled to but little weight. Plaintiff testified that there was no such oral contract. Mr. Frum was called as a witness, and he testified that no such agreement was brought to his knowledge or attention, and, had it been, he would not have drawn a warranty deed without reservation.

From a consideration of all the evidence, we are unable

to say, on a trial *de novo*, that defendant has sustained the burden which the law casts upon him to establish the making of the oral contract. While the trial court was not specific in its findings, it reasonably appears that its decision was based upon the theory that the oral contract was not established by the evidence. Cases of this character are for trial *de novo*, but we have frequently held that where the evidence is in conflict we will take into consideration the fact that the trial court saw the witnesses and the manner in which they testified.

We are of the opinion that the oral contract to reconvey was not satisfactorily established. It follows that plaintiff and defendant were each the legal owners of one-half interest in the particular tract. The judgment of the trial court in awarding partition seems to be in accordance with law and justice and is

AFFIRMED.

FREMONT JOINT STOCK LAND BANK, APPELLEE, V. ELIZABETH HARDING ET AL., APPELLEES: SENA JONES ET AL., APPELLANTS.

FILED APRIL 24, 1936. NO. 29487.

Record and evidence examined *de novo*, and *held* to sustain the judgment of the trial court.

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

Davis & Vogeltanz, for appellants.

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

Quintard Joyner, amicus curiæ.

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

EBERLY, J.

This is an appeal in equity presented by Sena Jones and B. J. Jones, her husband, as appellants, from a final order of the district court for Valley county in this cause, which was entered in the following terms:

"Now on this 29th day of October, 1934, this matter came on for hearing on the application of the defendant, Sena Jones, to set aside the order vacating the moratorium and the order confirming the sale, upon said application and evidence duly introduced, and the court being fully advised in the premises, finds that said application should be denied.

"It is, therefore, ordered, adjudged and decreed that said application be, and the same is, hereby denied, to all of which the defendant, Sena Jones, excepts."

The record discloses that on August 19, 1932, plaintiff filed its petition in foreclosure, which disclosed that the last payment made by the defendants, under the mortgage in suit, was the payment of an instalment which came due July 1, 1931, and also showed that the defendants had paid no taxes on the mortgaged premises since those levied for the year 1929. Due service of process was had. On October 28, 1932, a decree was entered finding that there was then due and unpaid to plaintiff upon the debt secured by said mortgage the sum of $13,828.04 with interest at 8 per cent. from date of decree. On the same day the statutory nine months' stay of proceedings was entered in favor of defendants. On September 5, 1933, the land was sold to the plaintiff, after being advertised for 30 days, for $14,808.78. On the same day the plaintiff filed a motion to confirm said sale. On September 16, 1933, Sena Jones, defendant, filed an application for a moratorium in accordance with the statute passed at the 1933 session of the legislature, which moratorium was to extend until March 1, 1935, and also asked for the fixing of the rentals for the coming year. On September 19, 1933, upon this application, a hearing was had upon the evidence introduced by the parties, at the conclusion of which it was ordered that "further proceedings herein be and they hereby are stayed until March

1, 1935, upon the following conditions: The said defendant shall pay to the clerk of the district court for Valley county, Nebraska, the sum of $75 as cash rent for the pasture, prairie hay land and buildings on the premises involved herein, one-half of the said amount shall be paid on or before March 1, 1934, and the balance on or before January 1, 1935." The order provided for a crop rent in addition. The $37.50 cash rent payable by the conditions of the moratorium on or before March 1, 1934, was not paid to the clerk of the district court, as required by the terms thereof, and no rent whatever was ever paid or tendered to that officer or to the plaintiff herein. On September 7, 1934, the plaintiff filed an application to vacate the moratorium granted because of the failure of the defendants to pay the cash rent due March 1, 1934, as provided by the terms and conditions thereof, and of this application appellants' attorneys of record were given due notice. The defendants knew of the provisions of the moratorium requiring the payment of $37.50 on or before March 1, 1934. In addition, their attorneys of record had written Mrs. B. J. Jones on September 18, 1934, advising her of the application of the plaintiff for a vacation of the moratorium because of failure to comply therewith. As to actual knowledge of the defendants of the facts contained in this letter, the bill of exceptions discloses the following: "Q. Did you get a letter from me in reference to the hearing at the last term of court? A. Yes; the day before it was to be confirmed or the day before action was to be taken here by woman telephoning over the day before."

There is no evidence in the record which negatives the conclusion that the defendants were actually advised of the pendency of the application to cancel the moratorium on the 19th or 20th of September, 1934, previous to the hearing thereof on September 21, 1934, at 1:30 p. m. On the day last named the moratorium was, by the judgment of the trial court, canceled and revoked, and the sale, which was made pursuant to the decree of the court, on September 5, 1933, duly confirmed and deed ordered. This decree also

provided that a writ of assistance issue commanding the sheriff of said county to put the purchaser in possession.

Notwithstanding the fact that the defendants, prior to September 21, 1934, had actual knowledge of the pendency of plaintiff's application to cancel the moratorium, on October 20, 1934, but still one of the days of the regular September term of the district court for Valley county, the defendant, Sena Jones, filed an application for the setting aside of the order vacating the moratorium; asking that the order confirming said sale be vacated, and that the deed, if already issued, be canceled. As part of this application, it is alleged: "This defendant now tenders into court the sum of $37.50, with interest, if the court finds it should be paid." On October 29, 1934, this application was denied. It is from this order only that an appeal is prosecuted.

If we assume a tender necessary under the facts in this case, the record suggests the question of whether a proper tender was in fact made. There is no evidence that the money was ever actually produced in court or actually tendered, or that plaintiff was ever called upon to accept or reject it. A tender must be absolute and unconditional. *Schrandt v. Young,* 62 Neb. 254, 86 N. W. 1085. Then too, the rule appears to be that the plaintiff in an action already commenced is not compelled to receive a sum of money in satisfaction of his claim, unless the sum so paid is sufficient to include the costs to the time of payment. *McEldon v. Patton,* 4 Neb. (Unof.) 259, 93 N. W. 938.

New trials as a matter of right in civil cases are governed by section 20-1143, Comp. St. 1929, which reads as follows: "The application for a new trial must be made at the term the verdict, report, or decision is rendered, and, except for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented."

There is no showing whatever of "reasonable diligence" on part of the defendants, or that they were "unavoidably

prevented" from filing a proper motion for a new trial in compliance with the terms of the statute above quoted. However, where an application for a new trial is made subsequent to the lapse of three days after the decision is rendered, the case comes within the scope of another doctrine. It was stated in the following words by Sullivan, J., in *Bradley v. Slater*, 58 Neb. 554, 78 N. W. 1069: "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."

While it is true that all equity cases are to be considered *de novo* on appeal, still this court exercises its constitutional appellate jurisdiction only in their consideration. We are in all respects confined to the record properly before us, limited to what was presented to the trial tribunal. What is here challenged by the appeal is not the denial of a legal right, but the refusal to exercise judicial grace. The judgment vacating the moratorium stay, and confirming the sale of the mortgaged premises, was entered on September 21, 1934. The transcript on appeal in the present appellate proceeding was not docketed in this court until January 22, 1935, so the merits of the case, so far as the action taken on September 21, 1934, is concerned, are not before us. No appeal has been prosecuted therefrom. We now deal only with the refusal of the trial court to exercise its inherent powers as a matter strictly of judicial grace.

It is not to be overlooked that the original moratorium as expressly applied for by the defendants, and as granted by the court, expired March 1, 1935. As part of the order entered on September 21, 1934, the court, on its own motion, provided that on confirmation no writ of assistance should issue against the defendants until March 1, 1935. Thus, the continued possession of the defendants was assured for the full term of the moratorium statute then in force.

The terms and conditions of the moratorium decree of September 19, 1933, had the force and effect of a judgment. It was violated by the defendants by their default of March 1, 1934. Six months passed and no application for modification or other relief was presented by them. It is admitted that they were wholly unable to comply with any of the conditions prescribed until "just recently," which we understand, from the context, to mean, "just before the date of the application made on October 20, 1934." Considering the terms prescribed by the original moratorium in the nature of a contractual obligation binding on the parties thereto, as to which the defendants are promisors, the rule is: "The promisor's breach of an unconditional contract cannot be excused by any act of his own or of those in privity with him which prevents performance or renders it impossible." 13 C. J. 637. And, in the instant case, under the facts and circumstances existing at the time of the entry of the judgment appealed from, the legal effect of the conditions and terms thereof is in no manner altered or varied because the parties defendant were not possessed of sufficient funds to comply therewith. 13 C. J. 635; *McCreery v. Green*, 38 Mich. 172; *Western Union Telegraph Co. v. Detroit & M. Ry. Co.*, 233 Mich. 1, 206 N. W. 520.

It follows that the district court, in its denial of the application of defendants appealed from, committed no abuse of judicial discretion, but its action is fully justified by the present record, and its judgment is

AFFIRMED.

NENA SCOTT, APPELLANT, V. THOMAS H. DOHRSE, APPELLEE.

FILED APRIL 24, 1936. No. 29804.

1. **Statutes:** CONSTITUTIONALITY. If an act is complete and independent in itself, it may amend or modify the provisions of existing statutes without controverting the provisions of the Constitution relating to amendments.

2. ———. Chapter 57, Laws 1935, is a complete and independent act in itself.

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

Anson H. Bigelow, for appellant.

Mossman, Anderson & Meissner, contra.

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

DAY, J.

The appellant has filed a motion for a refund of costs collected by the clerk of this court for the docketing of the appeal under section 33-105, Comp. St. 1929. It provides as follows:

"At the time of filing each transcript, or original suit, or proceeding in the supreme court there shall be paid to the clerk the sum of twenty ($20.00) dollars as a docket fee, and the appellee or adverse party shall pay a docket fee of five ($5.00) dollars upon entering his appearance, or filing a motion, pleading, or brief in the case. These payments shall cover all clerk's fees except that the clerk shall be paid for each copy ordered of any pleading, record or other paper or any part thereof, for each ten words, one cent; for certificate and seal, fifty cents."

Under this statutory provision, the clerk has for many years collected costs in all cases filed in this court upon the filing of a transcript on appeal. This argument arises because of a statute enacted by the recent legislature.

Section 48-175, Comp. St. Supp. 1935, provides: "No filing fees shall be charged by the clerk of any court for any service required by this act." The reference to "this act" is to chapter 57, Laws 1935, and relates to compensation claims. This is a compensation case.

A part of the same act (Comp. St. Supp. 1935, sec. 48-177) provides that any award, order, or judgment for compensation of any court of competent jurisdiction may, as

soon as the same becomes conclusive upon the parties in interest, be filed with the district court of any county in the state, "upon the payment of a fee of one dollar to the clerk of the district court or courts where such order, award or judgment is so filed."

Section 48-174, Comp. St. Supp. 1935, provides for appeal to the supreme court in workmen's compensation cases, and in part reads as follows: "Any appeal from the judgment of the district court shall be prosecuted in accordance with the general laws of the state regulating appeals in actions at law."

The legislative enactment which is quoted above provided that no costs be charged by the clerk of any court for services rendered in a compensation case, and it clearly indicated a legislative intention to relieve the parties of the payment of costs except as noted above in a specific provision for one dollar for filing a transcript of a judgment in the office of the clerk of the district court.

As the docketing of the appeal is essential to the review of the cause, and as review by the supreme court is very obviously contemplated by the express words of section 48-174, Comp. St. Supp. 1935, and as section 33-105, Comp. St. 1929, expressly provides that a fee of $20 shall be paid to the clerk of the supreme court at the time of filing each transcript, original suit, or proceeding, it is clear that conflict exists between sections 33-105 and 48-175. Chapter 57, Laws 1935, of which sections 48-175 is a part, does not expressly purport to amend section 33-105, Comp. St. 1929.

The clerk of the supreme court comes within the purview of the statute which refers to the clerk of "any court," and the docketing of an appeal is a service rendered under the compensation law. Since section 33-105 and section 48-175 are in conflict and cannot be harmonized, the latter amends and modifies the former in so far as it is applied to compensation cases.

The rule is well established in this state that, if an act is complete and independent in itself, it may amend or modify the provisions of existing statutes without controverting

the provisions of the Constitution relating to amendments. *State v. Moorhead,* 100 Neb. 298, 159 N. W. 412; *Sheridan County v. Hand,* 114 Neb. 813, 210 N. W. 273.

It is apparent throughout the act that the legislative intent and purpose was to furnish a quick and sure method of adjudicating compensation claims without expense to the injured workman. We know of no limitation on the power of the legislature to permit litigants to pursue legal remedies without expense to them. In fact, no litigant pays the entire expense of his litigation. The costs fixed by law are only a small part of the cost of the judicial department of our state government. The state has taken a sympathetic interest in injured workmen and their claims for compensation. Whether or not it is desirable to permit one to litigate entirely at the expense of the taxpayers of the state is a matter within the discretion of the legislature. It is sometimes urged that such a policy would greatly increase the number of frivolous appeals. Time will demonstrate the effect in this respect. The mere fact that litigants having access to the courts without the payment of fees may increase frivolous and baseless litigation can in no way affect the construction of these statutes.

Unfortunately, it has been necessary to pay this money collected as costs into the treasury of the state, and we cannot order its return. However, the collection was contrary to the statutory provisions as now construed, and the legislature will undoubtedly make an appropriation for its return.

MOTION OVERRULED.

CITY OF BEATRICE, APPELLEE, V. GAGE COUNTY, APPELLANT.

FILED APRIL 24, 1936. No. 29462.

1. **Statutes: REPEAL.** The repeal of a statute, without a saving clause, destroys all rights founded thereon, where that is the clear intention of the legislature.

2. Reversal. The judgment of the trial court is reversed for the reasons set out in *City of Fremont v. Dodge County*, p. 856, *post*.

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

Ernest A. Hubka, Sackett & Brewster and *C. B. Ellis*, for appellant.

Rinaker & Delehant, Walter A. Vasey and *H. F. Mattoon, contra.*

W. J. Courtright et al., amici curiæ.

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

PAINE, J.

The city of Beatrice filed claim with Gage county to recover certain road taxes, which claim was rejected by the county board, whereupon the city appealed to the district court, and after trial a judgment was rendered for the city. The county appeals, and the city took a cross-appeal.

On June 18, 1931, the city of Beatrice filed a claim against Gage county, asking for the payment of $63,091.11. In said claim it was set out that Gage county had been under township organization since 1885, and claiming that for the 37 years itemized therein the county board had levied road taxes against the property located in the city of Beatrice in the sum above set out, and that the county had converted the same to its own use. A legal demand was made by the city upon the county treasurer, and he refused to pay. The board of supervisors for Gage county on July 7, 1931, rejected said claim of the city of Beatrice. Notice of appeal was given to the county clerk on July 14, 1931, and on July 29, 1931, a petition was filed in the district court, setting out these facts and praying a money judgment against Gage county for $63,091.11, with 7 per cent. interest from June 18, 1931, and costs. Gage county in its answer admitted that the county had been organized as a township organization since

1885, and admitted that township road taxes were levied, assessed, and collected upon the property in the city of Beatrice, and claimed that all of said taxes in controversy belonged to the county as county road levies; under section 39-1201 and section 77-1801, Comp. St. 1929, alleged that none of the taxes in dispute were levied or collected as township road taxes; that none of said taxes were included in the annual estimate certified to the defendant county by the plaintiff city; that plaintiff's claim is barred by the statute of limitations, and that plaintiff city is estopped by reason of inexcusable delay and gross laches from asserting any valid claim to the taxes in question. Thereafter, on December 22, 1933, the respective parties entered into a stipulation of all the facts in the case, which stipulation was 13 pages long.

On January 11, 1934, the case was tried in the district court. On October 5, 1934, a judgment was entered that plaintiff city was entitled to recover one-half of the road tax collected by the defendant county upon property within the corporate limits of said city under section 39-206, Comp. St. 1929; finding further that the city was not barred from recovery by virtue of the statute of limitations, nor was it estopped by reason of delay in bringing the action, and a judgment was entered against said county in the sum of $33,148.80. A motion for new trial was filed by the county of Gage, setting out some 28 errors of the trial judge.

In the brief filed in the case at bar, appellant county assigns a number of errors, charging that the judgment was not sustained by sufficient evidence, and that the judgment entered is contrary to law; that many of the items were barred by the statute of limitations; that the city was estopped by laches and acquiescence in asserting said claim, and that, if the city is entitled to a judgment, said judgment should have deducted therefrom large amounts of offsets for expenses of bridges and roads within the city paid for by the county.

It developed in the trial that all of the road tax money collected from property in plaintiff city had been expended

on roads in the county outside of the plaintiff city, and that no part of the money was in the possession or under the control of the defendant county at the time of trial. While there was a provision in the act under which the city was incorporated which made all of this road money collected from property within the city the property of the plaintiff city, yet a certain provision of the road law, to wit, section 39-206, Comp. St. 1929, gave the plaintiff city only one-half of the money, and the district court adopted the view that such section governed, and gave the plaintiff city a judgment for one-half of the amount sued for. The defendant county appealed from the judgment, and the plaintiff city took a cross-appeal because the judgment was not for the full amount.

While the case at bar was pending in the supreme court, the legislature in the regular 1935 session enacted two new statutes, House Rolls Nos. 60 and 61 (Laws 1935, chs. 88, 31), which the county claims entirely destroys the cause of action of the city of Beatrice. On the other hand, the city claims that the legislature did not have the power to deprive the plaintiff city of its right to recover judgment, and thereby ratify the misconduct of the defendant county in its wrongful use of money held in its hands as trustee and wrongfully converted to its own use. The city charges that the action of the legislature in House Roll No. 60, which declares that section 39-206, Comp. St. 1929, does not apply to township counties, violates the plain meaning of the statute and is contrary to repeated decisions of this court, and that it conflicts with section 4, art. VIII of the Constitution, in that it attempts to release or discharge a county from taxes due a municipal corporation, and denies that the legislature has the power to allocate this money entirely to the county and take it away from the city; House Roll No. 61 is amendatory of section 16-710, Comp. St. 1929, and that the attempted amendment of this section by House Roll No. 61 is unjust and an arbitrary discrimination against cities.

Practically all of the issues involved herein have been ex-

haustively discussed in the opinion in the case of *City of Fremont v. Dodge County*, p. 856, *post*, and the contentions have there been decided in favor of the appellant in the case at bar. There is this difference between the two cases: In the *Fremont* case the legislature acted before the judgment was rendered, while in the instant case the judgment had been entered in the district court and the legislature acted while the appeal was pending in this court.

In a very early case, decided by the supreme court of the territory of Nebraska, it appeared that one Hargus had assaulted Lacy, and in consequence thereof Lacy died, and the administrator brought action for damages. In the Territorial Statutes of Nebraska of 1855, at page 145, it said: "When a wrongful act produces death the perpetrator is civilly liable for the injury." The death occurred April 25, 1856, but in February, 1857, the entire Civil Code was repealed without any saving clause, and Justice Eleazer Wakely said: "By a long course of judicial decisions it has become a settled principle that a right of action, or a remedy founded solely on a statute, or a pending suit to enforce such remedy, not prosecuted to judgment, is terminated by the repeal of such statute, without a provision for saving rights accrued under it, or suits already commenced to enforce them. The reason is apparent. If there be no such remedy at common law, then, after the unconditional repeal of the statute which created it, there is neither common law nor statute to uphold it. I need not cite authorities to sustain this position, which, as a general principle, I understand to be conceded." *Bennet v. Hargus*, 1 Neb. 419. See *Tiger v. Western Investment Co.*, 31 S. Car. 578; *id.* 221 U. S. 286; *United States v. Freeman*, 3 How. (U. S.) 556; *State v. Clausen*, 63 Wash. 535, 116 Pac. 7; *Byram v. Board of Commissioners*, 145 Ind. 240, 44 N. E. 357.

There is a much older case decided in 1801 by John Marshall, C. J., and entitled *United States v. Schooner Peggy*, 1 Cranch (U. S.) *103, 2 L. Ed. 49, which concerns the small Schooner Peggy, navigated by ten men, which ran ashore on the island ruled by General Toussaint L'Ouver-

ture, and was there captured by an American vessel as a prize and condemned as forfeited, one-half to the use of the United States and the other half to the officers and men of the armed vessel Trumbull. Before the supreme court of the United States gave judgment on the writ of error, a treaty was entered into with France on December 21, 1801, which provided that property not yet definitely condemned should be mutually restored. Chief Justice Marshall held that the property had not been definitely condemned, since the judgment of condemnation had been appealed from and was undecided at the time when the treaty took effect; that, therefore, the property should be restored, the chief justice holding: "It is, in the general, true that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. * * * In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside." See *Lovelace v. Boatsman*, 113 Neb. 145, 202 N. W. 418; *Kleckner v. Turk*, 45 Neb. 176, 63 N. W. 469.

"If a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered." Cooley, Constitutional Limitations (6th ed.) 469.

"As a general rule the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions and proceedings pending under it at the time of its repeal." 59 C. J. 1189.

When a cause of action is founded upon a statute, a repeal thereof without a saving clause, even while an appeal is pending and before final judgment, destroys all rights founded thereon, where that is the clear intention of the legislature.

Without extending this opinion further, it is our opinion

that the action of the legislature as found in House Roll No. 60 and House Roll No. 61, Laws 1935, is fatal to the claims of the city of Beatrice.

All of the other issues involved are discussed at length in *City of Fremont v. Dodge County*, p. 856, *post*. It may be suggested that the litigation in that case was in the form of an equitable action for an accounting, while the case at bar is a law action, but section 20-101, Comp. St. 1929, states that in reality we have only one form of civil action in Nebraska; therefore, legal and equitable principles, either or both, may be enforced according to the facts (*Hopkins v. Washington County*, 56 Neb. 596, 77 N. W. 53), and the instant cases afford an excellent opportunity for the application of this statute.

We therefore conclude, under the principles set out in the case of *City of Fremont v. Dodge County*, p. 856, *post*, that the trial court was wrong, and the judgment rendered is hereby

REVERSED.

GOOD, J., dissents.

CITY OF FREMONT, APPELLANT, V. DODGE COUNTY ET AL., APPELLEES.

CITY OF SCRIBNER, APPELLANT, V. DODGE COUNTY ET AL., APPELLEES.

VILLAGE OF UEHLING, APPELLANT, V. DODGE COUNTY ET AL., APPELLEES.

CITY OF NORTH BEND, APPELLANT, V. DODGE COUNTY ET AL., APPELLEES.

FILED APRIL 24, 1936. No. 29600.

1. Highways: ROAD FUNDS. Where the county collects, retains, and annually expends the proceeds of a county road tax over a period of years, and a portion thereof is claimed by a municipality, the county acts as a trustee, and cannot acquire the ownership of such trust funds by mere lapse of time.

2. **Counties.** The county is a public corporation, which exists only for public purposes, and a county and its property are alike subject to legislative control.
3. **Constitutional Law.** The legislature has a plenary law-making power over all subjects, whether pertaining to persons or things, within its territorial jurisdiction, and can make new laws or repeal old laws unless the same are expressly prohibited by the Constitution.
4. **Counties: REVENUES.** The revenues of a county are not the property of the county in the sense in which the revenues of a private person are regarded. The state has an interest in the revenue of a county, and for the public good the legislature has the power to direct its application.
5. **Highways: ROAD FUNDS.** The proceeds of a county road levy held by a county as trustee for a city are at all times subject to the paramount right of the legislature to dictate how said tax funds should be used or allocated.

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

Courtright, Sidner, Lee & Gunderson, for appellants.

William H. Lamme and *Rodney S. Dunlap, contra.*

Edmund P. Nuss et al., amici curiæ.

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

PAINE, J.

Four municipalities brought separate suits in equity against Dodge county, asking for an accounting and payment to each of them of large sums of taxes collected under a county road tax levy over a long period of years. The suits were consolidated for trial, and the district court rendered judgment for the defendant county, and dismissed each of the four suits. The municipalities appealed.

On May 11, 1934, the city of Fremont, as plaintiff, filed a petition in equity against Dodge county and Thomas H. Fowler, county treasurer of said county, setting out, in brief, that plaintiff was incorporated as a village in 1859, and in 1901 became a city of the first class; that from 1887

to 1900 the corporate limits of said city constituted a road district within Dodge county. That Dodge county has levied and assessed a road tax upon all of the property within the city of Fremont, and the taxes have been paid thereon to the county treasurer. That it was the duty of Dodge county to set aside and hold in a trust fund one-half of all road taxes collected upon said property for the years 1887 to 1900, and that between the years 1901 and 1930, inclusive, it was the duty of the defendant county to set aside all of said road tax collected upon property within the city of Fremont, and plaintiff estimates the amount of said trust fund not accounted for by the defendant, Dodge county, to the plaintiff city at between $100,000 and $200,000. That there is now in the hands of the county treasurer a certain amount of said road tax, but the information in regard to the amount is exclusively within the knowledge and possession of the defendant.

Paragraph 12 of said petition sets out a copy of a written demand on the county treasurer, dated May 5, 1934, made by the city of Fremont, demanding, first, two-thirds of the amount of the county road taxes collected within the city of Fremont for the years 1873 to 1878; second, one-half of the amounts collected for county road taxes within the city of Fremont within the years 1879 to 1900, inclusive; and, third, the whole amount collected as county road taxes upon property within the city of Fremont for the years 1901 to 1930, inclusive, and further demanding a full accounting thereof, including the amount of county road tax now on hand collected upon property assessed within the corporate limits of the city of Fremont. It is alleged that the county treasurer, in answer to this formal demand, respectfully declined the same.

It is further alleged that the amendment of 1935 to section 39-206, Comp. St. 1929 (Laws 1935, ch. 88), providing that such section has not heretofore applied to counties under township organization, is a violation of section 10, art. I of the Constitution of the United States, forbidding *ex post facto* laws, or laws impairing the obligation of con-

tracts, and in violation of section 16, art. I of the Nebraska Constitution, in relation to the same matters, and is further a violation of section 4, art. VIII of the Nebraska Constitution, which declares that the legislature shall have no power to release or discharge any county from its proportionate share of taxes due to any municipal corporation. It is alleged that plaintiff has no adequate remedy at law. In the prayer of said petition the city of Fremont, as plaintiff, asks for an accounting from Dodge county, showing all sums of money collected as road taxes within the city of Fremont from 1887 to 1930, inclusive, and for judgment against the defendants for the amount due plaintiff with interest.

To this petition Dodge county filed a 16-page answer, of which only the merest outline can be given. The county charges that the plaintiff city did not file any claim with the board of supervisors; denies all of said petition not admitted; alleges that from 1887 to date the said city has constituted a separate township in Dodge county, and a township road tax has been collected, and all of it paid to Fremont by the county. That from the year 1887 to date the said county has levied and assessed against all of the property in the county, including Fremont, a county road levy, and that the amount collected is unknown to defendant. That the county has assessed and collected on all the property in plaintiff city a street fund tax, all of which has been paid over to the plaintiff city. That, as authorized by chapter 67, Laws 1917, defendant city in 1917 selected and designated county roads which were main traveled roads connecting cities, villages, and market centers, and leading to and from schools, and that the expense of establishment and upkeep of said county roads has been paid for out of the county road fund without the necessity for the issuance of bonds, and that all of the taxes collected for county roads against the property in the plaintiff city have been expended on said roads both within and without the city, and that none of said funds are now in the possession of the defendant county, and that the municipalities of said county have

received and accepted more benefit from the expenditures of said money than any of the other inhabitants of the county, and that the county has spent large sums in maintaining streets and highways within the corporate limits of plaintiff city, and the petition itemizes certain definite sums spent within the limits of plaintiff city in certain years, the total thereof amounting to $30,115.76. Said answer further alleges that said city is, in equity and good conscience, guilty of inexcusable and culpable delay and gross laches in making and presenting its alleged claim, and that same is barred by the statute of limitations, and that all of said funds were used by the defendant county with the full knowledge of plaintiff city, and that said city is estopped and barred from asserting and maintaining its alleged cause of action against the defendant county. That an unprecedented financial depression has existed for several years past, so that the value of farm lands and farm products in said county has greatly depreciated; that many of the farms therein are mortgaged; that many farmers are unable to meet the interest charges now standing against their land. That if timely demand had been made defendant county could without hardship have paid said funds to said city, but that all of said funds have been expended annually as collected by the county for the use and benefit of all the roads of said defendant county. That plaintiff has knowingly acquiesced in and permitted the defendant county, under a claim of ownership and right, to use and expend all of said road taxes, both within and without the limits of plaintiff city, and none of said funds are now in the possession of the defendant county, and plaintiff city, by reason of its course of conduct, is now estopped to assert its alleged demand. That a large number of taxpayers of said county purchased land, relying upon the property being free from any such tax burden, and without any knowledge that a claim could be made by the plaintiff city, and that it would now be inequitable and unconscionable to place charges on the land of said taxpayers to pay a large amount of taxes which have been expended with the acquiescence and con-

sent of the plaintiff city over such a long period of years.

That from 1887 to 1931 the defendant county and its treasurer have acted as agent for the plaintiff city in the collection of all taxes due plaintiff city, and once each year during all of said period has rendered a full accounting and settlement for all of the taxes belonging to plaintiff city so collected, and at the time of each of said annual settlements both plaintiff city and defendant county agreed upon an interpretation of the laws of the state, and, acting thereon, said settlements were made by the said parties upon the basis of the plaintiff not having or claiming any right to any of the taxes so levied. That plaintiff city accepted each settlement so made, and receipted for the same as payment in full of its share of the taxes collected by defendant county, and relying upon such annual settlements and each of them, and upon the construction placed by both parties upon the law in force and effect. That plaintiff city is now estopped to claim said settlements were made under a mistake of law, and defendant county prays that plaintiff's petition be dismissed at plaintiff's costs.

Separate petitions of similar nature were also filed against said county of Dodge by the city of Scribner, the village of Uehling, and the city of North Bend, each located in said county, and separate answers to each were filed by the county of Dodge and by Thomas H. Fowler, its county treasurer. On November 28, 1934, W. J. Courtright filed a motion as attorney for all four plaintiffs, setting out that all four actions involve the same subject-matter, and that the issues of fact and law are practically the same, and that in the interest of economy of expense and time the four cases should be tried together and, if there is an appeal, be briefed and argued together, without prejudice to the rights of any one. There being no objection, an order was made, consolidating the four actions.

A large number of witnesses testified at the trial. Many exhibits, such as maps, charts, and ledger pages, were introduced in evidence. A judgment was entered on April 13, 1935, finding generally for the defendants and against

the plaintiff in each of the four cases. Such actions were thereupon dismissed, and costs in each case taxed to the plaintiff.

The four municipalities, being the appellants in this court, set out a number of assignments of error, which may be set out as follows: The court erred in not finding for the plaintiff in each case for one-half of the full amount of the road tax collected on the property within the respective municipalities levied and collected for the years 1907 to 1930, inclusive, and in not making a specific accounting and finding of the amount of road tax belonging to each plaintiff that was still on hand in the county treasury, and in not ordering the same paid in cash to plaintiffs; the court erred in not rendering judgment for the respective plaintiffs, for the respective amount of their funds which had been appropriated and used by the defendant county, over and above such funds remaining on hand.

The judgment was entered in the case at bar on April 13, 1935, and the legislature of 1935, in House Roll No. 60 (Laws 1935, ch. 88), passed an act, with the emergency clause, which took effect March 6, 1935, which provided "that in counties under township organization all of the moneys heretofore collected as a county road levy and which have not heretofore been paid to any township or municipality in said county, shall be paid by the county treasurer to the county and shall belong to the said county and shall constitute a county road fund, and all of such moneys now in the hands of such county and unexpended, shall be expended by the county board for the benefit of all the county roads as may be deemed best and no part of said moneys, need to be paid to the townships in said counties or to the municipalities within said counties for expenditure by said township officers or said municipalities." Comp. St. Supp. 1935, sec. 29-206.

Did the 1935 legislature violate the Constitution of Nebraska by directing this entire sum of money to remain with the county?

The leading case in the United States on the question of

the control by the legislature of the public funds of the county is the celebrated case of *State v. Baltimore & O. R. Co.*, 12 Gill & J. (Md.) 399, 38 Am. Dec. 317. This case was decided in 1842, and grew out of a railroad charter which provided that, in case the railroad company failed to locate and build its road through three towns in Washington county, the railroad company should in that case forfeit one million dollars to the state of Maryland for the use of Washington county. Upon failure to conform to the charter terms, an action was brought for the million dollars. It was held that the act of the legislature incorporating a railroad company, requiring it to so locate and construct its road, and imposing a forfeiture in case of a failure to so locate it, was not a contract, but a case of penalty, subject as to its enforcement to the will and pleasure of the legislature. As a defense, the railroad company alleged that nothing was due the county, as a later act of the assembly annulled the obligation and released the forfeiture. Washington county treated the case as a clear case of contract covered by constitutional sanction, and, therefore, inviolable by legislative interference. It was held that the legislature had not transcended its constitutional limits in passing the later act of 1840 by which it released the claim of the plaintiff and discontinued the action which had been brought to enforce it. It is stated that Washington county, which is attempting to enforce the claim for a million dollars, is one of the public territorial divisions of the state, established for public political purposes; that the money, if received by the county, would be public property, to be used for public purposes only, and not for the use of her citizens in their private, individual character and capacity. It is held that the remission of the penalty by the state is a legitimate exercise of legislative power. The legislature had the power to remit the penalty accruing to a county in its public capacity as an integral part of the state, for the legislature has a controlling and disposing power over public property. The constitutional provision prohibiting the impairing of contracts does not apply to contracts relating to public proper-

ty, and therefore the act of the legislature in releasing the penalty accruing to a county does not violate the provision in the Constitution prohibiting the legislature from impairing the obligation of contract. This decision was affirmed by the supreme court of the United States in 3 How. (U. S.) 534, 11 L. Ed. 714.

Again, in *Herrick v. Cherokee County,* 199 Ia. 510, 202 N. W. 252, being an action to recover sheriff's collection fee on a mortgage foreclosure. The syllabus holds that a new act repealing another act providing that fees collected by a sheriff at the time of sale under the law which has been repealed, which fees the sheriff turns over to the county, shall be refunded by the county, affects no vested property right, a county being but an arm of the state to aid in its governmental functions, therefore the county and its property are wholly under the control of the legislature. In this case the Iowa court quotes at length from the case of *State v. Board of County Commissioners,* 109 Neb. 35, 189 N. W. 639, which was an action in mandamus to compel the county board of Douglas county to furnish office rooms in the courthouse for the municipal courts of the city of Omaha. It was held that a county does not possess the double governmental and private character that a city has. It is governmental in character only, and acts purely as an agent of the state. Property of the county acquired through taxation is property of which the state can direct the use, management and disposition so long as this is done for the benefit of the public in the taxing district. In the case at bar the taxing district is the entire county of Dodge.

In *Slutts v. Dana,* 138 Ia. 244, 115 N. W. 1115, being an action brought on behalf of all taxpayers of the city of Ottumwa to restrain the county treasurer from collecting a certain bond tax levied by the board of supervisors, it was held that the county is a public corporation, which exists only for public purposes, and that a county and its revenue are alike subject to legislative control.

The first purpose one has in examining a statute about which dispute has arisen is to ascertain the intention of the

legislature from the language of the statute itself, and when that is determined it is binding upon all, for to alter the statute by giving its words another meaning is in reality for the court to legislate rather than interpret.

Did the passage of chapter 88, Laws 1935, impair the vested rights of the municipalities in the case at bar?

In 59 C. J. 1179, we find: "Curative statutes, by reason of their remedial and retrospective nature, are applicable not only to past transactions generally, but also to cases pending in the trial court, and, in some jurisdictions, upon appeal."

"It is truly said that the bringing of suit vests in a party no right to a particular decision; and his case must be determined on the law as it stands, not when the suit is brought, but when judgment is rendered." 2 Lewis' Sutherland, Statutory Construction (2d ed.) sec. 677. See, also, Cooley, Constitutional Limitations (6th ed.) 469.

Again, in 1 Lewis' Sutherland, Statutory Construction (2d ed.) sec. 244, statutes are perpetual when no time is stated, but the operation of statutes may be suspended. "A state legislature has a plenary lawmaking power over all subjects, whether pertaining to persons or things, within its territorial jurisdiction, either to introduce new laws or repeal the old, unless prohibited expressly or by implication by the federal Constitution or limited or restrained by its own." A legislature may modify or abolish acts passed by itself or its predecessors; and in section 272, "Where the revising act prescribes its operation or effect upon a previous statute, it will have no other;" and in section 280, "If a conflict exists between two statutes or provisions, the earlier in enactment or position is repealed by the later."

In a very early Nebraska case we find some very pertinent statements. It is said in *State v. Graham,* 16 Neb. 74, 19 N. W. 470, that the county is a quasi corporation, and neither the county nor any officer has any vested right to the moneys which places them out of the reach of the law; that the legislature ought not to change the custody or control or disposition of funds except for a good cause, but of

that the legislature is the sole judge. The revenues of a county are not the property of the county in the sense in which the revenues of a private person or corporation are regarded. The whole state has an interest in the revenue of a county, and for the public good the legislature must have the power to direct its application. The power conferred upon a county to raise a revenue by taxation is a political power, and its application when collected must necessarily be within the control of the legislature.

It is clear that the tax funds in the case at bar were trust funds being held by the county as a trustee for the city of Fremont, and that the rights of said city were at all times subject to the paramount right of the legislature to dictate how said tax funds should be used.

The question then arises whether this cause of action might not be preserved to the plaintiffs under the general saving clause? To answer, we need only quote another paragraph from chapter 88, Laws 1935, as follows: "Provided, further, that the general saving clause of the statutes of Nebraska, section 49-301, Compiled Statutes of Nebraska, 1929, shall not apply to preserve to any municipality or governmental subdivision any right which such municipality or governmental subdivision may have had or claimed with respect to said moneys collected in counties under township organization as a county road levy and which have not heretofore been paid to such municipality or governmental subdivision, and provided further that the provisions of this section as amended shall take effect from and after its passage and approval, and shall be held and taken to apply to any case now pending and in which judgment has not become final in a court of last resort and to any case hereafter brought in any court in this state." Section 2 repealed the original section, and section 4 was the emergency clause, providing that the act took effect from its approval, which occurred on March 6, 1935, while the judgment was entered by the trial court in this case on April 13, 1935.

"Although the general proposition be undisputed that 'an

affirmative statute giving a new right, does not of itself and of necessity destroy a previously existing right,' it will nevertheless have such effect, 'if the apparent intention of the legislature is that the two rights should not exist together.'" Broom's Legal Maxims (9th ed.) 363.

It appears that there are now 27 counties in Nebraska organized under the supervisor plan; that, in addition to Dodge and Gage counties, now engaged in this litigation, the county attorneys of the following supervisor counties, to wit, Adams, Antelope, Buffalo, Butler, Cuming, Custer, Dixon, Fillmore, Franklin, Hall, Kearney, Merrick, Nance, Platte, Seward, Valley, and York, have endeavored to assist this court by filing a joint brief in the case at bar, setting out that similar alleged liability exists in all counties under township organization in the state.

We will assume that the funds the municipalities are seeking to recover were trust funds and did at the time belong to the municipalities as beneficiaries. Yet, at the same time, all of the funds in controversy collected on the county road levy during all these years were at all times public funds. Regardless of the ownership, these public funds were collected from the taxpayers by the county for the specific purpose of improving the roads. The taxpayers, whether inhabitants of the cities or in the county outside of the cities, were interested in good roads leading from the country into the cities, and the municipalities were, at all times, encouraging the county supervisors in making better roads to bring more trade into the cities.

The taxpayers in the cities who paid this county road levy and the officers of these cities, knowing all the facts, stood by year after year, receipting for all sums paid to the cities annually, but made no protest, objection, or complaint because they did not also receive a portion of this county road levy. The county officers, therefore, under this state of facts were justified in expending the taxes received on this county road levy on road improvements which benefited all of the taxpayers of the county.

When substantial benefits have been received under a

contract which it is authorized to make, but which is void because irregularly executed, the city cannot, after having paid the reasonable value of the benefits received, maintain an action to recover them back. A city which has for many years recognized and accepted a water-works system, as fully complying with the contract, cannot afterwards repudiate such recognition and claim damages for failure to comply with the contract. 10 R. C. L. 708, sec. 36.

It will perhaps be found that cases sometimes arise of such a character that they form a law unto themselves, and do not fall within the legal operation of limitation enactments, for it is well known that municipal corporations are not within the ordinary statutes of limitation. Dillon, Municipal Corporations (5th ed.) sec. 1194; 19 R. C. L. 1147, sec. 423.

In *Tiger v. Western Investment Co.*, 221 U. S. 286, it was held that the last act upon the same subject-matter may be considered to assist in interpretation of prior legislation. Therefore, if chapter 88, Laws 1935, shows clearly a certain intent and object, it must be carried out by this court; for as Mr. Justice Story said: "Every technical rule as to the construction or force of particular terms must yield to the clear expression of the paramount will of the legislature." *Wilkinson v. Leland*, 2 Pet. (U. S.) *627, 7 L. Ed. 542.

That there exists a general power in the state governments to enact retrospective or retroactive laws is a point too well settled to admit of question at this day. The only limit upon this power in the states by the federal Constitution is the provision that these retrospective laws shall not be such as are technically *ex post facto*. Thus, in the case of *Watson v. Mercer*, 8 Pet. (U. S.) *88, 8 L. Ed. 876, the court says: "It is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the states from passing retrospective laws, generally; but only *ex post facto* laws. Now, it has been solemnly settled by

this court that the phrase, *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws." See *Henry v. McKay,* 164 Wash. 526, 3 Pac. (2d) 145, 77 A. L. R. 1025.

It is true that inequality of tax assessments vitiates an act of the legislature, but inequality of distribution of the proceeds does not, provided the purpose be for the public welfare of the whole taxing district. *Sawyer v. Gilmore,* 109 Me. 169, 83 Atl. 673; *Smith v. Board of Commissioners,* 173 Ind. 364, 90 N. E. 881; *Rinder v. City of Madison,* 163 Wis. 525, 158 N. W. 302.

There is no ground here for the application of constitutional restraints by a municipality against the action of the state legislature. They do not apply as against the state in favor of its own municipalities unless there are clear constitutional provisions to that effect. *City of Trenton v. State of New Jersey,* 262 U. S. 182, 29 A. L. R. 1471.

After a very careful examination of the record in this case, we are convinced that the appellants in the case at bar have no rights in and to the tax funds in litigation, and that the district court was right in dismissing the suits filed by the four municipalities.

AFFIRMED.

GOOD, J., dissents.

OTOE COUNTY ET AL., APPELLEES, V. C. L. KELLY, COUNTY TREASURER, APPELLANT.

FILED APRIL 25, 1936. No. 29872.

1. **Counties.** County board may lawfully direct a jail fund, collected by taxation and in the county treasury, to be transferred to a special building fund, to be expended in the construction of an addition to the courthouse, including a jail in such addition, where the cost of the jail equals or exceeds the jail fund in the treasury.
2. ———. County may construct addition to and remodel and repair its courthouse without resort to bond issue or tax levy,

where there is a sufficient fund on hand available for such purpose.

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

Marshall Pitzer, for appellant.

Moran & James, contra.

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

GOOD, J.

This is an action for a declaratory judgment to determine whether the county board of Otoe county, by resolution, has power to direct the county treasurer to transfer a balance of $27,980.26 in a county jail fund and $3,000 from the general fund to a special fund for the construction of a jail, an addition to the courthouse and remodeling and repair thereof; and whether the county treasurer is required, upon resolution of the county board, to make such transfer.

The action was instituted by the county of Otoe and its county board against the county treasurer. In the answer of the treasurer it is asserted that the jail fund was collected by general taxation for the construction of a jail; that it would be unlawful to transfer such fund to another fund, and that, should he do so, he might be personally liable on his official bond, and it is contended that the county board has no authority to direct such transfer. The trial court entered judgment for plaintiffs and determined that the county board was authorized to direct the transfer of such fund to the special fund, and that it is the duty of the county treasurer, upon resolution of the county board, to make such transfer and to pay out such fund upon warrants for which the special fund would be created. The county treasurer has appealed.

The record discloses that the present county jail is in the basement of the courthouse; that the building is some 60 years old and is totally inadequate for the needs of the

county, either for a courthouse or a jail; that there is a lack of vault space for the county records, lack of office rooms for a number of the county officials, and that a new wing to the courthouse is needed; that the county jail is unsanitary, insecure and totally inadequate for the needs of the county. It also appears that the county of Otoe is in a position to obtain from the United States government the sum of $24,781, to be used in the construction of an addition to and remodeling and repair of the courthouse and the construction of a jail in the new wing or addition to the courthouse, and that such fund, together with the jail fund and $3,000 from the general fund, all placed in a special fund to be used for the construction of the addition to and remodeling of the courthouse and construction of the jail, will be sufficient for that purpose. It also appears that the county board has adopted plans and specifications for the proposed improvement, of an addition to and remodeling and repair of the courthouse and a new jail, and has advertised for and received bids for such construction, and that the proposed fund from the three sources is sufficient for the entire improvement. It also appears that the amount of the special fund, which would be required for the proposed jail in the wing or addition to the courthouse, would be in excess of $29,000, so that, in effect, the total amount of the jail fund, in the event the improvement is made according to the contract, would be wholly expended for jail purposes and none of such fund would be diverted from the purpose for which it was raised by taxation.

With respect to the transfer of $3,000 from the general fund, section 26-717, Comp. St. 1929, provides: "The county board of any county in the state of Nebraska shall have the power to transfer any unexpended balance * * * to any other county fund, when the interests of the county seem to demand such transfer: Provided, in no case shall such transfer reduce the amount of said county general fund below the sum of two thousand dollars." It is conceded that the transfer of $3,000 from the general fund would leave more than $2,000 in that fund, and the power of the county board

to authorize transfer of $3,000 of the general fund to the special fund in question is not contested.

Section 26-108, Comp. St. 1929, among other things, provides that a fund for the erection of a courthouse or jail shall be used only in the construction of a courthouse or jail, or for the expense of tearing down an existing courthouse or jail, or making improvements thereon. Appellant contends that the transfer of the fund in question would authorize the expenditure of the jail fund for another purpose than that for which it was created. If the contemplated improvement is made, it is true that the jail fund, when transferred to the special fund, would be used, with other funds, not only in the construction of a jail, but for the addition to and remodeling and repair of the courthouse, but, since more than the jail fund would be used for the construction of the jail, which would be in the basement of the proposed wing or addition to the courthouse, it seems that it can scarcely be contended in good faith that the jail fund would not be used for the purpose for which it was raised by taxation.

It might be suggested that the county was not authorized to expend the fund without an appropriation for that special purpose, and that, since the statute provided a specific method for raising funds for the construction of a county jail and for remodeling of a courthouse, that method alone should be used.

In *Carr v. Fenstermacher*, 119 Neb. 172, 228 N. W. 114, it was held: "A grant of power to a city may imply a means of exercising it in addition to statutory methods without restriction as to others." It was also therein held: "Where a city of the second class has on hand sufficient available money to pay the purchase price of a municipal lighting utility, resort to a tax levy or to a bond issue for that purpose may be unnecessary, such methods, though authorized by statute, not being exclusive." In that case there was a fund on hand sufficient for the construction of the utility. It was further held therein: "Power of a city to install and maintain a municipal lighting plant by means of a tax levy

or a bond issue may, for such purposes, imply power to make a cash payment from funds already on hand."

In the instant case, the money is on hand or available from the gift of the United States government and the fund in the treasury of the county to make the needed improvement. Resort to a levy or bond issue for an addition to the courthouse was, therefore, unnecessary, and we think it was within the power of the county board not only to authorize the transfer of the jail fund in the county treasury and $3,000 from the general fund, but also to contract for the proposed improvement, including the construction of a jail in the proposed addition to the courthouse.

We are of the opinion that the trial court committed no error; that its judgment is right, and it is therefore

AFFIRMED.

PATRICK C. KELLY, ADMINISTRATOR, APPELLEE, V. PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLANT.

FILED APRIL 30, 1936. NO. 29660.

1. Insurance: POLICY. An insurance policy must be considered as containing provisions required by statute to be included in it.
2. ———: ———: LAPSE. Where the insured borrowed the full cash value of a life policy, made no further premium or interest payments, and the remaining loan value would not have paid accrued premiums and interest, the policy lapsed and insured was entitled only to extended insurance.
3. ———: ———: CONSTRUCTION. An insurance policy should be construed most favorably to the insured, but courts cannot make contracts for parties.

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

Hall, Young & Williams, for appellant.

Emmet L. Murphy and *Kenneth G. Harvey, contra.*

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

GOSS, C. J.

At the close of the evidence, both parties moved for a directed verdict. The court sustained plaintiff's motion.

October 1, 1913, defendant issued a twenty-payment life policy for $3,000 to Thomas M. Kelly, for a premium of $69.78, payable annually. He paid 19 annual premiums. At the end of the nineteenth year the policy had a cash surrender and loan value of $1,191, as shown by the printed table which is a part of the policy. The last or twentieth premium payment came due October 1, 1932. It was never paid in cash, but plaintiff claims the insured was entitled to credits which would have paid it in a manner hereinafter set forth. The insured died on April 17, 1934.

The insured had borrowed on his policy in 1921, 1922, and 1923. In the nineteenth year, on November 17, 1931, he paid off his previous indebtedness on his policy by borrowing the full cash surrender or loan value of $1,191 at the end of the nineteenth year, October 1, 1932, and took out the entire value of his policy by receiving a check for $466.82. This left his policy with the premium paid for the nineteenth year and with the interest paid on the loan to October 1, 1932. Nothing further was ever paid in cash by or for the insured.

As of October 1, 1932, a dividend of $19.71 was allowed on the policy. The premium due on that date was $69.54 (it having been reduced from the original $69.78), so the money to pay this premium was short $49.83 of the necessary amount.

The insured was notified by the company that he had a dividend of $19.71, and that this would reduce the net premium to $49.83, but he paid no attention to it. The interest on his loan of $1,191, at 5 per cent. per annum was contracted to be paid in advance on each anniversary of the policy, so there was due $59.55 in interest on October 1, 1932, if he desired to keep both the policy and the loan in force and good standing.

When the insured failed to pay the October 1, 1932, premium in advance, defendant followed the provision of

the policy, lapsed the original policy of $3,000, and gave the insured for his $19.71 automatic extended insurance for one year and 47 days from October 1, 1932. This extended his insurance so that it expired on November 17, 1933. The extended insurance was for $3,000 (the face of the policy) less $1,191 (its gross cash surrender value) and was based upon the net term rate for the resulting $1,809 of insurance at insured's attained age of 41 years.

The terms of the policy as to advances or loans seem to comply with the provisions of the eighth subdivision of our section 44-602, Comp. St. 1929. Indeed, an insurance policy must be considered as containing provisions required by statute to be included in it. *Campbell v. Columbia Casualty Co.*, 125 Neb. 1, 248 N. W. 690.

But plaintiff contends that there was more than sufficient loan value in the policy on October 1, 1932, to pay the twentieth and last premium, and that it was the duty of the company to apply so much as was necessary of the increased loan value of the twentieth year toward the payment of this last premium, thus giving the insured a paid-up policy for all time until his death.

To arrive at his conclusion, plaintiff has to argue that the total cash surrender or loan value of the policy at the *end* of the twentieth year should be credited as of October 1, 1932, which was the *beginning* of the twentieth year. That value is $1,284, which is $93 more than the $1,191 value at the end of the nineteenth year, all of which was exhausted by the loan in existence. This all arises from the increase of reserve. The increase of reserve does not and cannot come until the end of the year. This increase must come from only two sources: First, a premium paid annually in advance, as provided by our statute and by the insurance policy; second, earnings on the previous reserve.

The statute recognizes this situation. It provides as a condition precedent to granting a loan of the "reserve at the end of the current policy year and on any dividends in addition thereto" that the company will deduct (1) "any existing indebtedness on the policy," and (2) "any unpaid

balance of the premium for the current policy year," and (3) "may collect interest in advance on the loan to the end of the current policy year." Comp. St. 1929, sec. 44-602, subd. 8. We find no way in which the $93 of increased loan value due at the end of the twentieth year can be used without first paying the $69.54 annual premium due in advance for that year and without paying in advance the $59.55 interest on the $1,191 borrowed the year before. This is as provided by the statute and by the policy. There was in the hands of the company only the $19.71 dividend due October 1, 1932. As we have seen, that was applied to extended insurance under the automatic extended insurance feature of the policy. It expired before the death of the insured.

In a very similar case, where 18 premiums had been paid on a twenty-payment life policy, a court held that, where the insured borrowed the full cash value of a life policy, made no further premium or interest payments, and the remaining loan value would not have paid accrued premiums and interest, the policy lapsed. The policy should be construed most favorably to the insured, but courts cannot make contracts. *Great Southern Life Ins. Co. v. Kirkpatrick*, 48 S. W. (2d) (Tex. Civ. App.) 759.

The motion of defendant for judgment should have been sustained. The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

IDELLE HOLMAN ET AL., APPELLEES, V. C. LAWRENCE STULL, APPELLANT.

FILED APRIL 30, 1936. No. 29624.

1. **Judgment:** VACATION. Motion to vacate judgment, filed in the same term of court but more than three days after entry of judgment, is addressed to the sound discretion of the trial court. An order denying such motion will not be disturbed, on appeal, unless an abuse of discretion is disclosed.

2. ———: ———. Judgment will not be reversed for harmless error.
3. ———: ———. Litigant may not complain of injury suffered in consequence of his own negligence.

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

S. L. Winters, for appellant.

J. A. Capwell, contra.

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

GOOD, J.

This is an appeal from an order of the district court for Cass county, refusing to set aside and vacate a judgment in favor of plaintiffs and against defendant.

The record discloses the following pertinent facts: In December, 1933, plaintiffs filed action against defendant for money deposited with defendant as security for a lease and for work and labor. In November, 1934, plaintiffs filed an amended petition, claiming a larger amount due them. Defendant employed counsel who prepared and filed an answer and cross-petition on the 15th day of April, 1935, but without verification. It was agreed between counsel for defendant and plaintiffs that the answer and cross-petition might be verified at the time of trial. To this answer and cross-petition plaintiffs filed an answer and reply on the 16th day of April, 1935. Apparently, the term of court opened on the 15th day of April. Some time previous thereto there had been a call of cases and the instant case was set down for trial on the 16th of April. Counsel for defendant, on the morning of the 15th of April, visited defendant at his farm, two and one-half miles from the county seat, and informed him that the case would be for trial either in the afternoon of the 16th or the morning of the 17th of April, and requested defendant to come to the county seat. Defendant told his counsel that he was busy and would not attend at

that time. He now claims that he further told his counsel that he had a large number of cattle and horses which had escaped from the pasture and were on a rifle range where rifle practice was being carried on, and that it was necessary for him to get his cattle and horses therefrom in order to keep them from being shot and destroyed.

The cause was regularly reached for trial on the morning of April 17. Counsel for defendant was present and informed the court that he had requested the attendance of his client, but that his client had said he was too busy and could not come in. Counsel then asked leave to withdraw his appearance as counsel, which was granted, and he departed from the courtroom. Thereafter counsel for plaintiffs asked and obtained leave of court to withdraw his reply to defendant's answer and cross-petition, and then moved to strike the answer and cross-petition from the files because it was not verified. This motion was sustained. Thereupon plaintiffs waived a jury; trial was had to the court; witnesses were called and examined, and judgment was entered for plaintiffs. Counsel for defendant did not notify defendant of his withdrawal from the cause, and did not know until some ten days later that a judgment had been taken against his former client.

About ten days after judgment was entered, defendant visited his former counsel and ascertained from him and the clerk of the court that judgment had been entered against him and that his counsel, with consent of the court, had withdrawn from the cause. Defendant then employed other counsel and filed a verified motion to vacate and set aside the judgment, in which he asked to be permitted to verify and file his answer and cross-petition and have a trial of the issues presented by such pleadings. On this application affidavits were introduced and oral evidence taken. After the hearing the court refused to vacate the judgment. The application was made at the same term of court, but more than three days after judgment.

It is conceded by defendant that the application for vacation of the judgment was addressed to the sound discretion

of the trial court, and that, unless there was an abuse of discretion, the judgment should be affirmed. However, it is strenuously contended that the trial court abused its discretion. Upon the hearing, the oral evidence of defendant's former counsel was taken. He testified, in substance, that early in the morning of the 15th of April he visited defendant at his farm, informing him that the case would be called for trial either on the afternoon of the 16th or the morning of the 17th of April, and requested defendant's attendance; that defendant informed him that he was too busy and would not come in, but did not tell him what his business was or that there was any emergency which required his being away from court. Defendant, himself, testified that the reason he could not come in was because of the necessity he was under in looking after his cattle, to prevent them from being killed on the rifle range, and that he had so informed his counsel. In this respect the evidence is in conflict. Other witnesses, by affidavit, showed that defendant, on the day of the trial, the 17th, was seen at his home hauling hay and was not looking after his live stock. The affidavit of another witness was that on the 17th of April he called at the home of defendant and did not find him there, and was informed by members of his family that he was away looking after his cattle on the rifle range. Another person, who had charge of the rifle range, testified by affidavit that on the 5th of April he had taken up 11 of defendant's horses and impounded them because they were on the rifle range, and that he had so notified defendant's son, but that defendant did not come for these horses until the 19th of April, two days after the trial of this cause. There is sufficient evidence from which the court could find, and did find, that the defendant, without just reason and contumaciously refused to attend the trial of his cause when it was regularly set down for trial.

It is contended that the court committed prejudicial error in not continuing the case after defendant's counsel had withdrawn; that plaintiffs had waived the want of verification to defendant's answer and cross-petition by filing a

reply thereto, and that it was error, for that reason, to strike the answer and cross-petition from the files.

It may be conceded that it was error for the court to strike the answer and cross-petition from the files, under the circumstances. However, unless that error was prejudicial, it can avail the defendant naught. The evidence taken at the trial upon the petition is in the bill of exceptions and is ample to sustain the judgment entered. If the answer had not been stricken, the result would no doubt have been the same. Therefore, it seems that defendant was not prejudiced by the striking of his answer and cross-petition from the files. A judgment will not be reversed for harmless error. If defendant had been prejudiced in any wise, it was because of his own wilful act in refusing to attend court at the time his cause was set for hearing, of which he had due notice. Courts are not required to wait on the pleasure or whim of litigants. It is the duty of litigants, unless unavoidably prevented, to attend court at the time their causes are set for hearing. There is ample evidence that would justify the court's finding that the defendant wilfully and without just cause absented himself from court when he should have been present. Defendant may not complain of any injury he has sustained by reason of his own negligence and want of care.

It is also contended that it was error to enter judgment for more than was indorsed upon the original summons, but that question was not raised in the motion for a new trial and was not passed upon by the trial court. It is therefore not before us for consideration.

From a careful scrutiny of the entire record, we fail to find any abuse of discretion by the trial court that was prejudicial to defendant. Judgment

AFFIRMED.

CLARA A. MILLS, EXECUTRIX, APPELLANT, V. C. E. MILLS ET AL., APPELLEES.

FILED APRIL 30, 1936. No. 29461.

1. **Statutes:** CONSTRUCTION. "In considering an amendatory or substituted statute, it is proper to consider the provisions of the law which was repealed in connection with the law which takes its place, in order to ascertain the legislative intent, and all provisions of the original statute which are not carried forward into or repeated in the new law are annulled by the repealing statute." *Campbell v. Youngson*, 80 Neb. 322, 114 N. W. 415.
2. **Witnesses:** COMPETENCY. The testimony of a witness as to a transaction or conversation had by him with a person since deceased is inadmissible in any civil action or proceeding in the result of which such witness has a direct legal interest, when the adverse party thereto is the representative of such deceased person, unless and until the evidence of such deceased party, in regard to such transaction or conversation, shall have been taken and read in evidence by such representative, or unless the latter shall have first introduced a witness who shall have testified to such transaction or conversation.

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

Stiner & Boslaugh, L. R. Stiner and *Charles E. McCarl*, for appellant.

J. F. Ratcliff and *Butler & James, contra.*

Heard before GOOD, EBERLY and DAY, JJ., and RAPER and PROUDFIT, District Judges.

EBERLY, J.

This is an action at law upon three promissory notes. A. J. Mills, on March 17, 1932, filed his petition in the district court for Hitchcock county, alleging that the defendants, C. E. Mills, B. O. Mills, and J. E. Mills, were indebted to him on three promissory notes, for which indebtedness he prayed judgment. Defendants B. O. Mills and J. E. Mills answered that the notes in suit were given to evidence the purchase price of certain horses sold by A. J. Mills to C. E. Mills; that there was no other consideration therefor; that

plaintiff advised the answering defendants that he did not expect them to pay said notes, but that their signatures were necessary in order that said notes could be used by plaintiff in connection with third parties; and that they signed said notes only for the accommodation of the plaintiff. Plaintiff's reply was a general denial. The first trial of the case resulted in judgment upon a directed verdict for plaintiff against B. O. Mills and J. E. Mills, the principal debtor, C. E. Mills, not being served. This judgment was reversed on appeal (126 Neb. 74, 252 N. W. 471) and the case remanded. Thereafter A. J. Mills died, and the action was revived in the name of his executrix, Clara A. Mills, appellant. Upon retrial on the same pleadings, the jury's verdict was for the defendants, and judgment was rendered accordingly. From the order of the trial court overruling her motion for a new trial, the executrix appeals.

The sole question presented by the record is whether the trial court properly admitted in evidence, over objections of the executrix properly framed under section 20-1202, Comp. St. 1929, the evidence of the two defendants as to the oral statements made and oral conversation had between them and the original plaintiff, now deceased, which related to and comprised the transaction between these parties substantially at the time of, and which resulted in, the execution by the defendants of the obligations in suit. Preceding this, the three notes in suit had been offered and received in evidence; the death of A. J. Mills was proved, and the appointment of the executrix established; and the defendants' pleading admitted the signatures of the notes, the delivery thereof, and the amount unpaid thereon.

The controlling section of our statutes is 20-1202, Comp. St. 1929. It was originally adopted as section 329 of title X of our Civil Code in 1866.

Section 328 of the Civil Code of 1866 provided: "Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: (Here

followed five statutory classes of incompetents, which have no application to the instant case.)"

Section 329, so far as here applicable, originally provided: "Nor shall any person having a direct legal interest in the result of any civil cause or proceeding, be a competent witness therein, when the adverse party is an executor, administrator, or legal representative of a deceased person."

By an act approved February 19, 1877, such section 329 was amended to read: "No person having a direct legal interest in the result of any civil cause or proceeding shall be a competent witness therein, when the adverse party is an executor, administrator, or legal representative of a deceased person, unless the testimony of such deceased person shall have been taken during his lifetime, and is to be read in evidence in such cause or proceeding."

However, in 1883, section 329 was again amended by chapter 83 of the session laws of that year to read as it now appears in our 1929 Compiled Statutes as section 20-1202, viz.: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation."

Under the terms of the statute last quoted, appellees insist that the proper rule to be applied in the instant case is: "Where a party has been rendered incompetent to testify by reason of the death of the adverse party, his testimony at a former trial, given when the adverse party was living and had and exercised the privilege of cross-examination and

testifying in rebuttal, is admissible on a second trial of the same issues."

This jurisdiction is fully committed to the doctrine that, "Where a witness is shown to be absent from the state, his testimony given at a former trial of the cause is admissible in evidence, *if otherwise unobjectionable.*" (Italics ours.) *Omaha Street R. Co. v. Elkins,* 39 Neb. 480, 58 N. W. 164. See, also, *City of Omaha v. Jensen,* 35 Neb. 68, 52 N. W. 833; *Jerich v. Union P. R. Co.,* 97 Neb. 767, 151 N. W. 310; *In re Estate of O'Connor,* 101 Neb. 617, 164 N. W. 570; *Koenigstein v. State,* 103 Neb. 580, 173 N. W. 603.

Whether or not the questioned testimony in the instant case is or is not "otherwise unobjectionable" must be determined by the proper construction of section 20-1202, Comp. St. 1929, hereinbefore quoted. Such testimony obviously is not within the express terms of this statute as it now exists. As we now read it, it prescribes two requisites to the admission of this class of evidence, stated in the alternative, viz.: Either (1) the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or (2) such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation.

In the instant case, on the present trial, the representative of the deceased party "read no evidence of such deceased," and introduced no witness who testified to the conversation or transaction which constituted the defense in the instant suit. The conclusion follows that the admission of the controverted evidence is not justified by the express terms of the statute, and if to be approved, it must be because of necessary implications arising therefrom. However, if we recur to the amendment of 1877 we find statutory language which might justify the action under consideration. It might well be said, in view of the precedents cited, that the previous testimony of the defendants given at the first trial, in the presence of the deceased, and subjected to cross-examination by deceased's legal representa-

tives, was squarely within the words of the 1877 amendment which excluded as inadmissible the evidence of a party having a direct legal interest when the adverse party is an executor, administrator, or legal representative of a deceased person; and also defined as an avoidance of such exclusion, "unless the testimony of the deceased shall have been taken during his lifetime," etc. Under the amendment of 1877, it would seem that the controverted evidence here in question would be receivable for the very reasons now advanced to support the action of the trial court in the instant case. But the language just set out, contained in the amendment of 1877, was absolutely repealed by the amendment of 1883 already referred to.

In the construction of statutes, the history of the legislation involved becomes important. So too, this jurisdiction has announced this rule: "In considering an amendatory or substituted statute, it is proper to consider the provisions of the law which was repealed in connection with the law which takes its place, in order to ascertain the legislative intent, and all provisions of the original statute which are not carried forward into or repeated in the new law are annulled by the repealing statute." *Campbell v. Youngson,* 80 Neb. 322, 114 N. W. 415.

Such a comparison indicates beyond question that the provisions introduced in section 329 of our Civil Code by the amendment of 1877, heretofore quoted and referred to, were in no part and in no degree carried forward into or repeated by the amendment of 1883 which now constitutes section 20-1202, Comp. St. 1929. Such being the case, they must be considered as annulled by the necessary effect of the provisions of section 20-1202 now in force. See *Campbell v. Youngson, supra*; *In re Estate of Bayer,* 116 Neb. 670, 218 N. W. 746; *Ancient and Accepted Scottish Rite v. Board of County Commissioners,* 122 Neb. 586, 241 N. W. 93; *Shandy v. City of Omaha,* 127 Neb. 406, 255 N. W. 477; *State v. Thomas,* 127 Neb. 891, 257 N. W. 265.

It may also be suggested that such section 20-1202 is a part of our Civil Code. Its language should be considered

in the light of other Code provisions relative to the subject to which it pertains. Its terms manifestly relate to the subject of conduct of trials, and, as involved in the instant case, to conduct of jury trials.

Section 20-1107, Comp. St. 1929, so far as pertinent in the instant case, provides: "The trial shall proceed in the following order, unless the court for special reasons otherwise direct. * * * Third. The party who would be defeated if no evidence were given on either side must first produce his evidence; the adverse party will then produce his evidence. Fourth. The parties will then be confined to rebutting evidence unless the court, for good reasons in furtherance of justice permits them to offer evidence in their original case."

Construing sections 20-1202 and 20-1107 together, it is obvious that the evidence of the deceased person or the testimony of the witness referred to in section 20-1202 is by that section contemplated to have been read or given in the regular course of trial as prescribed by section 20-1107, by the party adverse to him who is seeking to take advantage of the exception thus created. In the instant case, the plaintiff at no time introduced any part of the controverted evidence, and therefore the adverse parties can claim no rights of proof because of the exceptions created by section 20-1202. It may be said that this conclusion is in harmony with the following precedents: *Quick v. Brooks*, 29 Ia. 484; *Russell v. Estate of Close*, 83 Neb. 232, 119 N. W. 515; *Bresler Co. v. Bauer*, 212 Wis. 386, 248 N. W. 788; *Smith v. Billings*, 76 Ill. App. 454; *Garvik v. Burlington, C. R. & N. R. Co.*, 131 Ia. 415, 108 N. W. 327.

It follows, in view of the situation as appears in the record before us, that the conditions precedent created by section 20-1202 do not appear in such record, and the trial court erred in the admission of the controverted evidence as to the conversation and transaction between the deceased plaintiff and the defendants, testified to by the latter, and erred in overruling plaintiff's motion for a new trial based thereon.

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

REVERSED.

FRED A. NYE, APPELLANT, V. WARD W. ADAMSON, APPELLEE.

FILED APRIL 30, 1936. No. 29488.

1. **Pleading.** In the absence of a motion for a more specific statement, the words of the petition, viz., "and greatly interferes with his business which is that of practicing law; * * * and thereby plaintiff has suffered damage in the sum of $10,000," following a proper description of injuries received, construed in connection with the context, charge substantial injury to such business, sufficiently to permit and justify the introduction of competent evidence to establish the nature and extent thereof. This includes proper proof as to earnings and of decreased earning ability.
2. **Evidence** examined, and *held* to establish amount of verdict returned wholly inadequate to compensate for actual injuries proved.

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

N. P. McDonald, George I. Craven and *Nye & Nye*, for appellant.

Hamer & Tye, contra.

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

EBERLY, J.

This is an action at law to recover damages for personal injuries occasioned by an automobile collision occurring on May 5, 1933, prosecuted by Fred A. Nye, as plaintiff, against Ward W. Adamson, as defendant. A trial to a jury resulted in a verdict for the plaintiff in the sum of $611. From the order of the trial court overruling his motion for

a new trial, plaintiff appeals. No cross-appeal has been filed by the defendant.

Both the evidence and the verdict of the jury unquestionably establish actionable negligence on part of defendant. The appeal presents substantially two errors, viz.: First, inadequacy of the recovery; and, second, errors of the trial court which resulted in a denial to plaintiff of his right to establish the full extent of the damages he suffered.

The damages sustained by plaintiff were pleaded in his amended petition, on which the case was tried, in the following language: "That by reason of the injuries sustained by the plaintiff as above set forth, he suffered great shock, pain and anguish; that he has not recovered from said injuries and still suffers sharp pains, particularly in the right side or top of his head, which pains pass away and a dull headache around the forehead and down between the right eye and the right ear and on the left side of his head which occur every day and every night and more severely when plaintiff exercises more than usual, or in riding in an automobile on a graveled road or in riding in a train, and greatly interferes with his business which is that of practicing law; that said injuries are permanent and thereby plaintiff has suffered damage in the sum of $10,000."

The allegations of this amended petition were not challenged either by motion to make more definite and certain or by formal demurrer in writing.

Issues were joined by the defendant in his answer to this pleading, which, so far as concerns the portions above quoted, amounted to a general denial.

Upon trial of the cause, after the jury had been impaneled and sworn, and the taking of evidence had been commenced, the sufficiency of the allegation, viz., "and greatly interferes with his business which is that of practicing law," in connection with the context above quoted, was first raised by the defendant and presented to the court in a discussion which occupies substantially three pages of the bill of exceptions. Defendant's fundamental objection to the portion of the amended petition last quoted, presented to the dis-

trict court, amounted to a general demurrer *ore tenus* to the language above quoted, to which it was addressed. His contention was substantially based on the proposition that special damages, to be provable, must be specially pleaded; and that the language of the amended petition attacked was wholly insufficient to plead special damages which the facts that plaintiff was then seeking to prove really constituted.

The trial court clearly adopted defendant's views and applied them thereafter during the introduction of evidence, and in his fifteenth instruction given to the jury, on his own motion, stated: "You are instructed that it is not plead in the petition or shown by the evidence that plaintiff is earning less money since the accident than he did before. You therefore cannot allow him damages on account of such item." In so doing the trial court committed reversible error.

Section 20-804, Comp. St. 1929, provides, in part: "The petition must contain: * * * Second. A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition; Third. A demand of the relief to which the party supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated; and if interest thereon be claimed, the time from which interest is to be computed shall also be stated."

The result of the construction and application of this and similar Code provisions is the well-established rule, viz.: "In an action for personal injury suffered, the plaintiff may recover all the damages proximately caused by the tort, under a general allegation of the whole of the amount of damage caused. And so, the plaintiff is entitled to recover damages for any impairment of his capacity, as a previously healthy person, to earn money, as well as for expenses incurred for medical treatment, under a general averment of damage." 1 Bancroft, Code Pleading, 285, sec. 166.

The application of the general rule just quoted by courts generally achieves results wholly at variance with the results attained by the trial court in the instant case.

Thus, in *Frobisher v. Fifth Avenue Transportation Co.*,

30 N. Y. Supp. 1099, the opinion reads, in part: "It is alleged in the complaint that the plaintiff 'has become disabled for life to such an extent as to seriously interfere with the active prosecution of his business.' This is certainly not a very specific allegation of special damages resulting from an injury to the plaintiff's business, but it was sufficient to give defendant notice that an attempt would be made to recover such damages; and, if it had desired a more definite allegation, it should have moved that the complaint be made more definite and certain in this particular."

In support of the doctrine so announced, *Ehrgott v. Mayor, etc., of City of N. Y.*, 96 N. Y. 264, is cited by the New York court. In the *Ehrgott* case the court of appeals of New York, in its opinion, says of the complaint or petition then before it: "It alleges that he (plaintiff) suffered great bodily injury; that he became, and still continues to be, sick, sore and disabled; that he was obliged to spend large sums in attempting to cure himself, and was prevented for a long time from attending to his business, and that he was otherwise injured to his damage $25,000." Under such allegations the plaintiff was allowed in the trial court to testify, over objections, to the amount of his annual earning. On appeal the admission of this testimony was approved. See, also, *Fox v. Chicago, St. P. & K. C. R. Co.*, 86 Ia. 368, 53 N. W. 259; *Dickens v. City of Des Moines*, 74 Ia. 216, 37 N. W. 165; *Evertson v. McKay*, 124 Minn. 260, 144 N. W. 950.

Our own decisions necessarily tend to support the principles above announced. Thus, we are committed to the rule that, "Where the objection to a petition, that it does not state a cause of action, is not interposed until after the commencement of the trial of the case, the pleading will be liberally construed and if possible sustained." *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167, 70 N. W. 926. See, also, *Johnston v. Spencer*, 51 Neb. 198, 70 N. W. 982; *Peterson v. Hopewell*, 55 Neb. 670, 76 N. W. 451; *Norfolk Beet-Sugar Co. v. Hight*, 56 Neb. 162, 76 N. W. 566; *First Nat. Bank of Cobleskill v. Pennington*, 57 Neb. 404, 77 N. W. 1084.

It also follows that the principle above announced is applicable not only to the pleading as an entirety, but also applies to each of the integral parts of which a pleading may be composed.

Indeed, it must be conceded that "A petition is not fatally defective merely because its averments could have been made more certain." *Sanford v. Litchenberger*, 62 Neb. 501, 87 N. W. 305. Likewise, it must be admitted that "Objection that a pleading is indefinite in its allegations should be raised in the trial court by a motion to make more definite and certain." *Sanford v. Litchenberger, supra.*

So also, this jurisdiction is committed to the view that pleadings in civil actions are properly held to charge what can by reasonable and fair intendment be implied from the statements thereof. *Roberts v. Samson*, 50 Neb. 745, 70 N. W. 384; *Jaynes v. Omaha Street R. Co.*, 53 Neb. 631, 74 N. W. 67; *Dailey v. Burlington & M. R. R. Co.*, 58 Neb. 396, 78 N. W. 722; *Sorensen v. Sorensen*, 68 Neb. 483, 94 N. W. 540.

Further: "It is not error to submit testimony to a jury in a law action on a material issue that has not been specifically pleaded where such issue has been generally pleaded." *Anderson v. Chicago, B. & Q. R. Co.*, 102 Neb. 497, 167 N. W. 559.

In the light of these principles of construction, it would seem, under the special circumstances of the instant case, so construing, in connection with the context, the words, "greatly interferes with his business which is that of practicing law; * * * and thereby plaintiff has suffered damage in the sum of $10,000," as actually charging what can by reasonable and fair intendment be implied therefrom, substantial injury to business is by the pleader generally alleged, sufficiently to permit the introduction of any evidence of a nature calculated to establish the same, including evidence as to earnings and of decreased earning ability.

This practice, was, in principle, expressly approved in *Carlile v. Bentley*, 81 Neb. 715, 116 N. W. 772: "That part of the petition relating to the injury and damages sus-

tained is as follows: 'That on the 9th day of October, 1905, the defendant unlawfully made an assault upon the plaintiff, and him, the said plaintiff, did then and there beat, wound and illtreat (here follows description of the physical wounds and injuries inflicted); that ever since said injury, to wit, for the last three months, plaintiff has been unable to attend to his business, and has ever since said injury and by reason of the same suffered great pain of body and mind, and said injuries are of a permanent nature, * * * to plaintiff's damage in the sum of $2,043.' "

It appears that at the trial of the *Carlile* case, evidence of loss of earnings in plaintiff's business was, over objections of defendant, introduced. This was challenged by the defendant on appeal as erroneous. Good, C. (now of the court), in delivering the opinion of this court, in answer to this contention, stated in part: "Defendant complains because the court submitted to the jury as an element of damages loss of earnings in plaintiff's business, upon the grounds that the petition was insufficient to entitle the plaintiff to recover for such element of damages. The theory of this contention is that loss of time or loss of earnings is special damages and must be specially pleaded. It will be conceded that special damages cannot be recovered unless specially pleaded, but we do not think that the loss of time or the loss of earning capacity can be said in this case to come under the head of special damages. Where special damages are claimed for a personal injury, the only difficulty lies in the proper application of the rule that all of the results of the act or injury complained of need not be set forth in detail to be admissible, so long as such results are necessarily or legally implied from the injury alleged; while the effects that are not the natural and necessary results of the injury complained of constitute special damages and must be specially pleaded. 13 Cyc. 185. Where the injury alleged will necessarily render the person less capable of performing his usual business duties, proof of the impairment of his general earning capacity may ordinarily be given under the general allegations of the

injury and damages resulting therefrom, such as the inability to attend to his ordinary business, without any special averment as to the nature of the plaintiff's occupation or employment. And loss of time and of earning capacity may be proved without a special allegation, if the injury suffered would necessarily import a loss of time."

We do not commend the amended petition in the instant case as a model to be followed, nor do we determine whether the same would or would not be vulnerable to a motion for a more specific statement.

However, it is obvious, that in view of the surrounding circumstances, and the form in which the question is presented in the instant case, the principles announced by Judge Good in the *Carlile* case, in harmony with the doctrine of the authorities heretofore cited herein, are applicable and are here controlling.

The action of the trial court in giving instruction 15 on its own motion, as well as its practical exclusion of proof of loss of earning in plaintiff's business, on the ground that the amended petition was insufficient to support a recovery therefor, we deem reversible error.

The evidence has been carefully examined. We have determined that the amount of the recovery permitted by the jury's verdict is wholly inadequate. However, in view of the fact that the basis of a recovery on a retrial will be substantially different from that which prevailed at the first trial, no good purpose would be served by an extended analysis of the proof in the present record.

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

REVERSED.

MILDRED S. MARTIN, APPELLANT, V. ST. PAUL STATE BANK, APPELLEE.

FILED APRIL 30, 1936. No. 29648.

Banks and Banking. In the absence of specific authority or the establishment of a usage or course of action acquiesced in by its board of directors, the vice-president of a bank does not have the power by virtue of his office to bind the bank for the payment of a debt upon which it was not previously liable.

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

Cleary, Suhr & Davis and *Davis & Vogeltanz*, for appellant.

Prince & Prince and *T. T. Bell, contra.*

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

CARTER, J.

In this case the plaintiff sued the St. Paul State Bank on a promissory note in the principal sum of $6,500. The trial court directed a verdict for the defendant. From the overruling of her motion for a new trial, plaintiff appeals.

On and prior to January 24, 1930, Dr. F. S. Nicholson was the owner of certain lands in Perkins county subject to a first mortgage in favor of T. T. Bell for $4,000, and a second mortgage in favor of Ches Chinn for $5,000. On the above date, Dr. Nicholson gave a third mortgage to the St. Paul State Bank in the amount of $7,000. On June 10, 1931, Mary C. Nicholson, who had become the title owner, conveyed the lands to the St. Paul State Bank, subject to the two prior mortgages. On June 12, 1931, the second mortgage was extended for two years at the instance of the St. Paul State Bank. On November 18, 1931, a new note was executed as of the date of June 12, 1931, due three years from its date, in the amount of $6,500, which was signed by C. E. Arterburn as vice-president of the St. Paul State Bank. A new mortgage was given to secure this note on

November 18, 1931, which was signed in the same manner as the note. Subsequently, Bell foreclosed his first mortgage and took title to the land. Plaintiff, who had become the owner of the second mortgage, then commenced this action on the $6,500 note.

The evidence shows that on or about June 5, 1930, the St. Paul State Bank went out of business and surrendered its charter to the department of trade and commerce of the state of Nebraska. The St. Paul State Bank alleges in its answer that it was a nonexistent corporation at the time the note and mortgage were executed, and that C. E. Arterburn, as vice-president of the St. Paul State Bank, did not have authority to sign the note sued upon.

It is not disputed that the St. Paul State Bank had not become liable for the payment of the indebtedness prior to November 18, 1931. The only question for determination, therefore, is whether the acts of C. E. Arterburn, as vice-president on November 18, 1931, in signing the note in suit, obligated the bank to pay the debt.

The evidence discloses that on November 18, 1931, the plaintiff, Ches Chinn, C. E. Arterburn and W. S. Paul held a conversation in the St. Paul National Bank relative to the second mortgage on the Perkins county land and the indebtedness it was given to secure. Arterburn and Paul were officers of the St. Paul National Bank and were also officers of the St. Paul State Bank at the time it went out of business. Arterburn and Paul testified that plaintiff stated that she was the owner of the second mortgage, that it had outlawed or been mislaid, and that she wanted something done that would reinstate her lien on the land. The result of the conversation was that plaintiff, Arterburn and Chinn went to the office of T. T. Bell, an attorney in St. Paul, who was also a director in the St. Paul State Bank at the time it closed. The note involved in this action and the mortgage given to secure it were drawn up by Bell and signed by Arterburn, as vice-president of the St. Paul State Bank at that time. All of the officers and directors of the St. Paul State Bank testified that they never knew that Arterburn signed

the note until suit was brought upon it. The matter was never brought to the attention of the board of directors of the St. Paul State Bank. Assuming that the St. Paul State Bank was an existing corporation, and that Arterburn was still its vice-president, does his act in signing the note make the St. Paul State Bank liable for its payment? We think not. A vice-president of a bank, without authority granted by the bank's board of directors, and in the absence of an established usage acquiesced in by them, cannot bind the bank by agreeing to pay a debt upon which the bank was not previously liable. It has been held that a president of a bank has no implied power, by virtue of his office, to sell or mortgage property of the corporation. *Leggett v. New Jersey Mfg. & Banking Co.*, 1 N. J. Eq. 541. In *Montgomery Bank & Trust Co. v. Walker*, 181 Ala. 368, 61 So. 951, the court, in discussing this subject, said: "This rule applies to presidents of banks as well as presidents of other corporations, and who have no authority other than what is expressly granted by the charter, by-laws, etc. *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592; *Spyker v. Spence*, 8 Ala. 333. 'He has no more power of management or disposal over the property of the corporation than any other single member of the board. These remarks, of course, refer to his inherent powers enjoyed *virtute officii*, for, of course, if any resolution or any established usage gives him the power, either at all times or under special circumstances, to draw against the corporate deposits, he may do so within the limits of the power. * * * When the general management of the affairs of the bank is left, as is customary, with the directors, the president has not power to mortgage, assign, or pledge any more than he has to dispose otherwise of any of its property of any description whatsoever, or for any purpose, however justifiable and proper in itself.' Morse on Banking, secs. 143, 144. It has been held, however, in many cases that, where the president has no inherent power, he binds the bank in many instances by usage or express authority. 'The cases, though largely occupied in deciding that a president has no authority by

virtue of his office, yet hold the bank bound by his action whenever the charter, or a vote of the directors, or usage of the bank, or long acquiescence by the bank in a course of action by the president, or any facts constituting a holding out of the president by the bank as having a right to act for it, lay a foundation for authority actual or inferred, and whenever the bank has ratified his action.' "

In *First Nat. Bank v. Lucas,* 21 Neb. 280, 31 N. W. 805, the court said: "The sale of the $6,000 notes was without authority. At least none is shown. No rules or regulations had ever been made by the exchange committee which would authorize it, and it was not authorized by the board of directors. There is nothing in the act concerning the organization of national banks which would authorize it, and it is not shown to have been the custom of the bank to permit the president to make such sales to be subsequently ratified. Ordinarily the authority of a president of a bank, as such, is very much limited. He may bring an action at law and employ counsel for the purpose of protecting the rights of the bank, but he is not its executive officer nor has he charge of its moneyed operations. He has no more power of management, or disposal of the property of the corporation, than any other member of the board of directors. Morse on Banks and Banking, 146 *et seq.* It is true that extensive powers may be, and are, quite often, given to presidents of banking organizations by the charter of the bank or by the action of the managing board, and where so conferred, the right to proceed thereunder will exist; but there is no proof in this case, shown by the abstract, of any such power."

A vice-president certainly has more limited powers than the bank president. There is no evidence in the case at bar that the vice-president had been authorized to sign the note either by resolution of the board of directors, by usage of the bank, or by acquiescence of the bank in a course of action pursued by the vice-president. We are therefore obliged to hold that C. E. Arterburn, as vice-president of the St. Paul State Bank, did not have the power, by virtue of his office, to bind the bank for the payment of the indebtedness

in question and, there being no specific authority granted, the bank is not bound by his act in signing the note for the bank.

The trial court rightfully directed a verdict for the defendant. The judgment is therefore

AFFIRMED.

STATE, EX REL. ARCHIE MCMILLIN, APPELLEE, V. BOYD COUNTY ET AL., APPELLANTS.

FILED APRIL 30, 1936. No. 29659.

Appeal. The findings of the trial judge on a question of fact in a law action will not be disturbed by this court when supported by competent evidence.

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

W. L. Brennan, for appellants.

A. B. Wallace, contra.

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

FITZGERALD, District Judge.

This action arose in Boyd county, Nebraska, on a petition in the name of the state of Nebraska, on the relation of Archie McMillin, who will be referred to as plaintiff in this opinion. It is conceded by all the parties that plaintiff is a pauper within the meaning of our statutes, and he prayed for a peremptory writ of mandamus against the respondents, the county of Boyd and the county board of supervisors of said county, who will be hereinafter referred to as defendants. The trial judge found in favor of the plaintiff and decreed that a peremptory writ of mandamus issue against said respondents, commanding the defendants, the board of supervisors of the poor, to aid, support and grant relief to plaintiff as a pauper.

Plaintiff is 35 years of age, and a cripple, and while he is apparently crippled only in his power of locomotion, it does not appear that he has any capacity for earning his livelihood. His condition has existed since he was seven or eight years old. He has apparently had a country school education, and attended school some in Anoka, in Boyd county, Nebraska. The record does not disclose his place of birth, but at the age of three or four years he was a resident of Boyd county, either on a farm a short distance from Anoka, or in Anoka.

It is difficult to ascertain from the record any definite dates, but plaintiff lived with his father and mother in Boyd county, where the mother died, until plaintiff reached the age of at least 25 years. Some time thereafter plaintiff and his father moved to a tract of land in Cherry county, near the South Dakota border, the greater part of the tract of land being in South Dakota, but the home being in Cherry county, Nebraska. Plaintiff states that they remained there about seven or eight years, when the father sold out his personal effects, and he and plaintiff returned to Boyd county in November, 1933, where the father made arrangements to rent a building and conduct some sort of a store in Anoka, Boyd county, Nebraska. They moved some of their belongings into the store building, and put up their bed, but a storm arose and blew the front end out of the building, after which plaintiff and his father went to Norfolk, in Madison county, Nebraska, where a brother of plaintiff was living.

Plaintiff states that the stay in Norfolk was only a visit, but on the last day of December, 1933, plaintiff's father died in Norfolk, Madison county, Nebraska, and his estate was probated in that county. Plaintiff received from his father's estate something over $100, and he remained in Norfolk until about the 10th of October, 1934, when he returned to Anoka, Boyd county, Nebraska. About that time he sold a Ford automobile for $135, receiving $40 in cash and a note for the balance. He turned over to Mabel Keeler the $40 in cash and the note for the balance, and he boarded

and roomed with her and her family up to shortly before bringing this action.

It appears from the record that Mabel Keeler and her family were on relief during part, if not all, of this time, but it does not appear that plaintiff knew that fact. Some time in February, and again in March, it appears that plaintiff made application for relief, which was denied, although those in charge of the federal relief appear to have had in contemplation increasing the relief to Mabel Keeler because of her having the plaintiff as a charge, but it does not appear that her allowance was increased, nor does it appear that there was anything but the relation of debtor and creditor existing between the plaintiff and Mabel Keeler.

It appears that while plaintiff stayed in Norfolk he paid some of the money received from his father's estate toward his board with his brother John, but that such payment was small, and the defense has shown that his brother John was also on relief in Norfolk. There is another brother, but his financial condition is little better than that of John. There is a grandmother living in Boyd county, but her financial condition is about the same.

After plaintiff had made application for relief, which was denied him, he was finally told that they would have to "fight it out," and plaintiff appears to have seen an attorney, and he appears to have had some money to pay part of the expenses of starting this action. A few days prior to April 18, 1935, the situation became acute, and, on or about April 18, plaintiff was put in jail and remained there four or five days, after which the petition in this action was filed.

The record does not disclose that plaintiff received any public or private charity within six months after October 10, 1934, when he testified he returned to Boyd county. The record discloses that he asked for aid, but received none, and the learned trial judge who heard all of the witnesses and observed their demeanor could very well find from the testimony in the trial that plaintiff had spent six months in Boyd county before becoming a pauper and a

charge upon either public or private charity, and we find that his ruling that plaintiff was entitled to a peremptory writ of mandamus is amply supported by the evidence, and should be and is

AFFIRMED.

CARTER, J., concurs in the result.

EDWIN H. LUIKART, RECEIVER, APPELLEE, V. JAMES C. FLANNIGAN ET AL., APPELLANTS.

FILED MAY 8, 1936. No. 29473.

1. **Banks and Banking**: OFFICERS: BONDS. Each executive officer of a state bank is required by law to give a surety bond to protect it from pecuniary loss sustained by it through forbidden acts committed directly by him or by connivance with others. Comp. St. 1929, sec. 8-103.
2. ———: RECEIVERS: POWERS. A judicial order appointing a receiver for an insolvent state bank and directing him to liquidate it or wind up its affairs includes power of the receiver to sue an executive bank officer and the surety on his fidelity bond to recover losses sustained by the bank through wrongful acts committed by such officer in violation of the bond.
3. **Appeal.** Where an action at law is tried to the court without a jury, it will be presumed on appeal that incompetent evidence was disregarded, if the findings below are sustained by sufficient competent evidence.
4. ———: FINDINGS. In an action tried to the court, the findings on issues of fact are equivalent to the verdict of a jury and will not be set aside on appeal unless clearly wrong.
5. **Banks and Banking**: OFFICERS: LIABILITY. An executive officer of a state bank is liable for his illegal acts resulting in pecuniary loss to the bank and for illegal acts of other executive officers of the bank resulting in pecuniary loss thereto when he participates in, connives at, or consents to, such illegal acts.
6. **Costs**: ATTORNEY'S FEES. Where plaintiff recovers a judgment in an action against an executive officer of a state bank on his fidelity or surety bond, there is statutory authority for the allowance of a reasonable attorney's fee to be taxed as costs. Comp. St. 1929, sec. 44-346.
7. ———: ———: PROCEDURE. A claim for an attorney's fee to be taxed as costs, in addition to a judgment in favor of plaintiff

in an action on a fidelity or surety bond, may be presented by motion at a subsequent term of court.

8. ———: ———. Where the record of a trial discloses the nature and extent of services performed by the attorney for plaintiff in an action on a fidelity bond, the presiding judge, having knowledge of the value of legal services, may allow a reasonable attorney's fee in addition to a judgment in favor of plaintiff, without the testimony of witnesses on the issue of such value.

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

Hall, Young & Williams, for appellants.

I. J. Dunn and *F. C. Radke, contra.*

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

ROSE, J.

This is an action on a 5,000-dollar surety or fidelity bond wherein the Citizens Bank of Stuart and the state of Nebraska were obligees. The bank became insolvent and the state department of banking took charge of it December 1, 1930. In a proceeding to wind up its affairs, the district court for Holt county appointed Edwin H. Luikart receiver and as such he is plaintiff.

James C. Flannigan, the vice-president and a director of the bank, was the principal obligor and his surety was the American Surety Company. Both are defendants. To the extent of $5,000, they bound themselves, by their bond, to protect and indemnify the bank from all pecuniary loss sustained by it through or by reason of the fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction, misapplication or misappropriation, or any other dishonest or criminal act, of or by the bank officer, directly or through connivance with others, while in the employ of the bank. These contractual obligations were required by statute. Comp. St. 1929, sec. 8-103. The bond was in force on and after May 31, 1930, until the bank was closed for insolvency December 1, 1930.

The petition contained pleas that, while the bond was in force, defendants incurred liability thereon for bank losses in excess of $5,000 by misapplication of assets and other wrongful and illegal acts of James C. Flannigan, vice-president and director, in the following particulars: Transferring assets which depreciated in value before being recovered by the receiver; making excessive loans for the bank; allowing illegal preferences to some of the depositors; permitting withdrawals of deposits, knowing the bank was insolvent; drawing salary in excess of the legal amount. The different items of losses were stated in detail and each of the alleged unlawful acts of the vice-president and director were attributed also to John M. Flannigan, president and director, and to Thomas S. Mains, cashier and director.

The answer of defendants denied the allegations of fact on which their alleged liability was based. The reply to the answer was a general denial.

The parties waived a jury. Upon a trial of the cause, the district court found the issues in favor of plaintiff, entered a judgment against defendants for $6,239.58, including interest, and they appealed.

The first point urged for a reversal is the failure of the receiver to prove his authority to bring the action, the affirmative of the proposition having been alleged in the petition and denied in the answer. It is argued by defendants that the burden was on plaintiff to prove an order of court authorizing him to commence an action on the bond. In this connection reference is made to the statute providing: "Every order appointing a receiver shall contain special directions in respect to his powers and duties." Comp. St. 1929, sec. 20-1087. This applies to receivers generally, while other statutes deal specifically with the powers and duties of receivers in actions by the state to wind up the affairs of insolvent state banks—the business of banking corporations being affected with a public interest. A statute and the bond itself make the state of Nebraska an obligee. Comp. St. 1929, sec. 8-103. The petition alleges and the answer admits that Luikart is receiver.

The plain import of the banking laws is that it is the duty of the receiver of an insolvent state bank to wind up its affairs. According to the authorized procedure, the attorney general applies to the district court for a determination of insolvency or of violation of law and for an order appointing a receiver. Upon a finding of insolvency or of such violations of law as to authorize the closing of the bank, "decree shall be entered and the bank ordered liquidated." Comp. St. 1929, sec. 8-190. As thus used in the banking laws, "liquidation" means winding up the affairs of the bank. In connection with the statute, the appointment of a receiver for the purpose of liquidation includes power to sue for the recovery of assets and for the losses which the bank suffered by wrongful acts committed by its officers in violation of their bonds. A plain duty of the receiver in that respect did not necessarily require a separate judicial order granting him permission to sue. Proof of such an order was unnecessary in the present instance. *Jeffries v. Bacastow*, 90 Kan. 495, 135 Pac. 582. The assignment of error directed to this point is therefore overruled.

An elaborate argument is directed to the proposition that the evidence is insufficient to sustain findings that the bank sustained bonded losses through illegal acts of James C. Flannigan, vice-president, in transferring assets which depreciated in value before being recovered by the receiver; in making excessive loans; in allowing illegal preferences during insolvency; in permitting withdrawals of deposits, knowing of the insolvency; in drawing excessive salary while the bond was in force.

The record contains evidence tending to prove insolvency of the bank and actionable losses prior to the execution of the bond, but this does not require a reversal, if competent evidence is sufficient to sustain the finding of the district court that such losses of the bank during the period covered by the bond aggregated $5,000, the penalty or amount for which the surety became liable with interest. In that contingency it will be presumed that material evidence only was considered, since the cause was tried to the court with-

out a jury. Disregarding incompetent testimony, there is evidence tending to prove that actionable losses sustained by the bank in violation of the bond exceeded $5,000 with interest added. The finding of the trial court to that effect is equivalent to the verdict of a jury and, not being clearly wrong, is conclusive on appeal.

There is further contention by defendants that the district court erred in finding that John M. Flannigan, president, and Thomas S. Mains, cashier, committed the identical acts resulting in the losses for which the vice-president was held liable. Each of the three executive officers gave a surety or fidelity bond similar to that of the others. There was the same surety on each and the same penalty—$5,000. The receiver brought a separate action on each bond. The cases were consolidated and tried together. The evidence in one case applied to the others. Losses resulting from misapplication of assets and other actionable wrongs committed in violation of the bonds were not limited to individual acts of an executive officer. Such losses, "directly or through connivance with others," created a liability under both bond and statute. It was the affirmative duty of each executive officer to guard against such losses. Each knew in advance that the cash reserve of the bank had dwindled below the statutory limit and that the bank was insolvent. In that situation, each performed or knowingly permitted the illegal acts resulting in the losses. In contemplation of law, the evidence supports the finding that each executive officer is liable on his bond for the unlawful acts of the others.

The district court allowed plaintiff an attorney's fee of $300 in each case and the taxing thereof as costs is challenged as erroneous. Defendants insist that these fees were unauthorized. A statute provides that, in an action against a company on a policy of fidelity insurance or other insurance of a similar nature, "the court, upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed

as part of the costs." Comp. St. 1929, sec. 44-346. This is authority for the allowance of a reasonable attorney's fee in the case at bar, if the claim therefor was properly and timely presented upon a record containing a sufficient showing as to the amount allowed and taxed as costs. It is argued, however, that the record is fatally defective in the following respects: The petition did not contain a claim for an attorney's fee; it was allowed at a subsequent term of court, after jurisdiction to allow it had been lost, and not "upon rendering judgment," as required by statute; there is no evidence of the value of the services performed by counsel for plaintiff. These propositions seem to be at variance with former decisions of the supreme court. A claim for an attorney's fee after judgment in favor of plaintiff in an action on a fidelity policy or bond may be presented by motion at a subsequent term of court—the course taken herein. *Allen v. Tallon*, 120 Neb. 611, 234 N. W. 411. In that case the supreme court said:

"The district court has a general knowledge of the value of legal services, and attorney's fees are often allowed for services performed in that court without calling witnesses."

The judge who presided at the trial herein considered the motion for an attorney's fee. There were vigorous defenses to overcome both at the original trial and at the subsequent hearing on the motion. The record is long and complicated. It was made in the presence of the trial judge who had knowledge of the value of legal services. It shows skill, preparation and earnest effort by counsel on both sides and contains ample evidence of the value of the legal services performed for plaintiff to sustain the allowance of a 300-dollar fee in each case, or $900 in all, when the trial judge's knowledge of value on that issue is considered. For services performed by attorneys for plaintiff on appeal to the supreme court, a fee of $100 is allowed in this case and will be taxed as costs.

Finding no reversible error in the record, the judgment below is

AFFIRMED.

EDWIN H. LUIKART, RECEIVER, APPELLEE, V. THOMAS S. MAINS ET AL., APPELLANTS.

FILED MAY 8, 1936. No. 29474.

Judgment: SATISFACTION. Where plaintiff recovers a judgment in each of three separate actions on different surety bonds of the executive officers of an insolvent state bank for identical losses, the surety being the same on each bond, payment of the judgment in one case and payment of the costs in all the cases will satisfy the judgments in all.

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

Hall, Young & Williams, for appellants.

I. J. Dunn and *F. C. Radke, contra.*

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

ROSE, J.

This is an action on the 5,000-dollar fidelity or surety bond of Thomas S. Mains, cashier of the Citizens Bank of Stuart, an insolvent corporation. Edwin H. Luikart, receiver, is plaintiff. Mains and his surety, the American Surety Company, are defendants. The pleadings, issues and evidence are similar to those in the cases of *Luikart v. Flannigan, ante,* p. 901, and *Luikart v. Flannigan,* p. 908, *post.* The liability of defendants for the actionable losses to the bank is the same in the three cases. The surety is the same in all. There was a judgment herein in favor of plaintiff for $6,239.58, from which defendants appealed, and it is affirmed for the reasons stated in the opinion in the first of the cases cited. Since plaintiff recovered in each case a judgment for the identical losses sustained in all, payment of the principal and interest in one case and payment of the costs in the three cases will satisfy all of the judgments. A fee of $100 for services of plaintiff's attorneys on appeal herein is allowed and will be taxed as costs.

AFFIRMED.

EDWIN H. LUIKART, RECEIVER, APPELLEE, V. JOHN M. FLANNIGAN ET AL., APPELLANTS.

FILED MAY 8, 1936. NO. 29475.

Rulings in *Luikart v. Flannigan, ante*, p. 901, followed.

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

Hall, Young & Williams, for appellants.

I. J. Dunn and *F. C. Radke, contra.*

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

ROSE, J.

This is an action on the 5,000-dollar fidelity or surety bond of John M. Flannigan, president of the Citizens Bank of Stuart, an insolvent corporation. Edwin H. Luikart, receiver, is plaintiff. John M. Flannigan and his surety, the American Surety Company, are defendants. The pleadings, issues, evidence and losses are similar to those in *Luikart v. Flannigan, ante*, p. 901, and *Luikart v. Mains, ante*, p. 907, decided herewith. The liability on the bond for the identical losses to the bank in the three cases is the same. There was a judgment in favor of plaintiff herein for $6,239.58, from which defendants appealed, and it is affirmed for the reasons stated in the opinion in the first of the cases cited. A fee of $100 for services of plaintiff's attorneys on appeal herein is allowed and will be taxed as costs.

AFFIRMED.

MARY SERRATORE, APPELLEE, V. CLINTON MILLER, APPELLANT.

FILED MAY 8, 1936. NO. 29655.

1. Trial: DIRECTION OF VERDICT. Where there is competent evidence sufficient to sustain a verdict for plaintiff, the trial court properly refused to direct a verdict for defendant.

2. **Appeal:** INSTRUCTIONS. An instruction, although not couched in clear, concise language, but containing no misstatement of law, will not be ground for reversal unless clearly prejudicial.
3. **Highways:** RIGHT OF WAY AT INTERSECTION. Where two automobiles approach an intersection at right angles to each other, the one first entering the intersection has the right of way and may, ordinarily, proceed to cross, but if the situation is such as to indicate to the mind of an ordinarily prudent person in his position that to proceed will probably result in a collision, then he should exercise ordinary care to prevent accident, even to the extent of waiving his right.
4. **Negligence.** A plaintiff, who is without fault, may recover for injuries as the proximate result of the negligence of another, regardless of the degree of such negligence.
5. **Appeal.** A defendant may not predicate error on plaintiff's introduction of evidence as to a fact irrelevant to any issue in the case, where such fact has been first brought to the attention of the jury by defendant.
6. **Evidence.** "Speed of an automobile is not a matter of exclusive expert knowledge or skill, but any one with a knowledge of time and distance is a competent witness to give an estimate. The opportunity and extent of his observation goes to the weight of the testimony." *Patterson v. Kerr*, 127 Neb. 73, 254 N. W. 704.

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

Lee R. Kenny and *Crofoot, Fraser, Connolly & Stryker*, for appellant.

John A. McKenzie and *Ben E. Kazlowsky, contra.*

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

GOOD, J.

This is a personal injury action in which plaintiff had judgment, and defendant has appealed.

Plaintiff was injured in a collision between the automobile in which she was riding and one driven by defendant. The collision occurred at the intersection of Twelfth and Bancroft streets in the city of Omaha. Twelfth street runs north and south; Bancroft east and west. The car in which plaintiff was riding was being driven south on Twelfth

street. There were five persons in the car, driven by Concetta Piccolo. Plaintiff was sitting in the rear seat on the left side, with two other girls to her right. It is plaintiff's contention that the car in which she was riding was first to enter the intersection and had the right of way; that the car had proceeded nearly across Bancroft street, the front wheels thereof emerging from Bancroft street, when the rear end of the car was struck by defendant's car, traveling east on Bancroft street. It is charged that the defendant was negligent in driving at an excessive rate of speed; in crossing an intersection at a rate of speed of more than 20 miles an hour, and in that he failed to reduce his speed so as to permit the car in which plaintiff was riding to pass over the intersection in safety.

Defendant denies any negligence on his part, and alleges that plaintiff's injuries were caused by the negligence of Concetta Piccolo, the driver of the car in which plaintiff was riding, and that plaintiff was also guilty of contributory negligence in failing to warn the driver of the approach of defendant's car.

Defendant contends that there should have been an instructed verdict for him, and that the evidence was insufficient to justify a verdict for plaintiff. With this contention we cannot agree. If defendant's evidence were all that was in the record, there might be good grounds for such contention, but the evidence on behalf of the plaintiff tends to prove that the car in which she was riding was first to enter the intersection, had proceeded nearly across the intersection, and, in fact, was emerging therefrom, when the defendant, driving at a high rate of speed—40 miles an hour —struck the right rear end of the car in which plaintiff was riding and caused it to overturn and inflict the injuries of which she complains. Defendant contends that, since plaintiff saw the defendant's car approaching when it was 15 or 20 feet away and failed to give any warning to the driver, she was negligent to such an extent as to prevent a recovery. Plaintiff's evidence was that defendant's car was traveling at the rate of 40 or 45 miles an hour, and that

plaintiff, herself, did not see the car until it was within 15 or 20 feet of the one in which she was riding. It is apparent that less than one-third of a second elapsed after she saw defendant's car until the collision occurred. There was insufficient time for her to give any warning to the driver of the car. There is ample evidence to sustain a verdict for plaintiff, and the court properly refused to direct a verdict for defendant.

Defendant contends that the trial court committed error in giving instruction No. 8. This instruction is long, somewhat involved, and not couched in clear and concise language. It is far from being a model of excellence. However, in effect, it informed the jury that the driver of a car, crossing an intersection and having the right of way, may assume that another car, approaching at right angles, will exercise due care until the contrary is apparent and a collision is imminent if the one having the right of way persists in exercising such right. Under such circumstances, it then becomes the duty of one having the right of way to exercise reasonable care to avoid a collision, even to the extent of waiving his right of way.

The rule is well stated in *Thrapp v. Meyers,* 114 Neb. 689, 209 N. W. 238, in this language: "The driver of an automobile, upon reaching an intersection, has the right of way over a vehicle approaching on his left, and may ordinarily proceed to cross; but if the situation is such as to indicate to the mind of an ordinarily prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent accident, even to the extent of waiving his right."

In the instant case, according to the testimony on behalf of plaintiff, the car in which she was riding first entered the intersection and had the right of way. According to defendant's testimony, he was the first to enter the intersection and had the right of way. The instruction was equally applicable to plaintiff and defendant and their respective contentions. We are unable to see wherein the instruction was prejudicial to either of the parties.

Defendant also contends that instruction No. 9 was prejudicially erroneous. In that instruction the court told the jury that if they found "that the defendant was negligent, *even slightly so,* which negligence proximately caused or contributed to the accident, your verdict would then be for the plaintiff if the plaintiff herself is not found to have been guilty of such negligence, if any, as to defeat her recovery, as herein elsewhere instructed." (Italics ours.)

Defendant argues that the instruction permits plaintiff to recover if there is but a scintilla of evidence indicating negligence on the part of defendant. A defendant is liable for injuries caused proximately by his negligence, regardless of its degree, provided the plaintiff's right of recovery is not barred by reason of contributory negligence. We think it is immaterial whether the negligence of the defendant, under the circumstances, was gross, ordinary, or slight, if it was the proximate cause of the injury to plaintiff, and if she was without fault. We do not commend the instruction in using the words, "even slightly so." The instruction was not prejudicially erroneous.

Defendant next complains because plaintiff, by testimony, brought into the record the fact that defendant carried liability insurance. The manner in which some of this evidence was brought into the record was highly improper and would require a reversal of the judgment, were it not that the record discloses that, prior thereto, defendant himself had brought into the record the question that he carried liability insurance, both on the *voir dire* examination of, and in his opening statement to, the jury. A defendant may not predicate error on plaintiff's introduction of evidence as to a fact irrelevant to any issue in the case, where such fact has been first brought to the attention of the jury by defendant.

Complaint is made because plaintiff and one of her witnesses testified as to the rate of speed at which defendant's car was traveling at and immediately before the time of the collision. It is contended that it is not shown they were competent to testify as to the speed. Plaintiff had ridden

in cars and observed their speed, and the other witness had not only ridden in but had driven a car and was able, in her own opinion, to state approximately the speed at which a car was traveling.

In *Patterson v. Kerr*, 127 Neb. 73, 254 N. W. 704, it was held: "Speed of an automobile is not a matter of exclusive expert knowledge or skill, but any one with a knowledge of time and distance is a competent witness to give an estimate. The opportunity and extent of his observation goes to the weight of the testimony." The rule is somewhat similarly stated in Jones, Commentaries on Evidence (2d ed.) 2323 to 2330. See, also, *Lewis v. Miller*, 119 Neb. 765, 230 N. W. 769, and *Sterns v. Hellerich, ante*, p. 251, 264 N. W. 677. Under these authorities, each of the witnesses was competent to testify. The weight of their evidence was for the jury.

No error prejudicial to defendant has been found.

AFFIRMED.

JOSEPH LADMAN ET AL., APPELLEES, V. EMIL LADMAN ET AL., APPELLANTS: JAN LADMAN ET AL., APPELLEES.

FILED MAY 8, 1936. No. 29668.

1. **Husband and Wife**: POSTNUPTIAL CONTRACT. A contract between a husband and wife, where a legal separation is justified, in which they settle their property rights and each relinquishes all rights including inheritance in the property of the other, will be enforced if fair and equitable.
2. ———. An examination of the record reveals that the evidence does not establish a separation contract.
3. **Deeds**: DELIVERY. Delivery is essential to the validity and operation of a deed.
4. ———: ———. No particular ceremony is necessary to constitute a delivery of a deed. Any words or acts showing intention of grantor to deliver and grantee to accept are sufficient.
5. ———: ———. Possession of a deed by grantee is *prima facie* evidence of delivery, which may be rebutted, but the burden of proof is upon him who denies this presumption.
6. ———: ———. Where grantor gives deed to third person to

hold until the happening of some contingency, it does not operate as a delivery.

7. Action. Under pleadings and facts in this case, the suit for partition was not prematurely commenced.

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

Guy A. Hamilton and *Edward J. Steinacher,* for appellants.

Waring & Waring and *Sloans, Keenan & Corbitt, contra.*

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

DAY, J.

The district court decreed the partition of certain real estate in a suit in which the five children and the surviving spouse of Barbara Ladman were parties. The real estate was formerly owned by Barbara Ladman. Two daughters and one son opposed the partition of the property decreed by the trial court and prosecute this appeal.

The petition of the plaintiff, a son, alleges that Barbara Ladman died intestate, and that the five children and the surviving husband are the heirs at law, and as such the owners of the property. The defendants opposed to the partition on this basis are two daughters and one son. They allege that Barbara Ladman executed a will. This question has been heretofore settled adversely to the appellants by this court. Barbara Ladman died intestate. *In re Estate of Ladman,* 128 Neb. 483, 259 N. W. 50.

The appellants also allege that by virtue of a separation agreement John Ladman, the surviving spouse, and the son Joseph, who is plaintiff here, had been barred and estopped from claiming any right, title and interest in the real estate. The separation agreement relied upon was between John Ladman and Barbara Ladman, his wife, and is alleged to have been made in 1895. An examination of the evidence reveals that it does not establish that the agreement was made. No such agreement was ever executed, and, if

it was made, it was oral. The plaintiff here was alleged to have been a party to the separation agreement between his mother and father, and as a result to have been deeded some land. A contract between a husband and wife, where a legal separation is justified, in which they settle their property rights and each relinquishes all rights including inheritance in the property of the other, will be enforced if fair and equitable. *In re Estate of Lauderback,* 106 Neb. 461, 184 N. W. 128; *Hiett v. Hiett,* 74 Neb. 96, 103 N. W. 1051; *Amspoker v. Amspoker,* 99 Neb. 122, 155 N. W. 602. Since the evidence fails to establish that such an agreement was made between the parties or the terms thereof, it is unnecessary to speculate about the effect of such an agreement upon the issues in this case.

The amended answer of the appellants here alleged that on December 1, 1932, Barbara Ladman executed a warranty deed conveying the real estate to her five children. The plaintiff denies the execution and delivery of such a deed. It is necessary to determine the validity and effect of this deed. The appellants ground their argument upon a statement in the opinion filed in *In re Estate of Ladman,* 128 Neb. 483, 259 N. W. 50. The issue in that case was the revocation of a will. It was said by way of argument that Barbara Ladman's intention to revoke her will was evidenced by the fact that she had made another disposition of her property. As already indicated in *Ladman v. Farmers & Merchants Bank, ante,* p. 460, 265 N. W. 252, it would have been more accurate to state that her intention was shown by an attempt to make another disposition of her property. Persistence of counsel seems to require that we again take note of this language, although it was neither vital to the decision in which it was used, nor binding as an adjudication of any issue here. The argument of appellants that it adjudicates the question of fact relative to the conveyance by deed of the real estate here involved is unsound and untenable.

The original pleadings of two of the three appellants alleged that Barbara Ladman died seised of this property.

The claim that the property had been conveyed to the five children was made for the first time in an amended answer filed after the opinion in *In re Estate of Ladman,* 128 Neb. 483, 259 N. W. 50, had been filed. The deed was executed and delivered to Charles Smrha, which conveyed this real estate to her five children, reserving a life interest. This deed was executed in connection with a proposed plan for the disposition of her property. The deed was given to Mr. Smrha for the purpose of making the disposition. But it never was delivered to the grantees. It is an old, established rule in this state that: "A deed takes effect only from the time of delivery. The possession of a deed by the grantee, in the absence of opposing circumstances, is *prima facie* evidence of delivery, and the burden of proof is on him who disputes this presumption." *Roberts v. Swearingen,* 8 Neb. 363, 1 N. W. 305. Delivery is essential to the validity and operation of a deed. *Roepke v. Nutzmann,* 95 Neb. 589, 146 N. W. 939; *Brown v. Westerfield,* 47 Neb. 399, 66 N. W. 439. No particular ceremony is necessary to constitute a delivery of a deed. Any words or acts showing intention of grantor to deliver and grantee to accept are sufficient. *Flannery v. Flannery,* 99 Neb. 557, 156 N. W. 1065. In *Roberts v. Swearingen, supra,* it was held in substance that the possession of a deed by the grantee is *prima facie* evidence of delivery, which may be rebutted, but the burden of proof is upon him who denies this presumption. But the deed which concerns us here was never delivered to the grantees. And the rule is different where there is delivery to a third party, and the facts and circumstances surrounding the delivery indicate that there was no present intention of passing title. *Trask v. Trask,* 90 Ia. 318, 57 N. W. 841, states the rule as follows: "A delivery to a third person does not authorize a presumption that it is done with the intention of passing the title. The facts and circumstances attending the transaction must be such as to show that the grantor intended that the deed should be delivered by the custodian to the grantee."

The rule has been stated in different terms as follows:

"Where a deed is given to a third person to hold until the performance of some act by the grantee or the happening of some contingency, it does not operate as a delivery to the grantee, and a delivery by the depositary contrary to the directions of the grantor will not pass the title." 18 C. J. 206.

This deed was delivered to Smrha, a third party, for delivery to the grantees when John Ladman executed and delivered to Smrha a deed for the land. John Ladman refused to execute such a deed. There is a deed in the record executed by John Ladman, but it relates to an attempted settlement of the Ladman estate and has no connection with the deed of Barbara Ladman.

Finally, the appellants complain of the action of the trial court in denying their motion to continue the trial until the cases heretofore mentioned were disposed of, and until the final claim day in the estate. The rule, venerable with age, is stated in *Alexander v. Alexander,* 26 Neb. 68, 41 N. W. 1065, as follows: "An heir or devisee of an estate cannot maintain an action for distribution or partition until the debts, allowances, and expenses against said estate have been paid or provided for, unless he give a bond with approved sureties to pay the same."

The record reveals that at the time of trial there was more than $8,000 in the possession of the administrator, and that the deceased had no substantial debts. The plaintiff offered to furnish a bond, but the trial court held that a bond was unnecessary. This case is similar to *Schick v. Whitcomb,* 68 Neb. 784, 94 N. W. 1023, in which the court construed section 30-1304, Comp. St. 1929. In the *Schick* case there was $11,000 in the hands of the executor, and in this the administrator has $8,000. In that case, there was one claim of $70 allowed and unpaid. In this case, the claims including expense of administration are only a small part of the amount of cash reserved. The only distinction is that the time for filing claims had passed in the *Schick* case, and here it had not.

The appellants who complain are estopped, since they

asked either for partition or a decree quieting the title to this property. They invoked the powers of the court and cannot complain. There was no good reason why this case should wait until the other cases were disposed of by this court. It is not apparent that the appellants have been prejudiced by the refusal of the trial court to continue this case until a final disposition was made of the other cases. The argument of the appellants is highly technical and is not based upon the promotion of justice. There are substantial reasons why this case should not be reversed upon the reasons urged. Section 20-853, Comp. St. 1929, provides: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." There is no claim here that the alleged error affected substantial rights, and the technical questions of practice are not sufficient to justify a reversal. It would be a foolish waste of time to reverse the judgment and remand this case, when a retrial would require the same judgment. Present litigation, to serve a useful purpose, should be ended within the life of those now living, and the purpose of the courts should be the determination of substantial rights.

AFFIRMED.

ADA BROWN, APPELLEE, V. WILLIAM A. EHLERS, ADMINISTRATOR, APPELLANT.

FILED MAY 8, 1936. No. 29661.

1. Insurance. The claim to the proceeds of an industrial insurance policy is not affected by the facility of payment clause where the insurance company had failed to avail itself of such provision.
2. ———: ASSIGNMENT: WAIVER. The insurance company, by paying the proceeds of a policy into court, waived a provision therein invalidating assignments of the policy.
3. ———: PLEDGE. The delivery of a life insurance policy by the insured to secure a debt of such insured, whether the policy is

assigned or not, constitutes a pledge entitling the pledgee to an equitable lien upon the proceeds of the policy.

4. ———: ———. An oral assignment or pledge of three life insurance policies, as security for insured's debt, is valid between the parties, notwithstanding that each policy provided that any assignment or pledge of the policy should be void.

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

William A. Ehlers, for appellant.

R. B. Hasselquist, Donald S. Krause and *Ray L. Williams, contra.*

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

PAINE, J.

Evelyn Davis Graham died in Omaha on April 9, 1934, leaving in force three policies of industrial insurance in the Metropolitan Life Insurance Company. Attorney William A. Ehlers was appointed administrator of her estate. The insurance company paid $1,397.46, due on the three policies, into district court. This is an action against the administrator, brought by Ada Brown, a friend of deceased, who had from time to time advanced large sums of money to deceased. The trial court found that the administrator was entitled to all of the estate of the deceased except the proceeds of these three policies, which should go to Ada Brown. The administrator appeals.

The probate proceedings were brought pretty largely at the instance of Ada Brown, who filed a claim in the county court against the estate. Then the said Ada Brown started this independent action in the district court, alleging an oral contract with deceased to bequeath her property to plaintiff.

It is necessary to briefly review the facts. The plaintiff, Ada Brown, was born in 1897, and made her home with Evelyn Davis for a number of years, first going to live with her in 1913 in Lead, South Dakota, and remaining with her

for five or six years. Ada Brown was known in the family as a "cousin" of Mrs. Davis, having grown up with her. Mrs. Davis' family at that time consisted of her mother, Mrs. Yancey, May Yancey, her sister, and Tom Yancey, her brother, who was later killed in service, and by whose death Mrs. Davis drew small monthly payments of war risk insurance.

After Mrs. Davis had moved her family, including plaintiff, to Omaha in 1918, and after a home was bought, Ada Brown went out to Casper, where she engaged in the rooming-house and restaurant business, in which she was quite successful, and she forwarded from time to time considerable amounts of money to Mrs. Davis, a great deal of which was in remittances that are a matter of record.

The records at the Western Union Telegraph office of Casper, Wyoming, showed there were 72 wires forwarding money to a total sum of $1,754.93 from Ada Brown to Mrs. Davis, and in addition to these sums there were some 68 post office money orders transferring money from Ada Brown to Mrs. Davis, all for the purpose of taking care of and supporting this old lady and paying on her debts.

All the way through the evidence the deceased is referred to as Evelyn Davis. After she moved to Omaha she married a man by the name of Todd, but they separated soon after. Later in Omaha she married a man by the name of Graham, who only lived with her some six weeks, but he had not been heard of for some six years at the time of the trial; so that the name Evelyn Davis was the one she was usually known by.

There are letters in evidence from Mrs. Davis showing that she designated Ada Brown to have all of her property, plaintiff claiming these show that Mrs. Davis gave an equitable assignment of these policies for the money that plaintiff had sent her. These letters indicate that the deceased intended that Ada Brown should have her property, and perhaps sent her these policies, for there is testimony which shows that the old lady went to the post office in the Brandeis store, Omaha, with a woman who testifies to the

facts, and bought exhibit 23, a large envelope, and it is claimed that she sent the policies in that envelope from the Brandeis post office by registered mail to Ada Brown at Casper, and Mrs. Davis stated in the letters, and also orally, that Ada Brown should have these insurance policies, as she was furnishing the money to take care of her.

These three policies provided no beneficiary, and there is a clause in industrial policies that the insurance company may pay it to the undertaker, or any one who is equitably entitled to the money. Those clauses are legally styled "facility of payment." There appear to have been six policies at one time, but only these three were in force and effect at the time of the death of the insured. Each of these policies carried the provision that "any assignment or pledge of this policy or any benefits hereunder shall be void and of no effect." These industrial policies have many different provisions from any other kind of insurance policy.

Mrs. Davis visited plaintiff twice in Casper, staying three months the first time and two months the second time. When Mrs. Davis died, the plaintiff received a wire and came at once to Omaha, where she has since remained. The plaintiff was married to Udell Brown, who died in 1928, and she was a widow at the time of trial. The plaintiff invested money with the deceased, both in the home and also in the furniture, putting in a great part of her earnings.

The decree of the trial court contained a finding that the Metropolitan Life Insurance Company was released and discharged from all liability under the policies of insurance upon the life of the deceased. The court found there was insufficient evidence to establish a contract between plaintiff and decedent to bequeath all her property to plaintiff, but did find that, in consideration of the money advanced and services rendered by the plaintiff, the policies of life insurance were equitably assigned and possession thereof delivered under an oral agreement, and that said policies and the proceeds thereof in the hands of the clerk should be the property of the plaintiff, less the costs incurred by

the filing of the interpleader of the insurance company, and that the plaintiff should recover her costs, and the trial court found that all other property in the estate of the deceased belongs to the defendant administrator.

The defendant sets out as prejudicial errors the rulings upon motions and in the reception of evidence, and that the decree is not supported by the pleadings and is contrary to the evidence and the rules of law with respect to proceeds of life insurance policies. The defendant insists that one who claims an equitable assignment of a life insurance policy must allege and prove all of the terms and conditions of the alleged contract. The defendant insists that an assignment or pledge of a policy of insurance is in effect an attempt to change the beneficiary, and is void unless consented to by the insured and the insurer.

The defendant insists that the clause in an insurance policy known as the facility of payment clause is an exclusive privilege and provision for the benefit of the insurance company, and gives no right of action to any other person, and the courts should enforce the contract as made in an insurance policy. An industrial life insurance policy containing a clause saying that any assignment or pledge of the policy shall be void and of no effect is in itself notice to the holder of the policy of that fact.

Several references are made in the briefs to the case of *Metropolitan Life Ins. Co. v. Dunne*, 2 Fed. Supp. 165. In this late case two industrial policies were issued in 1918 on the life of one Johnson in the amount of $310 each. They were payable to his estate, and contained the usual facility of payment clause. Johnson paid the first two payments of 25 cents a week on each policy, after which Mrs. Bridget Dunne, with whom he was boarding, made all the payments. After he moved to New York state in 1925, she continued to make payments on these policies until 1929, at which time she discovered that Johnson had died three years before, and that she had paid $59.50 in premiums after his death. Johnson had delivered the policies to Mrs. Dunne in 1918, telling her they were for her little daughter, Dorothy

Dunne. The court decided that Bridget Dunne was entitled to $59.50 out of the face amount of the policies paid into court by the insurance company, and that the defendant Dorothy Dunne was entitled to the balance of the insurance money. It was held that the claim to the proceeds of the life insurance policy was not affected by facility of payment clause where insurer had failed to exercise option under that clause. It was also held that the policy provisions invalidating assignment of the policies may be waived by the insurer, and that the insurance company had waived these provisions by paying the proceeds into court. It was further held that the delivery of a life policy, under circumstances indicating a clear intent to make a gift, is a sufficient assignment, notwithstanding an absence of writing.

In the case of *New York Life Ins. Co. v. Cross*, 7 Fed. Supp. 130, it was held that the insurance company, by paying the money into court, waived objection, which the insurer alone could raise, that the beneficiaries were not formally changed in the policy. It also held that, in determining whether insured delivered life policy to beneficiary by way of gift, security, or for safe-keeping, where beneficiary's testimony is unreliable, parties' contemporary attitudes, especially if shown by documents and letters, control. In ruling upon objections to testimony in this case, the testimony of one of the claimants, designated by the insured as beneficiary under a life policy, concerning oral communications had with the insured, was held admissible, since the other claimants of the proceeds did not derive their title or interest from, through, or under deceased within the state statute.

There is one late case that this court has just handed down which is right in point. It is *Dvorak v. Kucera, ante*, p. 341, 264 N. W. 737, in which case the plaintiff loaned her husband certain sums of money, and prior to her death she orally assigned the policy of insurance to him, and our court held that an oral assignment or pledge of a life policy as security for insured's debt is valid between the parties, notwithstanding the policy provided that no assignment

shall be valid unless in writing and filed with insurer. The delivery of a life insurance policy to secure a debt of the insured, whether the policy is assigned or not, constitutes a pledge entitling the pledgee to an equitable lien upon the proceeds of the policy. *Redden v. Prudential Life Ins. Co.*, 193 Minn. 228, 258 N. W. 300; *Davis v. Murphy*, 105 Neb. 839, 182 N. W. 365.

From an examination of the entire record, we find no prejudicial error in the judgment of the trial court, and it is hereby

AFFIRMED.

JOSEPH J. SRAJHANS, APPELLEE, V. FRANK MARES ET AL., APPELLANTS.

FILED MAY 8, 1936. No. 29672.

1. **Mortgages: FORECLOSURE: MORATORIUM.** When it appears from the evidence that the amount of the mortgage liens on the land exceeds its value, a moratory stay under section 20-21,159, Comp. St. Supp. 1935, must be denied.
2. ———: ———: SALE: CONFIRMATION. Mere inadequacy of price will not preclude a confirmation of a foreclosure sale unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud.

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

Richard O. Johnson and *Bernard J. Klasek*, for appellants.

C. R. Stasenka, contra.

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

CARTER, J.

This is an appeal from a judgment of the district court for Saline county denying the application of the appellant for a moratory stay under the provisions of section 20-21,159, Comp. St. Supp. 1935.

On June 20, 1934, a decree of foreclosure was entered against the property covered by appellee's mortgage on liens aggregating an amount in excess of $48,000. The property consisted of four lots in the city of Wilber upon which was a modern one-story garage building 132 feet long and 88 feet wide. The appellant placed the highest value on the property of any witness who was called, when he testified it was worth $25,000. Assuming that this evidence is true, appellant would not be entitled to a moratory stay under the recent holdings of this court.

In *Clark v. Hass,* 129 Neb. 112, 260 N. W. 792, this court said: "Where, upon a hearing on an application for a moratory stay of proceedings under section 20-21,159, Comp. St. Supp. 1933, it appears that the amount of the mortgage lien exceeds the value of the lands secured by the mortgage, it is not an abuse of discretion on the part of the trial court to deny the application." Other cases to the same effect are *First Trust Co. v. Stenger, ante,* p. 750, 266 N. W. 642; *Luikart v. Graf, ante,* p. 736, 266 N. W. 641. We conclude, therefore, that the trial court properly denied the moratory stay.

Appellant contends that the trial court erred in confirming the sale of the premises. The record shows that the property sold for $5,500. Delinquent taxes in the amount of $4,500 were a prior lien. The testimony of appellant's witnesses, other than appellant himself, is to the effect that the property is worth $15,000. Appellee's witnesses place the value approximately at $10,500. Under these circumstances, we are unable to say that the sale for $5,500, subject to taxes in the amount of $4,500, was not properly confirmed by the trial court. This court is also committed to the rule that mere inadequacy of price will not preclude confirmation of foreclosure sale unless shocking the conscience of the court or amounting to evidence of fraud. *Erickson v. Hansen,* 129 Neb. 806, 263 N. W. 132; *Keller v. Boehmer, ante,* p. 763, 266 N. W. 577. We conclude, therefore, that the trial court did not err in confirming the sale.

In view of what we have heretofore said in this opinion, it will not be necessary to consider other assignments of error. The judgment of the district court is

AFFIRMED.

ROY W. BELVILLE, APPELLANT, V. GLENN W. BONDESSON, APPELLEE.

FILED MAY 8, 1936. No. 29604.

1. Negligence: COMPARATIVE NEGLIGENCE. Where there is evidence tending to prove both negligence and contributory negligence in an action to recover damages for causing an injury by wrongful act, the duty of making the comparison under the comparative negligence law is imposed upon the jury, unless the evidence of negligence is legally insufficient to sustain a verdict in favor of plaintiff, or unless the court finds, as a matter of law, that the negligence of plaintiff is more than slight, or that the defendant's negligence is not gross in comparison with that of plaintiff.
2. ———: ———. The evidence of the plaintiff in this case did not justify the trial court in finding, as a matter of law, that the negligence of plaintiff was more than slight, when compared with the negligence of defendant, and that question should have been submitted to the jury.

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

Burbank & Burbank, for appellant.

Reed, Ramacciotti & Robinson, contra.

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

CLEMENTS, District Judge.

This action was brought by Roy W. Belville, plaintiff, against Glenn W. Bondesson, defendant, to recover damages which he says he sustained by being struck and injured by a car owned and driven by said defendant.

The plaintiff alleges the defendant was guilty of gross negligence in driving his car at the time of the accident, and that such negligence was the proximate cause of the

accident and plaintiff's injury. The defendant denies any negligence on his part, and alleges that any injury which the plaintiff sustained was the result of his own carelessness and negligence in failing to see, and walking into and upon, the defendant's automobile. The plaintiff denies the allegations of the defendant. The cause was tried to a jury. At the close of plaintiff's testimony, the defendant moved the court to dismiss the action "for the reason that on the testimony of the plaintiff it has been definitely established that the plaintiff was guilty of negligence more than slight." This motion was sustained and the cause dismissed. Motion for a new trial was filed and overruled. The case comes here on appeal.

While the defendant bases his right to a dismissal of the case, without its submission to a jury, solely on the question of the contributory negligence of the plaintiff, thereby impliedly admitting his own negligence, still it is necessary for us to examine his acts of negligence, as shown by the evidence, to determine whether the contributory negligence of the plaintiff was, as a matter of law, more than slight in comparison therewith.

The facts established by the plaintiff's evidence are as follows: On August 31, 1934, between the hours of 12:00 midnight and 1:00 a. m., the plaintiff, accompanied by a friend, was walking east on the north side of Capitol avenue in the city of Omaha. It was raining and the streets were wet. Arriving at the intersection of Sixteenth street with Capitol avenue, they paused momentarily; the plaintiff looked both to the left and right along Sixteenth street; he saw cars coming from both directions. At the north, two or three cars were about a half block away coming at a moderate speed toward Capitol avenue. He would have to cross the traffic lanes of these cars before reaching the center of Sixteenth street. In the other direction, he saw two cars south of Capitol avenue. He would not cross the traffic lanes of these cars, had they proceeded north, until after he reached the center of Sixteenth street. He started to cross Sixteenth street followed at a distance of

about three feet by his friend. They were walking very fast, kept within the white marks which defined the cross-walk, safely crossed the traffic lanes of the cars coming from the north, and reached the center of Sixteenth street when the plaintiff was struck and injured by the defendant's car. After looking to the south and noting the position of the cars coming from that direction, the plaintiff directed his attention to the cars whose traffic lanes he was crossing and to his footing, there being puddles of water on the crossing. However, he noticed that the two cars coming from the south turned east on Capitol avenue. Arriving at the center of the street, he looked to the south, presumably to see if it was safe to cross the traffic lanes of north-bound cars, and at that instant was struck by the defendant's car. The defendant's car was behind the two cars coming from the south, when these cars started to turn east on Capitol avenue. Defendant swung his car to the left and angled across the intersection to the middle of the street. No reason is shown why he could not have continued on the east side of the street. He was driving at about 35 or 40 miles an hour. He struck the plaintiff with the bumper of his car. The plaintiff was carried a distance of two car-lengths and thrown to the pavement.

The intersection of Capitol avenue and Sixteenth street is within the congested traffic district of the city of Omaha. At the time of this accident, there was in force in the city of Omaha an ordinance which provided: Section 16-A. "The driver of any vehicle shall yield the right of way to a pedestrian crossing the street within any marked cross-walk or within any unmarked cross-walk, at the end of a block." Also an ordinance providing: Section 40-A. "No person shall drive or operate a vehicle or street car upon a street at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road, nor at a rate of speed such as to endanger life or limb of any person, nor in any case at a rate of speed exceeding the limit set forth in section 40-B." Section 40-B. "Indicated speeds are as follows: 18 miles per hour."

On this statement of the record, the court, at the close of plaintiff's evidence, refused to permit the trial to proceed further and dismissed the action. In this, we think he erred.

Where there is evidence tending to prove both negligence and contributory negligence in an action to recover damages for causing an injury by wrongful act, the duty of making the comparison under the comparative negligence law is imposed upon the jury, unless the evidence of negligence is legally insufficient to sustain a verdict in favor of plaintiff, or unless the court finds, as a matter of law, that the negligence of plaintiff is more than slight, or that the defendant's negligence is not gross in comparison with that of plaintiff.

To drive an automobile at 35 or 40 miles an hour, on a dark, rainy night, over wet streets diagonally across an intersection, in the congested traffic district of the city of Omaha, and against a pedestrian, in the center of the street, between the white lines marking the cross-walk, and in violation of ordinances providing that pedestrians, under such circumstances, shall have the right of way, and that the maximum speed of automobiles in crossing such intersections shall not exceed 18 miles an hour, is gross, if not wilful, negligence, and upon such evidence a jury would be justified in so finding.

In examining the question of plaintiff's contributory negligence, it is necessary for us to formulate some idea as to what an ordinarily cautious and prudent man would do under like circumstances. We think he would act about as follows: On reaching the intersection, he would look both to his right and to his left. Seeing that no cars were coming from the right that would endanger him before reaching the center of the street and determining that he could safely cross in front of cars coming from his left, he would proceed, being watchful of the cars whose traffic lanes he was crossing. Arriving in the center of the street, he would devote the greater part of his attention to cars coming from the south whose traffic lanes he would cross in

reaching the other side of the street, being alert, however, at all times, to the possibility that a car might appear where normally it would not be expected. This is about what the evidence shows the plaintiff did. It is possible that he should have seen the defendant's car before he reached the center of the street, but it must be remembered that not more than five seconds elapsed after he left the curb until he was struck. During this time he watched and avoided the cars coming from his left, watched his footing, and saw the two cars turn east on Capitol avenue. It is probable that the turning on Capitol avenue of the only two cars he saw coming from the south caused him to be less watchful for cars from that direction than he otherwise would have been. If this was evidence of negligence, it was not such evidence as would warrant the court in finding, as a matter of law, it was more than slight in comparison with the gross negligence of the plaintiff.

Complaint is made that a declaration of the defendant relating to the striking of the plaintiff was illegally excluded on the trial. The witness, Henry A. Fehrenz, was asked: "Did you hear Bondesson say anything with reference to the injury that Belville had received? A. Yes, sir; I did. Q. What did you hear him say? Objected to as immaterial. * * * The Court: I will sustain the objection. * * * Q. You may state what, if anything, you heard Mr. Bondesson say at that time and place. Objected to as incompetent, irrelevant and immaterial. The Court: It is open to the same objection that the court ruled on before, Mr. Burbank. Mr. Burbank: I offer to show that the answer of the witness would be that Bondesson said he was surprised that he wasn't hurt worse by reason of his having hit him going as fast as he was. * * * Defendant objects * * * as incompetent, irrelevant and immaterial. The Court: Sustained." The testimony sought to be elicited by these questions was no doubt competent and material, but the questions do not clearly so indicate, and the offer made is so unfortunate in the use of pronouns that it is doubtful if the jury could have known just what meaning was sought to be conveyed.

As there must be a retrial, and as no doubt the questions, if asked again, will be more carefully framed, we do not think it necessary to consider this matter further.

For the reasons given, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

INDEX

Account Stated.

1. A settlement of accounts between principal and agent is generally binding on the agent, in absence of fraud or mistake. *American States Life Ins. Co. v. Richardson* 108
2. A settlement of accounts between an insurance company and an agent selling insurance on commission, including charges for advances in excess of commissions, *held* binding on the agent. *American States Life Ins. Co. v. Richardson* 108
3. Where seller's invoice which was paid by buyers did not include all merchandise actually delivered, and buyers had not changed their position in ignorance of the mistake, *held* seller could recover remainder actually due. *Valvoline Oil Co. v. Duda-Myers Co* 190
4. Seller *held* not precluded from recovery, for merchandise erroneously omitted from invoice, in a law action commenced 20 months after the merchandise was delivered, because he had means at hand for ascertaining the mistake some time before action was commenced. *Valvoline Oil Co. v. Duda-Myers Co* 190

Acknowledgment.

A certificate of acknowledgment of a deed or mortgage, in proper form, can be impeached only by clear, convincing, and satisfactory proof that the certificate is false and fraudulent. *Coe v. Talcott* 32

Action.

1. The declaratory judgments act is applicable only where all interested persons are made parties to the proceeding. *Southern Nebraska Power Co. v. Village of Deshler* 133
2. In an action attacking the validity of statute imposing gasoline tax, and seeking a declaratory judgment, motion to dismiss for defect of parties sustained. *Arlington Oil Co. v. Hall* 674

Adoption.

1. Failure to give statutory notice to natural parent renders adoption proceedings void as to person not notified. *In re Estate of Zehner* 375

2. A parent who appears, participates in, and consents to adoption proceeding, and thereafter treats it as valid, is estopped to deny the validity thereof. *In re Estate of Zehner* 375
3. Parent alone can complain of failure to notify him of adoption proceeding. *In re Estate of Zehner* 375
4. The probate court acts judicially in an adoption proceeding, and if there is substantial compliance with the statutes, the decree is conclusive. *In re Estate of Zehner* 375
5. A decree of adoption can be reversed, vacated, or modified by the district court on appeal by one having an appealable interest. *In re Estate of Zehner* 375
6. Where adopting parents obtain a decree of adoption and take the adopted child into their home as their own, they and their heirs are estopped from attacking the decree collaterally. *In re Estate of Zehner* 375
7. Collateral heirs of adopting parents are estopped to deny validity of adoption proceeding and right of adopted child to inherit. *In re Estate of Zehner* 375

Appeal. SEE CRIMINAL LAW. TRIAL.
1. Jurisdiction of the district court will be presumed on appeal, unless the record affirmatively shows the contrary. *Myers v. Hall County* 13
2. Where the district court, on appeal from the county board, overruled a motion to strike the petition on appeal because not filed within time, nor good cause for delay shown, it will be presumed on appeal to the supreme court that good cause was shown, in absence of a record disclosing the contrary. *Myers v. Hall County* 13
3. Nonexistence of jurisdiction of the district court will not be presumed on appeal, to reverse a judgment. *Myers v. Hall County* 13
4. On appeal from the county board to the district court, failure to verify the petition on appeal is not a jurisdictional defect. *Myers v. Hall County* 13
5. Plaintiff, failing to take a cross-appeal from a judgment in his favor in a law action, is not entitled to an increase in his recovery. *Myers v. Hall County* 13
6. Whether seller orally agreed to repurchase bonds at any time on buyer's demand *held* question for jury. *Johnson v. First Trust Co* 77
7. When the law of the case is determined on appeal, the trial court is bound thereby, and its judgment

accordingly will not ordinarily be disturbed on another appeal. *In re Estate of Clarke* 121
8. Where defendant adduces no proof, all facts which plaintiff's evidence tends to prove will be treated as *prima facie* established. *Valvoline Oil Co. v. Duda-Myers Co* 190
Manley State Bank v. Spangler 196
9. Violation of strict rule of cross-examination is not reversible error unless prejudicial to complainant. *Manley State Bank v. Spangler* 196
10. Where both parties move for a directed verdict, findings of the court, if sustained by sufficient evidence, will not be disturbed on appeal. *Bonacorso v. Camden Fire Ins. Ass'n* 203
11. A verdict based on conflicting evidence will not be disturbed unless clearly wrong. *Boehler v. Kraay* 233
Swain v. Cogswell 709
12. Instructions which withdraw from the jury material issues presented by the pleadings and evidence are erroneous. *Nocita v. Guiliano* 241
13. An instruction which serves only to guide the jury in weighing certain features of evidence must be requested before error can be predicated on failure to so instruct. *Woracek v. Schuehart* 260
14. Where evidence is insufficient to sustain verdict for plaintiff, error, if any, in giving or refusing instructions is not prejudicial to him. *Nielsen v. Yellow Cab & Baggage Co* 457
15. Where bill of exceptions has been quashed, it will be presumed that findings of fact by trial court are supported by evidence. *Towle v. Richardson County* 467
16. Without a bill of exceptions, the only question to be considered is sufficiency of pleadings to support judgment. *Towle v. Richardson County* 467
17. The appellate court may, on a second appeal, review and reverse its former decision; but parties are not entitled to such review as matter of right, and such practice will be resorted to only where cogent reasons exist therefor. *Burnham v. Bennison* 558
18. Generally, the appellate court, on a second appeal, will not reexamine questions of law presented in the first appeal. *Burnham v. Bennison* 558
19. Generally, on a second appeal, which merely seeks to relitigate questions settled in former appeal, the supreme court will not inquire into the merits of its former decision. *Burnham v. Bennison* 558

20. When evidence is substantially same as on former appeal, weight and effect thereof must be considered as foreclosed by the former decision. *Tyler v. Estate of McDougal* 633
21. Order denying motion to vacate judgment during the term will not be disturbed on appeal, in absence of abuse of discretion. *Holman v. Stull* 876
22. A judgment will not be reversed for harmless error. *Holman v. Stull* 876
23. A litigant may not complain of injury suffered in consequence of his own negligence. *Holman v. Stull* 876
24. Findings of trial court in a law action supported by competent evidence will not be disturbed on appeal. *State, ex rel. McMillin, v. Boyd County* 898
25. In an action tried to the court, it will be presumed on appeal that incompetent evidence was disregarded. *Luikart v. Flannigan* 901
26. Findings in an action tried to the court will not be set aside on appeal unless clearly wrong. *Luikart v. Flannigan* 901
27. An instruction, although not couched in clear, concise language, but containing no misstatement of law, will not be ground for reversal unless clearly prejudicial. *Serratore v. Miller* 908
28. A defendant may not predicate error on plaintiff's introduction of evidence as to an irrelevant fact where evidence thereof has been first introduced by defendant. *Serratore v. Miller* 908

Appearance.

Filing in state court of petition for removal of case to federal court is a special appearance. *Security State Bank v. Jackson Bros., Boesel & Co* 562

Attachment.

Evidence *held* insufficient to justify discharge of attachment. *Farmers State Bank v. Lemmer* 211

Automobiles.

1. In action by guest for injuries sustained in collision of automobiles at intersection, evidence *held* to sustain judgment for defendant. *Storm v. Christenson* 86
2. Owner of family-purpose automobile may be liable for guest's injury resulting from gross negligence of owner's son in operating the automobile. *Sterns v. Hellerich* 251

3. Whether the driver of an automobile was guilty of gross negligence under the evidence *held* question for jury. *Sterns v. Hellerich* 251
4. "Gross negligence," within statute regarding motorist's liability to an injured guest, means a degree of negligence greater than want of ordinary care or slight negligence, but not necessarily extending to wanton, wilful, or intentional disregard for the guest's safety. *Sterns v. Hellerich* 251
5. "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. *Covey v. Anderson* 702
6. Driving an automobile at night at such speed that one cannot avoid collision with an object within the area covered by its lights is generally negligence as a matter of law. *Anderson v. Lee* 258
7. In an action for injuries sustained by a pedestrian who was struck by a motorist, motorist's negligence was question for jury. *Anderson v. Lee* 258
8. A motorist should have his automobile under such control that, on entering an intersection, he can avoid collison with another automobile operated with due care. *Woracek v. Schuehart* 260
9. In an action for injuries in an automobile collision, whether defendant had a last clear chance to avoid the collision *held* question for jury. *Parsons v. Berry* 264
10. A vehicle entering a public highway from a private road must yield the right of way to vehicles on the highway. *Klaus v. Soloman Valley Stage Lines Co* 325
11. One driving on public highway has right of way over vehicle entering highway from private road, and is not required to slow down or stop until it should appear that the other driver was not going to yield the right of way. *Klaus v. Soloman Valley Stage Lines Co* 325
12. Driver on public highway having right of way may assume that drivers of other vehicles about to enter highway will obey the law, until the contrary appears. *Klaus v. Soloman Valley Stage Lines Co* 325
13. Bus driver *held* not negligent in turning to left to avoid collision with automobile entering pavement at speed of five or six miles an hour. *Klaus v. Soloman Valley Stage Lines Co* 325
14. Where two or more are riding in an automobile and are operating it as a joint enterprise, one who has joint

control over the automobile may be liable for the negligence of the other in operating it. *Ahlstedt v. Smith* 372
15. Whether a person riding in an automobile driven by another is engaged in a joint enterprise with the driver is a question of fact. *Ahlstedt v. Smith* 372
16. A minor who occupies an automobile and engages in the prosecution of a joint enterprise with the driver may be liable for the driver's negligence. *Ahlstedt v. Smith* 372
17. In considering an application for a certificate of convenience and necessity for operation of taxicabs, the public, and not individuals, is to be most considered. *Publix Cars, Inc., v. Yellow Cab & Baggage Co* 401
18. Where the railway commission determined the number of taxicabs necessary to supply needs of a city and less than that number were operating, the commission's refusal to grant additional certificates of convenience and necessity to qualified applicants *held* unreasonable and arbitrary. *Publix Cars, Inc., v. Yellow Cab & Baggage Co* 401
19. Where a regulation adopted by the railway commission provided that certificates of convenience and necessity should be granted to persons operating taxicabs on date commission assumed control, the commission could not impose arbitrary conditions precedent on issuance of such certificates. *Publix Cars, Inc., v. Yellow Cab & Baggage Co* 401
20. Order of railway commission, which in form denied application of taxicab owners for additional certificates of convenience and necessity, but in effect approved other certificates held by a competitor unlawfully, *held* reviewable on appeal. *Publix Cars, Inc., v. Yellow Cab & Baggage Co* 401
21. A regulation of the railway commission requiring taxicab operators to obtain certificates of convenience and necessity is not unreasonable or arbitrary. *Publix Cars, Inc., v. Yellow Cab & Baggage Co* 401
22. Grant or denial of a certificate of convenience and necessity by the railway commission requires exercise of administrative and legislative functions and not of judicial powers. *Publix Cars, Inc., v. Yellow Cab & Baggage Co* 401
23. On appeal to the supreme court from an order of the railway commission which is administrative or legis-

lative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable. *Publix Cars, Inc., v. Yellow Cab & Baggage Co.* 401

24. Where reasonable grounds for investigation exist, the railway commission cannot dismiss a complaint as to certificate of convenience and necessity by a taxicab operator without a hearing on the merits. *Publix Cars, Inc., v. Yellow Cab & Baggage Co.* 413
25. A motorist who, on approaching an intersection, failed to look in direction from which another automobile was approaching, where, by looking, he could have avoided a collision, *held* guilty of more than slight negligence. *Nelson v. Plautz* 641
26. Verdict, in action for injury sustained in automobile collision, *held* inadequate. *Nye v. Adamson* 887

Banks and Banking.

1. Where an assessment was levied against bank stockholders to make good impairment of capital due to bad loans, payment of the assessment by the stockholders gave them no interest in the loans. *Luikart v. Wells* 172
2. Where realty belonging to a bank was conveyed as security for a personal debt of the president, a decree canceling the conveyance and restoring the property *held* proper. *Luikart v. Wells* 172
   Luikart v. Wells 179
3. 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 obligation. *State, ex rel. Good, v. Platte Valley State Bank* 222
4. Proceeds of check *held* a trust fund and entitled to preference on insolvency of bank. *State, ex rel. Good, v. Platte Valley State Bank* 222
5. Where the president of a bank drew in its favor unauthorized checks against an administrator's account and turned the proceeds over to the bank, the deposit remained a liability of the bank and of a subsequently appointed receiver, though the administrator was cashier of the bank, but without knowledge of the transactions. *State, ex rel. Sorensen, v. Verdigre State Bank* 273
6. A suit to recover double liability on bank stock purchased prior to 1930 amendment to Constitution, which was brought before assets of bank were exhausted

and before exact amount due was judicially determined, *held* premature. *Luikart v. Higgins* 395
7. The constitutional double liability of a stockholder in a state bank is determined at time of purchase of stock. *Luikart v. Higgins* 395
8. Sureties on a depository bond *held* not entitled to preferred claim against assets of insolvent bank. *Shumway v. Department of Banking* 491
9. When a state bank is reorganized as a national bank, which takes over all assets and rights of the state bank, the national bank is subject to all existing obligations of the old bank. *Wilson v. Continental Nat. Bank* 614
10. Payment of interest by a trust company to its customer on daily balance of funds he has placed in possession of the company is a strong indication that title to the funds passed to the company, and that the relation between it and the customer was that of debtor and creditor. *Crancer v. Reichenbach* 645
11. Vice-president of bank cannot bind the bank for payment of a debt for which it was not previously liable, in absence of specific authority or established usage acquiesced in by bank's directors. *Martin v. St. Paul State Bank* 894
12. Executive officers of a state bank are required by law to give a surety bond. *Luikart v. Flannigan* 901
13. The receiver for an insolvent state bank may sue an executive bank officer and the surety on his bond to recover losses sustained by the bank through wrongful acts of such officer. *Luikart v. Flannigan* 901
14. An executive officer of a state bank is liable for his illegal acts, and for illegal acts of other executive officers of the bank when he participates in, connives at, or consents to, such illegal acts. *Luikart v. Flannigan* 901

Bastards.

1. Bastardy is a civil proceeding. *Brown v. Echtenkamp* .. 297
2. Payment by father of bastard child of amount fixed in judgment is to indemnify the public against possible liability for the child's care and maintenance. *Brown v. Echtenkamp* 297
3. Inability of defendant to furnish bond or to meet payments fixed by bastardy judgment justifies modification of terms of judgment. *Brown v. Echtenkamp* 297

Bills and Notes.

1. Accommodation maker defined. *Stockmens State Bank v. Pollat* 244
2. A consideration moving to one of several joint makers of a note is good as to all. *Stockmens State Bank v. Pollat* 244
3. A note, as between parties, is not binding on one who signed it on express condition that another would sign it, where there was no compliance with the condition. *Luikart v. Braasch* 361
4. Where the evidence is conflicting or different inferences may be properly drawn therefrom, whether the signer of a note is an accommodation maker is question for jury. *Atlas Corporation v. Magdanz* 519
5. A bank cashier who transferred to the bank a note in which he was made payee and who from time to time made payments on the note *held* estopped from pleading the statute of limitations or the statute of frauds in suit on note. *Atlas Corporation v. Magdanz* 519
6. A provision in a note waiving demand, protest and extension of time for payment does not waive defense of statute of limitations. *Kuhse v. Luther* 623

Carriers.

In action against bus company for injury to passenger, issues of mutual mistake and fraud in procurement of release *held* not inconsistent. *Tighe v. Interstate Transit Lines* 5

Clerks of Courts.

No filing fee is required in compensation cases. *Scott v. Dohrse* 847

Constitutional Law. SEE COUNTIES AND COUNTY OFFICERS, 9. MUNICIPAL CORPORATIONS, 20, 21. STATUTES.

1. A constitutional amendment must be construed in connection with other provisions so as to harmonize the whole instrument. *Luikart v. Higgins* 395
2. A constitutional amendment operates prospectively only, unless the words employed show a clear intent that it should have a retrospective effect. *Luikart v. Higgins* 395
3. A statute will not be declared unconstitutional unless necessary to proper disposition of pending case. *First Trust Co. v. Stenger* 750
4. The legislature has plenary law-making power over all subjects within its territorial jurisdiction. *City of Fremont v. Dodge County* 856

Contracts. SEE SPECIFIC PERFORMANCE, 2.

1. Contracts must receive a reasonable construction so as to give effect to the intention of the parties. *Morse v. General American Life Ins. Co.* 37
2. The general rule of construction of contracts is to ascertain and give effect to the intentions and purposes of the parties executing such contracts. *Clough v. Standard Oil Co.* 136
3. Agreement by a city officer to perform the duties of his office for a sum less than the amount fixed by law is against public policy. *Bishop v. City of Omaha* 162
4. A contract by office manager not to engage in a competitive business in the locality for one year after termination of employment *held* enforceable. *Personal Finance Co. v. Hynes* 547
5. Equity has jurisdiction to protect rights of loan company under contract restricting employee's right to engage in competitive business, though contract provides for liquidated damages. *Personal Finance Co. v. Hynes* 547
6. While executory, and before breach, terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration. *Personal Finance Co. v. Hynes* 547
7. The right to rescind a contract for fraud or duress must be promptly exercised on discovery of grounds therefor. *Glatfelter v. Curtis* 628
8. Whether plaintiff suing to rescind a contract for fraud or duress acted with reasonable promptness is a question for the jury. *Glatfelter v. Curtis* 628
9. Construction of written contract, if couched in clear, unambiguous language, is for the court. *Crancer v. Reichenbach* 645

Corporations.

1. Profits of a corporation are not due a stockholder as a debt until a dividend is declared. *Luikart v. Wells* 172
2. Directors have authority to bind a corporation only when they act collectively as a board, and are not *ex officio* agents of the corporation, and their individual declarations and admissions, when not acting as a board, are not binding on the corporation, nor admissible in evidence against it. *Smith v. Bankers Nat. Life Ins. Co.* 552
3. The electrical power act *held* not to require the department of roads and irrigation, in issuing a certificate of

approval, to include a finding that services in one district will not materially affect those of another district in overlapping territory. *State, ex rel. Wright, v. Lancaster County Rural Public Power District* 677

4. In the provision in the electrical power act that state department of roads and irrigation shall issue certificate of approval within 30 days, the word "shall" *held* directory. *State, ex rel. Wright, v. Lancaster County Rural Public Power District* 677
5. Two corporations may be organized to supply electrical energy in the same territory, where exercise of powers by one will not conflict with those of the other. *State, ex rel. Wright, v. Lancaster County Rural Public Power District* 677
6. Certificate by the department of roads and irrigation that a power project is feasible *held* sufficient as against an attack by *quo warranto* on ground that services will materially affect those of another district in overlapping territory. *State, ex rel. Wright, v. Lancaster County Rural Public Power District* 677
7. Officers of a corporation are responsible for fraudulent acts of the corporation in which they participate. *Wells v. Carlsen* 773
8. In a suit against a corporation for fraud, officers who acted in the matter are proper parties defendant. *Wells v. Carlsen* 773

Costs. SEE INJUNCTION, 3.

1. Where plaintiff recovers judgment in an action against an officer of a state bank on his surety bond, a reasonable attorney's fee may be taxed as costs, and the claim may be presented by motion at a subsequent term. *Luikart v. Flannigan* 901
2. Where record discloses nature and extent of services performed by attorney in action on a fidelity bond, the presiding judge may allow a reasonable attorney's fee, without testimony as to value of services. *Luikart v. Flannigan* 901

Counties and County Officers.

1. The district court acquires jurisdiction of appeal from order of county board disallowing claim against county, where claimant gives notice of appeal, furnishes appeal bond, and files in clerk's office a transcript within time allowed by law, though petition on appeal is not filed until later. *Myers v. Hall County* 13

2. Members of county board *held* not liable for warrant drawn after 85 per cent. of the levy for the year was exhausted, in absence of evidence that there were no funds in the treasury for payment of the warrant. *Beadle v. Harmon* 389
3. A county board has exclusive jurisdiction to examine and pass on claims against county, and the board's action in allowing or rejecting claims has the effect of a judgment. *Beadle v. Harmon* 389
4. The county board has jurisdiction to pass on claim against county, though claim not verified. *Beadle v. Harmon* 389
5. Delivery of county warrant before expiration of time for taking taxpayer's appeal *held* not to affect taxpayer's right of appeal. *Beadle v. Harmon* 389
6. Allowance of claim by county board is conclusive unless appealed from. *Beadle v. Harmon* 389
7. Members of county board are not liable for a mere mistake in passing on claim against county. *Beadle v. Harmon* 389
8. The office of register of deeds of a county *held* not abolished upon adoption of the county manager act by the electors of a county. *State, ex rel. O'Connor, v. Tusa* 528
9. Section of county manager act placing appointment of officers of county in hands of county manager *held* unconstitutional. *State, ex rel. O'Connor, v. Tusa* 528
10. A county is liable for the reasonable value of merchandise which it retains and uses, though the contract of purchase is unenforceable. *Western Chemical Co. v. Board of County Commissioners* 550
11. Interest received on public funds held by a county officer is a perquisite. *Scotts Bluff County v. McHenry* 717
12. Official bond of clerk of district court covers only acts done by virtue of office. *Scotts Bluff County v. McHenry* 717
13. The county is entitled to interest earned on public funds in hands of a county officer. *Scotts Bluff County v. McHenry* 717
14. A county and its property are subject to legislative control. *City of Fremont v. Dodge County* 856
15. The state has an interest in the revenue of a county, and for the public good the legislature has power to direct its application. *City of Fremont v. Dodge County* 856
16. County board may lawfully direct a jail fund, collected by taxation and in the county treasury, to be trans-

ferred to a special building fund, to be expended in construction of an addition to the courthouse including a jail, where the cost of the jail equals or exceeds the jail fund in the treasury. *Otoe County v. Kelly* 869
17. County may construct addition to and remodel and repair its courthouse without resort to bond issue or tax levy, where there is a sufficient fund on hand available for such purpose. *Otoe County v. Kelly* 869

Courts.

1. County courts are vested with original jurisdiction to construe wills so far as is necessary to enable personal representatives to properly administer estates. *In re Estate of Gibson* 278
2. An appellate court does not acquire jurisdiction by appeal, unless the court from which appeal was taken also had jurisdiction. *In re Estate of Gibson* 278
3. On appeal from municipal court to district court, damages claimed may be increased, but not beyond jurisdiction of the municipal court. *Short v. Bollen* 728
4. District court, on appeal from municipal court, may permit amendments to pleadings. *Short v. Bollen* 728

Criminal Law.

1. Application for appointment of counsel to assist in prosecution of a criminal case is addressed to the discretion of the trial court. *Dobry v. State* 51
2. In a prosecution for murder, an offer of evidence to show that a third person might have had a motive for killing deceased is properly rejected where there is no evidence to connect such third person with the crime. *Dobry v. State* 51
3. Persons called to testify as witnesses skilled in ballistics are considered expert witnesses. *Dobry v. State* 51
4. In a prosecution for murder, accused is not entitled to have a cautionary instruction given regarding credibility of witnesses called as experts on ballistics on the theory that they fall under the same classification as private detectives and informers. *Dobry v. State* 51
5. A witness skilled in ballistics may testify that, in his opinion, the revolver in possession of accused at time of homicide fired the bullet taken from the body of deceased, where his opinion is the result of comparison and markings on that bullet with those found on bullets fired by the witness through the revolver, the test on which he based his observations being minutely described to the jury. *Dobry v. State* 51

6. Credibility of a witness skilled in ballistics and weight to be given to his evidence are questions for the jury. *Dobry v. State* 51
7. Accused may not predicate error on misconduct of prosecuting attorney known to him before submission of cause to jury, when he does not ask for a mistrial, since he will not be permitted to take chances on a favorable verdict and then complain if the verdict is adverse. *Dobry v. State* 51
8. Reference by prosecutor to accused in a murder case as a murderer and an assassin *held* not error where such conclusions were reasonable deductions from the evidence. *Dobry v. State* 51
9. Accused, in prosecution for robbery, is not entitled to instruction that jury should exercise greater care in weighing testimony of police officers than in weighing testimony of other witnesses. *Koch v. State* 119
10. Court may properly refuse to give an instruction which contains both correct and incorrect statements of the law. *Koch v. State* 119
11. Where the court has instructed the jury on all issues, it is not required to give a more explicit instruction respecting the effect of impeachment evidence, in absence of request for a properly prepared instruction. *Koch v. State* 119
12. It is not error to permit incorporation in the record of a transcript of stenographer's shorthand notes read in evidence. *Koch v. State* 119
13. A conviction may rest on uncorroborated evidence of an accomplice, when considered with all the testimony. *Lovejoy v. State* 154
14. Instruction as to evidence of accomplices, approved. *Lovejoy v. State* 154
15. Instruction on reasonable doubt *held* not prejudicial. *Zimmerman v. State* 269
16. Beer *held* properly admitted in evidence, though not analyzed as to alcoholic content until nine days after seizure. *Wilson v. State* 752
17. Prosecutors should conduct prosecutions without bias or prejudice. *Plessman v. State* 758
18. Where evidence of insanity of accused appears from admitted testimony, then the burden is on the state to prove his sanity beyond a reasonable doubt. *Plessman v. State* 758
19. Insanity does not constitute a defense to a criminal act

unless it renders accused incapable of distinguishing between right and wrong with reference to such act. *Plessman v. State* 758

Death.

1. Seven years' unexplained absence raises presumption of death. *Wells v. Equitable Life Assurance Society* 722
2. One alleging death within time when presumption of death arises has burden of showing facts and circumstances which make death probable at a particular time. *Wells v. Equitable Life Assurance Society* 722

Deeds. SEE EVIDENCE, 6.

1. If it clearly appears that grantor had capacity to understand what he was doing, knew nature and extent of property dealt with, and had capacity to decide intelligently whether he intended to make conveyance, he was not incompetent to execute the instrument. *John Hancock Mutual Life Ins. Co. v. Harrold* 23
2. Undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. *Gidley v. Gidley* 419
3. A case of undue influence is made out where it is shown by clear and satisfactory evidence that testator or grantor was subject to such influence, that opportunity to exercise it existed, that there was a disposition to exercise it, and that the result appears to be the effect of such influence. *Gidley v. Gidley* 419
4. Generally, one attacking an instrument as procured by undue influence has the burden to establish such fact, but circumstances, grantor's condition, and injustice to grantor and his heirs if instrument is upheld may cast on grantee the burden of showing that instrument is untainted with undue influence, imposition or fraud. *Gidley v. Gidley* 419
5. Evidence *held* to establish that certain deeds were obtained by undue influence. *Gidley v. Gidley* 419
6. Evidence *held* insufficient to establish an oral contract that plaintiff would reconvey land deeded to plaintiff by defendant. *Sides v. Sides* 839
7. Delivery is essential to the validity of a deed. *Ladman v. Ladman* 913
8. Any words or acts showing intention of grantor to deliver and grantee to accept constitute delivery of a deed. *Ladman v. Ladman* 913
9. Possession of a deed by grantee raises a presumption of

delivery, which may be rebutted, but the burden of proof is on him who denies the presumption. *Ladman v. Ladman* 913

10. Where grantor gives deed to third person to hold until the happening of some contingency, it does not operate as a delivery. *Ladman v. Ladman* 913

Descent and Distribution.

Where testator paid a son's debt and took the son's note, payable at a definite date, the payment was not an advancement, the doctrine of advancements applying only to intestate estates. *In re Estate of Gibson* 278

Divorce.

1. Evidence *held* to sustain decree of divorce for extreme cruelty and nonsupport. *Ellwanger v. Ellwanger* 96
2. Facts to be considered in awarding alimony, stated. *Ellwanger v. Ellwanger* 96
3. Plea for determination of property rights not growing out of the marriage relation should not be joined with plea for divorce; but, when such rights are asserted in petition for divorce and no objection is made to the misjoinder, the court should determine the entire controversy. *Ellwanger v. Ellwanger* 96
4. Jurisdiction relative to divorce and alimony is given by statute, and decree of divorce can be granted only for cause prescribed by statute. *Brown v. Brown* 487
5. Extreme cruelty as ground for divorce, where there is no physical injury or violence, must be of such character as to destroy peace of mind, seriously impair bodily health, or destroy the legitimate ends and objects of matrimony. *Brown v. Brown* 487

Electricity. SEE CORPORATIONS, 3-6.

Equity.

Where one of two innocent persons must suffer by the acts of a third, he who enabled such third person to occasion the loss must sustain it. *Oleson v. Albers* 823

Escrows.

When an escrow agreement is impossible of completion, the parties are entitled to return of deeds deposited in escrow for purpose of agreement. *Ladman v. Farmers & Merchants Bank* 460

Evidence.

1. The journals of the legislature, kept according to the

Constitution, are the best evidence of what appears therein. *State, ex rel. Ball, v. Hall* 18
2. The burden of proof is on one alleging grantor's mental incapacity, in order to cancel an instrument. *John Hancock Mutual Life Ins. Co. v. Harrold* 23
3. Evidence *held* inadmissible to contradict recital in note, whereby wife bound her separate estate. *Sturm v. Lloyd* 89
4. Declarations and admissions of party against his own interest on a material matter are admissible against him. *Havlik v. Anderson* 94
5. Laws of a sister state will be presumed to be the same as the laws of Nebraska, in absence of proof to the contrary. *National Fidelity Life Ins. Co. v. Gordon* 130
6. Parol evidence is inadmissible to prove that grantor in a warranty deed conveying realty without exception, condition, or reservation retained a life estate therein by a contemporaneous oral agreement. *Erwin v. Kuhlman* 249
7. An intelligent person who has driven an automobile and observed the speedometer is competent to testify as to the rate of speed of an automobile in which he is riding. *Sterns v. Hellerich* 251
8. One with knowledge of time and distance is competent to testify as to rate of speed of automobile, his opportunity for and extent of observation being matters affecting the weight of the testimony. *Serratore v. Miller* 908
9. An extrajudicial admission is admissible only when it is against interest of party making it, but is incompetent as evidence in his favor. *Dvorak v. Kucera* 341
10. Conditional delivery of note may be shown by parol evidence. *Luikart v. Braasch* 361
11. A note cannot be varied by evidence of a prior or contemporaneous parol agreement. *Vybiral v. Schildhauer* 433
12. Inferences which may be logically drawn from proved facts may overcome positive testimony. *Smith v. Bankers Nat. Life Ins. Co.* 552
13. While a material fact may be established by circumstantial evidence, it must be such that reasonable inferences therefrom produce moral certainty. *Tongue v. Perrigo* 564
14. A statement, to be admissible as a dying declaration, must appear to have been made at a time when there

was actual danger of death and no hope of life. *Tongue v. Perrigo* 564
15. A statement, to be admissible as part of the *res gestæ*, must have been spontaneous, and made at a time and under circumstances inducing belief that it was not the result of reflection and premeditation. *Tongue v. Perrigo* 564
16. A complete, unambiguous written contract cannot be varied by a contemporaneous oral agreement. *Bartels v. Wade* 836
17. Where a witness is absent from the state, his testimony given at a former trial of the cause is admissible, if otherwise unobjectionable. *Mills v. Mills* 881

Execution.

1. Where defendant appeals from an order confirming sale to plaintiff of realty under execution issued on a judgment, and the order is superseded and judgment on which execution is issued is reversed, an order may be entered quashing the levy and vacating the sale. *Baxter v. National Mtg. Loan Co* 256
2. Under the statute providing that, if judgment in satisfaction of which land is sold be reversed, restitution shall be made of moneys received with interest from day of sale, the sale is not complete until order of confirmation is entered and time for superseding the order has elapsed. *Baxter v. National Mtg. Loan Co* 256

Executors and Administrators.

1. Claim, for personal taxes may be filed against an estate, filing of such a claim not being an action. *In re Estate of Badberg* 216
2. Claim for personal taxes *held* a first lien against assets of estate derived from sale of deceased's personalty. *In re Estate of Badberg* 216
3. Where one indebted to a person who dies testate becomes executor of his creditor's estate, if he be solvent, he must pay the estate the amount of his debt. *In re Estate of Boschulte* 284
4. If an executor places title to trust property in his individual name, he is personally liable for loss, irrespective of negligence or bad faith. *In re Estate of Boschulte* 284
5. The right of the administrator to recover in equity assets of the estate *held* limited to the rights of heirs represented by him. *Blochowitz v. Blochowitz* 789

6. Contracts, conveyances, and judgments which are binding on heirs as individuals *held* binding on the administrator. *Blochowitz v. Blochowitz* 789

False Imprisonment.

False imprisonment is the unlawful restraint of a person without his consent. *Robertson v. Safe Ways Stores, Inc.* 82

Forcible Entry and Detainer.

Plea of "not guilty" in an action of forcible entry and detainer requires plaintiff to prove every fact necessary to entitle him to recover. *Boehler v. Kraay* 233

Fraudulent Conveyances.

1. The burden of establishing good faith of conveyance by husband to wife is on the grantee. *Nebraska Wheat Growers Ass'n v. Johnson* 99
2. A debtor in failing circumstances may prefer one creditor, including a relative, to the exclusion of others. *Nebraska Wheat Growers Ass'n v. Johnson* 99
3. To make a conveyance fraudulent, a fraudulent intent participated in by both parties to the transfer must exist. *Nebraska Wheat Growers Ass'n v. Johnson* 99
4. Purchaser in good faith, for value, of a note secured by realty mortgage before it is due will be protected from seller's creditors, even if seller intended to hinder, delay, and defraud his creditors, and though part of the consideration was an agreement for an annuity to the seller in the future. *Assenmacher Co. v. Holmes* 124

Gifts.

1. To constitute a gift *inter vivos*, transfer of possession and title must be absolute and go into immediate effect. *Ladman v. Farmers & Merchants Bank* 460
2. If anything remains to be done by donor to complete the transaction, an attempted gift *inter vivos* constitutes an executory agreement and not a completed gift. *Ladman v. Farmers & Merchants Bank* 460
3. Where donor retains control over the subject of a gift, with reservation of the right to use all or any part thereof, no valid gift is effected. *Ladman v. Farmers & Merchants Bank* 460
4. Essential elements of a gift *inter vivos* are delivery of actual property or some evidence of its existence, with intention of donor to relinquish all further dominion over it and to transfer title to donee. *Smith v. Pacific Mutual Life Ins. Co.* 501

5. The beneficial interest in a policy of life insurance may be transferred by gift *inter vivos*. *Smith v. Pacific Mutual Life Ins. Co*..... 501
6. Evidence *held* to show a gift *inter vivos*. *Smith v. Pacific Mutual Life Ins. Co*..... 501
7. In replevin by administrator, whether decedent gave personalty to defendant *held* question for jury. *Lidmila v. Wendt*..... 546

Guaranty.

Contract of guaranty of renewal note executed after making of renewal note *held* not without consideration. *Manley State Bank v. Spangler*..... 196

Highways.

1. A traveler may occupy any part of a public highway when not needed by another whose rights thereto are superior to his own. *Klaus v. Soloman Valley Stage Lines Co*..... 325
2. County is not liable to person injured by reason of defect in highway which county is not required to keep in repair. *Porter v. Lancaster County*..... 705
3. The department of public works must maintain state highways after undertaking their construction. *Porter v. Lancaster Co*..... 705
4. In absence of contract between county and department of public works whereby the county undertakes maintenance of state highways, the county is not liable for injury to person on a highway which the state is maintaining. *Porter v. Lancaster County*..... 705
5. Where a county collected road taxes, a portion of which was claimed by a municipality, the county could not acquire ownership of the fund by lapse of time. *City of Fremont v. Dodge County*..... 856
6. Municipality within county *held* to have no right to county road fund collected by county. *City of Fremont v. Dodge County*..... 856
City of Beatrice v. Gage County..... 851
7. County road taxes held by a county as trustee for a city are subject to the paramount right of the legislature to dictate how such taxes shall be used or allocated. *City of Fremont v. Dodge County*..... 856
8. Though autoist first entering intersection has the right of way, he should exercise ordinary care to prevent accident, even to the extent of waiving his right. *Serratore v. Miller*..... 908

Homestead.

1. Where husband devised to wife fee to realty occupied by both during his lifetime as a homestead, and the wife subsequently occupied the realty during remainder of her life, at her death intestate, in absence of a homestead interest therein in her own right as head of a family, her heirs took the property subject to debts of wife incurred after her husband's decease; the words, "of such husband or wife," in statute exempting homestead from debts, referring to deceased title-owning spouse. *Lewis v. McAdams* 62
2. On death of spouse holding fee to the family homestead, the homestead vests in the surviving spouse for life, and children, whether adults or minors, have no homestead rights therein. *Lewis v. McAdams* 62

Homicide.

Evidence *held* to sustain conviction of murder in the first degree. *Dobry v. State* 51

Husband and Wife.

1. Wife *held* liable on joint note of husband and wife. *Sturm v. Lloyd* 89
2. Where separation is justified, an equitable contract between husband and wife settling their property rights will be enforced. *Ladman v. Ladman* 913
3. Evidence *held* not to establish a separation contract. *Ladman v. Ladman* 913

Indemnity.

1. Indemnity bond *held* sufficient to support an action by mortgagees claiming liens on live stock sold by marketing agency named as principal in bond. *Oss v. Hartford Accident & Indemnity Co* 311
2. Mortgagees of cattle may join as plaintiffs with owner in action on statutory indemnity bond of commission company. *Oss v. Hartford Accident & Indemnity Co.* 311

Infants.

Failure to appoint a guardian *ad litem* for 20-year old minor defendant *held* not prejudicial error. *Kuhlman v. Schacht* 511

Injunction.

1. A court of equity may exercise jurisdiction to prevent a multiplicity of prosecutions to collect confiscatory fines for violations of city ordinances. *Hoyt Bros. v. City of Lincoln* 79

2. Where the bond voluntarily delivered to secure issuance of a restraining order undertakes to indemnify for damages resulting from the injunction, the term "injunction" includes restraining order. *Behrens v. Smith Baking Co* 651
3. Reasonable counsel fees incurred in procuring dissolution of a restraining order may be recovered in an action on the bond. *Behrens v. Smith Baking Co* 651

Insurance.

1. If ambiguities in a policy may be solved by either of two constructions, the one that is more favorable to insured and which will give effect to the policy should be adopted. *Morse v. General American Life Ins. Co* 37
2. Where a new policy, except as to amount and premium, was issued in lieu of a former policy, *held* that the date of the old policy governed in determining applicability of a one-year suicide provision. *Morse v. General American Life Ins. Co* 37
3. Where the constitution and by-laws of a fraternal benefit association provide that a member suspended for nonpayment of assessments may be reinstated within three months by paying all delinquent assessments to date, and that such payment shall be held to warrant that the member is then in good health and will remain so for 30 days, association *held* not liable for death benefit where the certificate holder died within 30 days from payment of delinquent assessments. *Van Dahl v. Sovereign Camp, W. O. W.* 181
4. Proof of practice of fraternal benefit association in accepting payments for purposes of reinstatement after the member was automatically suspended for nonpayment of assessments *held* not to establish a course of dealing or custom to accept such payments which would estop the association from asserting forfeiture on ground that certificate holder was not in good health at time of payment or had failed to remain in good health for 30 days thereafter. *Van Dahl v. Sovereign Camp, W. O. W.* 181
5. The articles of incorporation, constitution, laws and by-laws of a fraternal benefit association, application for membership and certificate constitute the contract between the association and the certificate holder. *Van Dahl v. Sovereign Camp, W. O. W.* 181
6. The by-laws of a fraternal benefit association providing for payment of assessments made during the month on

a certain day and for suspension without notice of members in default are self-executing and provide a reasonable and necessary penalty for enforcement of payment of assessments. *Van Dahl v. Sovereign Camp, W. O. W.* ... 181

7. A member of a fraternal benefit association, who has been suspended for nonpayment of assessments, can be reinstated only in strict conformity with the by-laws in force at time of reinstatement, and has no rights under his certificate until actual reinstatement. *Van Dahl v. Sovereign Camp, W. O. W.* ... 181
8. Where an insurance agent, authorized to issue policies, had desk room in offices of another company under arrangement that its clerk should receive telephone calls and do stenographic work for the agent, notice to such clerk of removal to another location of personalty insured against fire, with request to put through a change of address, was notice to the agent and binding on the company. *Bonacorso v. Camden Fire Ins. Ass'n* 203
9. Notice to agent of removal of insured goods to another location and request to change policy accordingly *held* binding on insurer, and failure to cancel policy would be evidence of insurer's consent to the change, in absence of notice to the contrary. *Bonacorso v. Camden Fire Ins. Ass'n* ... 203
10. An oral assignment or pledge of a life policy as security for insured's debt is valid between the parties, notwithstanding provision in policy that no assignment shall be valid unless in writing and filed with insurer. *Dvorak v. Kucera* ... 341
11. Delivery, without written assignment, of life policy to secure insured's debt constitutes a pledge entitling pledgee to equitable lien on proceeds. *Dvorak v. Kucera* 341
12. An insurance policy should be construed as other contracts. *Omar Baking Co. v. Employers Liability Assurance Corporation* ... 365
13. Where there is no uncertainty as to the meaning of an insurance contract, it will be enforced as made. *Omar Baking Co. v. Employers Liability Assurance Corporation* ... 365
14. Policy insuring against accidental injuries caused by ownership and operation of horses used in connection with insured's business *held* not to cover loss sustained by insured in paying damages for breach of warranty in sale of a horse. *Omar Baking Co. v. Employers Liability Assurance Corporation* ... 365

15. The application, policy, articles of incorporation and by-laws of insurer, and applicable statutes constitute insurance contract. *Ehlers v. Farmers Mutual Ins. Co.* 368
16. Mutual assessment fire policy *held* to authorize assessments only for losses which had occurred and necessary expenses. *Ehlers v. Farmers Mutual Ins. Co*..... 368
17. Insured's failure to pay an invalid assessment will not forfeit policy. *Ehlers v. Farmers Mutual Ins. Co*..... 368
18. A husband may transfer the beneficial interest in a life insurance policy to a person other than his wife, without consent of wife. *Smith v. Pacific Mutual Life Ins. Co*..... 501
19. Provisions of insurance contract providing manner of assignment of policy or change of beneficiary are for benefit of insurer, and failure to comply therewith cannot be raised by third persons. *Smith v. Pacific Mutual Life Ins. Co*..... 501
20. Decree reinstating lapsed life policy affirmed. *Smith v. Bankers Nat. Life Ins. Co*..... 552
21. Articles of incorporation, constitution, laws and by-laws of a fraternal insurance association, together with the application for membership and benefit certificate, constitute the insurance contract. *Fairbanks v. Sovereign Camp, W. O. W*..... 654
22. A suspended member of a fraternal benefit association can be reinstated only in strict conformity to by-laws in force, and has no rights under his certificate until so reinstated. *Fairbanks v. Sovereign Camp, W. O. W.* 654
23. Member of beneficial society *held* not entitled to reinstatement, by reason of ill health. *Fairbanks v. Sovereign Camp, W. O. W*..... 654
24. Where policy provides for waiver of premiums on receipt of proof of disability, insured *held* not entitled to recover premiums paid after disability and before furnishing sufficient proof thereof. *Schollman v. Prudential Ins. Co.* 662
25. Where policy provided for waiver of premiums on receipt of proof of disability, insured *held* not entitled to recover premiums on theory that proof of disability was waived. *Schollman v. Prudential Ins. Co*..... 662
26. The term "due proof of such disability," as used in an insurance policy, *held* not to require any particular form of proof. *Schollman v. Prudential Ins. Co*..... 662
27. Principal clause of life policy *held* to control subordi-

nate clause as to payment of disability benefits. *Schollman v. Prudential Ins. Co.* ... 662
28. When terms of policy are unambiguous, construction most favorable to insured will be adopted. *Schollman v. Prudential Ins. Co* ... 662
29. A "facility of payment" clause in an industrial policy providing that insurer may pay benefits to a person other than the beneficiary generally does not give such third party the right to sue to compel insurer to make payment to him. *Weddle v. Prudential Ins. Co* ... 744
30. Election by insurer to pay amount due under a policy according to provisions of a "facility of payment" clause discharges insurer from liability. *Weddle v. Prudential Ins. Co* ... 744
31. Where insurer successfully defends an action brought by a third person to recover under the "facility of payment" clause of a policy, liability of insurer is not thereby discharged. *Weddle v. Prudential Ins. Co* ... 744
32. A provision that a policy shall not take effect unless insured is in good health on date of issuance is a condition precedent without which there is no liability under the policy. *Weddle v. Prudential Ins. Co* ... 744
33. Plaintiff has burden of proving that insured was in good health when the policy was issued, where good health at time of issuance is a condition precedent to assumption of liability by insurer. *Weddle v. Prudential Ins. Co* ... 744
34. Delivery of life policy, acceptance of premiums, and treatment of policy by insurer and insured as a binding contract raises a presumption that insured was in good health when policy was issued. *Weddle v. Prudential Ins. Co* ... 744
35. The burden of proving as a defense that insured was not in sound health at date of issuance of policy is on insurer. *Weddle v. Prudential Ins. Co* ... 744
36. Where a policy provides that it shall not take effect if on issuance thereof insured is not in sound health, but premiums shall be returned, insurer, to defend under this provision, must allege and prove return or tender of premiums. *Weddle v. Prudential Ins. Co* ... 744
37. In construing a contract of insurance, words used therein will be considered as used in their ordinary and popular sense. *Stone v. Physicians Casualty Ass'n* 769
38. Where assured died from monoxide gas poisoning, recovery *held* limited to amount fixed in policy for

death "resulting from accidental suffocation by illuminating or other gases." *Stone v. Physicians Casualty Ass'n* 769
39. False answers in an application for life insurance, which are material to the risk, will support a suit to cancel a total disability agreement founded thereon. *Penn Mutual Life Ins. Co. v. Lindquist* 813
40. An insurance company is not estopped from seeking cancelation of a total disability agreement attached to a life policy on the ground of false statements given the medical examiner, by the fact that the agent who wrote the application knew the statements were false. *Penn Mutual Life Ins. Co. v. Lindquist* 813
41. Incontestability clause in life policy *held* not applicable to total disability agreement. *Penn Mutual Life Ins. Co. v. Lindquist* 813
42. An insurance policy must be considered as containing provisions required by statute to be included in it. *Kelly v. Prudential Ins. Co* 873
43. Where insured borrowed the full cash value of a life policy, made no further premium or interest payments, and the remaining loan value would not have paid accrued premiums and interest, the policy lapsed and insured was entitled only to extended insurance. *Kelly v. Prudential Ins. Co* 873
44. An insurance policy will be construed most favorably to the insured. *Kelly v. Prudential Ins. Co* 873
45. Claim to proceeds of industrial insurance policy *held* not affected by facility of payment clause, where insurer had failed to avail itself of such provision. *Brown v. Ehlers* 918
46. Insurer, by paying proceeds of policy into court, waived provision therein invalidating assignment of the policy. *Brown v. Ehlers* 918
47. Delivery of life policy by insured to secure a debt constitutes a pledge entitling pledgee to an equitable lien on proceeds of policy. *Brown v. Ehlers* 918
48. Oral assignment of life policy by insured to secure a debt *held* valid between the parties, notwithstanding policy provided that any assignment thereof would be void. *Brown v. Ehlers* 918

Intoxicating Liquors.

1. Legislative power to prohibit manufacture and sale of intoxicating liquor was not dependent on the constitutional prohibition, and hence repeal of the constitu-

tional provision did not repeal existing statutes on that subject. *Zimmerman v. State* 269
2. Evidence *held* to sustain conviction for unlawful possession of intoxicating liquor. *Zimmerman v. State*.... 269
3. Alcoholic liquors as defined by the liquor control act include "alcohol, spirits, wine and beer." *Hanson v. Gass* 685
4. Section 3, ch. 116, Laws 1935, *held* merely a declaration of policy as to liquor licenses. *Hanson v. Gass*..... 685
5. Specific provisions of a law are not changed by a preliminary declaration as to public policy. *Hanson v. Gass* 685
6. Under sections 82 and 83, ch. 116, Laws 1935, only one license is required to sell alcoholic liquor including beer at retail. *Hanson v. Gass*..... 685
7. The legislature has power, within reasonable limits, to declare what percentage of alcohol beer may contain before it becomes intoxicating liquor. *Wilson v. State* 752
8. Repeal of constitutional prohibition did not repeal existing liquor statutes. *Wilson v. State*..... 752

Judgment.

1. A trial court may vacate a judgment rendered at a previous term only for reasons enumerated and within the time limited by statute. *Cronkleton v. Lane*..... 17
2. Generally, matters once litigated and judicially determined will not be reexamined in a subsequent action between the same parties. *State, ex rel. Sorensen, v. Verdigre State Bank*..... 273
3. A judgment in replevin, awarding to the receiver of an insolvent bank proceeds of checks drawn against an administrator's account on plea that issuance and payment of checks were attempts to create an unlawful preference over other depositors, *held* to leave undetermined the liability of bank and receiver for the deposit against which the checks were drawn. *State, ex rel. Sorensen, v. Verdigre State Bank*..... 273
4. A judgment cannot be attacked collaterally except for fraud or want of jurisdiction. *Selleck v. Miller*..... 306
5. Judgment debtor *held* not entitled to enjoin valid judgment. *Selleck v. Miller*..... 306
6. A deficiency judgment in a foreclosure suit against assignor of note and mortgage *held* subject to collateral attack in revivor proceeding, where the foreclosure

petition showed that assignment was without recourse. *Branz v. Hylton* 385
7. Doctrine of *res judicata* stated. *Blochowitz v. Blochowitz* 789
8. Judgment *held res judicata* as to rights of heirs in estate. *Blochowitz v. Blochowitz* 789
9. Where plaintiff recovers judgment in each of three separate actions on different surety bonds of bank officers for identical losses, the surety being the same on each bond, payment of the judgment in one case and payment of all costs will satisfy all the judgments. *Luikart v. Mains* 907

Landlord and Tenant.

1. The relation of landlord and tenant is created by contract. *Clough v. Standard Oil Co* 136
2. A lease of a farm, in absence of exceptions therein, includes the right to occupy buildings on the farm. *Boehler v. Kraay* 233
3. The word "summer," in describing the term of an oral lease of a farm, *held* to mean the farming season. *Boehler v. Kraay* 233
4. The measure of damages for wrongfully withholding possession of leased premises is the rental value less the rent reserved by the lease. *Jarman v. Sexton* 453
5. Special damages for wrongfully withholding possession of leased premises may be awarded, where such damages are certain and the natural result of the wrong complained of. *Jarman v. Sexton* 453

Larceny

1. Ownership of chattels may, in an indictment for their theft, be laid either in the owner or in the person who at time of theft was in actual peaceable possession thereof, although such person may have no other property therein than right of possession as against the thief. *Lovejoy v. State* 154
2. Generally, ownership of personal property may be established by circumstantial evidence. *Lovejoy v. State* 154
3. In a prosecution for larceny, nonconsent of owner of property allegedly stolen may be inferred from circumstances. *Lovejoy v. State* 154

Licenses.

1. A municipal license fee and an occupation tax must be reasonable. *Hoyt Bros. v. City of Lincoln* 79
2. Municipal power to regulate commercial sign painting

and sign hanging does not imply power to exact from a sign painter an annual license to pursue his vocation in addition to an inspector's regulatory permit and fee. *State v. Wiggenjost* 450

3. Provisions of a city ordinance imposing a $10 annual license fee on a sign painter in addition to an inspector's regulatory permit and a fee for each sign *held* not within powers granted by home rule charter. *State v. Wiggenjost* 450

Limitation of Actions.

1. If action against county for refund of taxes is barred on face of petition by statute of limitations, the petition is demurrable. *Kennedy v. Dawes County* 227
2. The statute of limitations does not commence to run on city warrants until ten years after special taxes levied to pay same are exhausted. *Daniels v. City of Gering* 443
3. Suit by judgment creditor of state bank to enforce the judgment against a national bank, which was organized by taking over assets and liabilities of the state bank, *held* not barred by limitation on debt before limitation on judgment. *Wilson v. Continental Nat. Bank* 614
4. A payment by one joint maker on a note without authority of the others will not toll the statute of limitations as to them. *Kuhse v. Luther* 623
5. A joint maker primarily liable on a note *held* not deprived of defense of statute of limitations by payments of his comaker or by the negotiable instruments law. *Kuhse v. Luther* 623
6. In action based on presumption of death after seven years' absence, limitations begin to run at expiration of the seven-year period. *Wells v. Equitable Life Assurance Society* 722

Mandamus.

1. Ministerial duties of a state officer may be enforced by mandamus. *State, ex rel. Ball, v. Hall* 18
2. Whether writ of mandamus shall be granted or refused depends on the character of the act in question, and not on the office held by respondent. *State, ex rel. Ball, v. Hall* 18

Master and Servant.

1. If injury results from doing some act, even for the employer's benefit, at a place and in a manner not contemplated by the parties, it does not arise out of the employment. *Albers v. Kipp* 46

2. Where an employee is injured while using an appliance for a purpose for which it was not designed, the employer is not liable, unless it is shown that it was so used with the employer's knowledge. *Albers v. Kipp*.... 46
3. Where injury is caused by adoption by employee of a dangerous method of work where a safe method has been provided by the employer, there can be no recovery. *Albers v. Kipp*.... 46
4. Remedy under compensation law is exclusive where employee operating thereunder sustains injury from an accident arising out of and in course of his employment. *Jones v. Rossbach Coal Co*.... 302
5. Owner of building used in conducting owner's business, who engaged a contractor to make repairs, *held* an "employer" within the compensation law, where it was not shown that the contractor was required to procure compensation insurance. *Jones v. Rossbach Coal Co*.... 302
6. Employee of contractor suing owner of building at common law to recover damages for injury must allege and prove that provisions of compensation law do not apply. *Jones v. Rossbach Coal Co*.... 302
7. Nebraska compensation law *held* controlling where work was done in Nebraska. *Solomon v. A. W. Farney, Inc.*.... 484

Mortgages.

1. Evidence *held* not to sustain charge that mortgage was obtained by fraud. *Coe v. Talcott*.... 32
2. An action at law on a note secured by realty mortgage may be commenced without leave of court, where the pleadings and proof show that no action has been filed in the district court of the county where the mortgaged premises are situated to foreclose the mortgage. *National Fidelity Life Ins. Co. v. Gordon*.... 130
3. Evidence, in suit to foreclose realty mortgage, *held* to sustain decree for plaintiff. *Hawe v. Johnson*.... 320
4. Mortgagors are not entitled to moratory stay after foreclosure decree, where uncontradicted evidence shows that mortgagee's lien far exceeds value of land. *First Trust Co. v. Hickey*.... 351
5. On application for a moratory stay after mortgage foreclosure, affidavits were admissible to show value of land. *First Trust Co. v. Hickey*.... 351
6. A mortgagee can maintain a suit to prevent waste by mortgagor in possession where the security is impaired

or there is danger that the mortgaged property may become insufficient security for the mortgage debt, and he may include application to prevent waste in the foreclosure petition. *Vybiral v. Schildhauer* 433
7. Removal of growing timber from mortgaged land may be an element of waste. *Vybiral v. Schildhauer* 433
8. A moratory stay will not be granted where the mortgage lien equals or exceeds value of mortgaged premises. *Luikart v. Graf* 736
First Trust Co. v. Stenger 750
9. A moratory stay will not be granted to one having no interest in mortgaged premises. *First Trust Co. v. Stenger* 750
10. Vacation of moratorium for noncompliance with its terms sustained. *Fremont Joint Stock Land Bank v. Harding* 842
11. A moratory stay will be denied where mortgage liens exceed value of land. *Srajhans v. Mares* 924
12. A junior encumbrancer cannot redeem from a prior mortgage and claim subrogation after decree of foreclosure of prior mortgage in a suit to which he was a party. *Keller v. Boehmer* 763
13. Mere inadequacy of price will not preclude confirmation of a foreclosure sale, unless the inadequacy is so great as to evidence fraud. *Keller v. Boehmer* 763
Srajhans v. Mares 924
14. Evidence in a foreclosure suit, where defendants claimed a credit and release of certain land, *held* to sustain decree for plaintiff. *First Trust Co. v. Blore* 785

Municipal Corporations.

1. Where necessary work of repairing public pavements on streets and sidewalks is in open progress in broad daylight, watchmen, barriers, and signals for protection of the public are not required. *Conklin v. Lincoln Traction Co* 28
2. The duty ordinarily resting upon a city to maintain its streets in a reasonably safe condition for travel in the ordinary mode is remitted during time occupied by street railway company in making repairs or improvements. *Conklin v. Lincoln Traction Co* 28
3. An action will not lie against a village for an act done by its officers outside the actual and apparent scope of their authority. *Southern Nebraska Power Co. v. Village of Deshler* 133
4. If members of a village board threaten to exceed their

authority in carrying out an ordinance which would be prejudicial to plaintiff's rights, injunctive relief may be granted against members of the board, but not against the village. *Southern Nebraska Power Co. v. Village of Deshler* 133

5. If members of a village board threaten to exceed their authority in carrying out an ordinance which would be prejudicial to plaintiff's rights, injunctive relief could not be granted against members of the board when they were not made parties to the action. *Southern Nebraska Power Co. v. Village of Deshler* 133
6. Regular members of city fire department are public officers. *Bishop v. City of Omaha* 162
7. A public officer is entitled to the salary fixed by law. *Bishop v. City of Omaha* 162
8. Right to salary fixed for a public officer is incident to his office, and cannot be changed by agreement. *Bishop v. City of Omaha* 162
9. A city officer is not estopped from claiming remainder due of the legal salary, simply because the authorities paid him a less sum which he accepted. *Bishop v. City of Omaha* 162
10. Petition in action against city to recover on sewer warrants *held* insufficient. *Miller v. City of Scottsbluff* 440
11. City sewer warrants which cannot be paid because the special fund created for their payment is exhausted become general obligations of the city. *Daniels v. City of Gering* 443
12. A municipality cannot restrict the right of a citizen to acquire means of support by honest labor and skill, unless clearly authorized by law. *State v. Wiggenjost* 450
13. The vocation of painting and hanging advertising signs *held* not subject to municipal surveillance in form of a license in addition to an inspector's regulatory permit and a fee for each sign. *State v. Wiggenjost* 450
14. Invalidity of license feature of sign ordinance does not necessarily invalidate regulatory provisions of same ordinance. *State v. Wiggenjost* 450
15. A city council, under a zoning ordinance, cannot restrict use of property in an unreasonable or arbitrary manner. *Coulthard v. Board of Adjustment* 543
16. A village owning electric light plant may contract to enlarge the plant and issue warrants pledging future earnings without liability on the village for their payment. *Southern Nebraska Power Co. v. Village of Deshler* 598

17. The ordinary business affairs of a municipality are committed to the corporate authorities, and the courts will not interfere except in a clear case of mismanagement or fraud. *Southern Nebraska Power Co. v. Village of Deshler* 598
18. A village is a public corporation, created by and existing subject to the legislative will. *Hardin v. Pavlat* 829
19. One dealing with a municipality does so with the knowledge that its territory may be enlarged or diminished in the manner prescribed by the law in existence at the time. *Hardin v. Pavlat* 829
20. A creditor of a municipality has no vested right on that account to have territorial boundaries thereof remain constant so long as the municipality continues to exist with a substantial part of its original territory unimpaired. *Hardin v. Pavlat* 829
21. Where a bondholder became a creditor of a village, disconnecting of lands from the village under a statute then existing *held* not an impairment of the bondholder's contract. *Hardin v. Pavlat* 829
22. Taxes cannot be levied on property for village purposes, in absence of statutory authority, after such property has been lawfully disconnected from the village. *Hardin v. Pavlat* 829
23. A village can tax for village purposes only property within the village. *Hardin v. Pavlat* 829

Negligence.

1. Existence of gross negligence must be determined from circumstances in each case. *Sterns v. Hellerich* 251
2. Where reasonable men might draw different conclusions from the evidence, questions of negligence are for the jury. *Anderson v. Lee* 258
3. The doctrine of last clear chance applies where there is negligence of defendant subsequent to negligence of plaintiff and defendant's negligence is the proximate cause of injury. *Parsons v. Berry* 264
4. Where two persons unite in joint prosecution of a common purpose, negligence of one will be imputed to the other. *Ahlstedt v. Smith* 372
5. In order to recover under last clear chance doctrine, plaintiff must prove by a preponderance of evidence that he was in a place of danger and so situated that defendant could have observed him in time to avoid accident; it is facts and not probabilities that must be thus established. *Nyegomir v. Union P. R. Co* 380

6. To recover under the last clear chance doctrine, plaintiff must have been in a position of peril which was known or, by the exercise of ordinary care, ought to have been known to defendant in time to avoid injury by exercise of ordinary care. *Nyegomir v. Union P. R. Co.* 380
7. The last clear chance rule is that, when a person is in danger, whether negligent or not, one who knows, or ought to know, of the danger must use every precaution to avoid injuring him. *Nielsen v. Yellow Cab & Baggage Co.* 457
8. In absence of proof of opportunity to avoid injuring a person after his danger was, or ought to have been, discovered, the last clear chance doctrine does not apply. *Nielsen v. Yellow Cab & Baggage Co.* 457
9. Evidence *held* to show that decedent's death was caused by negligence of defendant motorist. *Kuhlman v. Schacht* 511
10. Existence of gross negligence must be determined from circumstances in each case. *Covey v. Anderson* 702
11. Gross negligence is question for jury. *Covey v. Anderson* 702
12. A plaintiff without fault may recover for injuries proximately resulting from negligence of another, regardless of the degree of such negligence. *Serratore v. Miller* 908
13. Where the evidence tends to prove both negligence and contributory negligence, the duty of making comparison is on the jury, unless the evidence of negligence is legally insufficient to sustain a verdict for plaintiff, or unless the court finds, as matter of law, that plaintiff's negligence is more than slight, or that defendant's negligence is not gross in comparison with that of plaintiff. *Belville v. Bondesson* 926
14. Evidence *held* not to justify the court in finding, as matter of law, that plaintiff's negligence was more than slight, when compared with that of defendant. *Belville v. Bondesson* 926

New Trial.

Where defendant was surprised by evidence, but made no request for adjournment, discovery after trial of evidence contradicting plaintiff's evidence *held* **not ground** for a new trial. *Bonacorso v. Camden Fire Ins. Ass'n* 203

Nuisance.

1. Evidence *held* to sustain findings that beer tavern and

dance hall were a nuisance. *State, ex rel. Towle, v. Eyen* 416
2. A court of equity has jurisdiction to enjoin maintenance of a nuisance, and, if necessities of the case require, it may enjoin continuation of the business which occasions such nuisance. *State, ex rel. Towle, v. Eyen*.... 416

Officers.

The county manager to be appointed under the county manager act is a public officer. *State, ex rel. O'Connor, v. Tusa*..... **528**

Parties.

In an action attacking validity of statute imposing gasoline tax, interveners' petition *held* not to show interest entitling interveners to a declaratory judgment. *Smithberger v. Banning*..... 354

Partition.

Suit for partition *held* not prematurely commenced. *Ladman v. Ladman*..... 913

Partnership.

1. Existence of partnership *held* question of fact. *Carlson v. Peterson*..... 806
2. More convincing evidence is required to prove existence of partnership where alleged partners are the only litigants than where the controversy is between a third party and the partners. *Carlson v. Peterson*..... 806
3. Existence of partnership depends on agreement of parties, and their intention is to be ascertained from facts and circumstances of each case. *Carlson v. Peterson*.... 806

Paupers.

Grant of writ of mandamus, commanding board of supervisors of poor to furnish relief to relator, approved. *State, ex rel. McMillin, v. Boyd County*..... 898

Payment.

Where obligation to pay and right to receive are united in same person, in absence of affirmative proof of insolvency, the law operates appropriation of fund to discharge of debt. *In re Estate of Boschulte*..... 284

Pleading.

1. More than one defense may be interposed to a cause of action, provided they are not inconsistent, and they are not inconsistent unless proof of one necessarily disproves another. *Tighe v. Interstate Transit Lines* 5

2. Facts alleged in petition to which answer pleads waiver, estoppel, or matter in avoidance will be treated as admitted, though answer also contains a general denial. *Manley State Bank v. Spangler* 196
3. Prayer for equitable relief is of no avail unless petition states facts authorizing relief. *Branz v. Hylton* 385
4. Petition for damages for withholding possession of leased premises *held* demurrable. *Jarman v. Sexton* 453
5. Petition *held* to sufficiently plead special damage. *Nye v. Adamson* 887

Pledges.

1. A pledgee surrendering a pledged certificate of deposit, and taking in lieu thereof, without pledgor's knowledge, a new certificate having a later maturity date, *held* liable for conversion. *Citizens State Bank v. United States Fidelity & Guaranty Co* 603
2. Evidence *held* insufficient to sustain defense of ratification by pledgor of pledgee's acts. *Citizens State Bank v. United States Fidelity & Guaranty Co* 603

Principal and Agent.

1. Agent is liable for loss of principal's funds mingled with his own. *In re Estate of Boschulte* 284
2. An agent, admitting receipt of his principal's money, has the burden to show that he made proper disposition thereof. *In re Estate of Boschulte* 284
3. A trustee dealing with his trust in another's name, or by an agency within his control, will be deemed to have acted in his own right. *In re Estate of Boschulte* 284
4. An agent must not deal with his principal's property as his own, nor mingle it with his own. *In re Estate of Boschulte* 284
5. An agent has the implied duty to act for the principal and to take title in the principal's name. *In re Estate of Boschulte* 284
6. A principal is bound by acts of agent to extent of apparent authority conferred on agent. *Howe v. Provident Loan & Investment Co* 469
7. Evidence of acts or declarations of agent concerning existence or extent of his authority are not admissible against principal to prove its existence or extent. *Le Bron Electrical Works, Inc., v. Livingston* 733
8. Ratification of acts of agent to be binding on principal must be with full knowledge of facts. *Le Bron Electrical Works, Inc., v. Livingston* 733

9. Buyer *held* justified in relying on agent's apparent authority to sell and receive payment for corn delivered by agent. *Oleson v. Albers* 823

Process.

Abuse of legal process consists in malicious use or misapplication of process to accomplish purpose not warranted or commanded by the writ. *Vybiral v. Schildhauer* 433

Public Lands.

1. Auction of state school land leases must be conducted by the commissioner of public lands and buildings, or his deputy, or the treasurer of the county in which the lands are located. *Stock Yards Nat. Bank v. Wyman* 113
2. Notice for auction of leases of state school lands becomes ineffective where proper officer is not present at time stated in notice to conduct the auction. *Stock Yards Nat. Bank v. Wyman* 113
3. Holder of lease of state school lands which has been declared forfeited for nonpayment of rentals may redeem from forfeiture by paying all delinquencies, fees and cost of forfeiture at any time before the land is advertised to be leased at public auction. *Stock Yards Nat. Bank v. Wyman* 113
4. Where forfeiture of lease of state school lands has been declared for nonpayment of rentals, and notice published of auction of lease, and at time fixed in notice no officer is present to conduct the auction, the lands cannot be leased until another notice is given, and holder of lease declared forfeited may redeem at any time before subsequent notice is given. *Stock Yards Nat. Bank v. Wyman* 113
5. Holder of contract for purchase of state school lands, who permitted interest payment to become delinquent for more than one year, and, after notice and declaration of forfeiture, failed to redeem or to comply with the statute, lost all rights under such contract. *Spahr v. Godfrey* 539
6. The legislature may change the manner of serving notice of cancelation of school land contract for nonpayment of interest after contract has been executed, if such change does not affect substantial rights of the contract holder. *Spahr v. Godfrey* 539

Quo Warranto.

1. *Quo warranto* is intended to prevent exercise of powers

not conferred by law, and generally is not available to regulate manner of exercising powers. *State, ex rel. Wright, v. Lancaster County Rural Public Power District* 677

2. Organization of Eastern Nebraska Public Power District sustained as against an attack by *quo warranto*. *State, ex rel. Wright, v. Eastern Nebraska Public Power District*..... 683

Railroads.

1. Action of state railway commission in dismissing complaint of county seeking to compel railroad to widen underpass where railroad crossed public road *held* not abuse of discretion. *Butler County v. Chicago & N. W. R. Co*..... 75
2. A railroad track is inherently dangerous, and a pedestrian who walks on a track and fails without reasonable excuse to take ordinary precautions for his safety is guilty of contributory negligence as a matter of law. *Nyegomir v. Union P. R. Co*..... 380
3. No liability is imposed on a railroad company under the fencing law for injuries to stock caused by themselves when straying upon the railroad right of way. *Brei v. Chicago, B. & Q. R. Co*..... 496
4. Statutes requiring railroad corporations to fence their rights of way do not render them liable for injury to cattle by straying onto their rights of way because of the absence of a proper fence, and from there onto the private property of a third person where they are injured. *Brei v. Chicago, B. & Q. R. Co*..... 496

Rape.

In a prosecution for assault to commit rape, exclusion of a note written during the hours of an alleged assault to defendant, who was temporarily absent from the room, which disclosed close intimacy between the parties, *held* prejudicial error. *Shineflew v. State*..... 42

Replevin.

In absence of specific lien or other special interest, issues in replevin are ownership, right of possession, and unlawful detention of property replevied. *State, ex rel. Sorensen, v. Verdigre State Bank*..... 273

Rewards.

In equity, all parties are entitled to share in a reward for apprehension of a criminal whose apprehension was

a result of their combined efforts. *Omaha Printing Co. v. Mack* 237

Sales.

A chattel mortgagee who bought mortgaged books at foreclosure sale *held* a "purchaser" entitled to possession as against claimant under a conditional sales contract. *American Law Book Co. v. Ferrin Van & Storage Co* 231

Seduction.

In an action for seduction, evidence *held* insufficient to establish defendant's sexual relations with plaintiff's daughter. *Tongue v. Perrigo* 564

Specific Performance.

1. If one party to a contract cannot enforce substantial performance, equity will not decree specific performance at the instance of the other party, since the right to specific performance must be reciprocal. *Wilson v. Nelson* 1
2. Time is not generally considered as of the essence of a contract, unless it is expressly so provided or such was the parties' intention. *Morison v. Fremont Joint Stock Land Bank* 104

Statute of Frauds.

An oral agreement is not void under the statute unless its terms indicate it is not to be performed within one year. *Johnson v. First Trust Co* 77

Statutes. SEE CONSTITUTIONAL LAW.

1. Where journals of both houses of legislature and signature of governor clearly show passage of an act in a certain form, the undisputed mistake of an enrolling clerk will not defeat the act. *State, ex rel. Ball, v. Hall* 18
2. When the supreme court has judicially construed a statute, contemporaneous construction by administrative or executive officials charged with its enforcement cannot be considered. *Ehlers v. Farmers Mutual Ins. Co.* 368
3. County manager act *held* unconstitutional. *State, ex rel. O'Connor, v. Tusa* 528
4. Where valid and invalid parts of a legislative act cannot be separated, no part thereof can be enforced. *State, ex rel. O'Connor, v. Tusa* 528
5. Resort may be had to recitals of legislative intent for the purpose of construing an ambiguous statute, but

where there is no ambiguity, the meaning will not be affected by such recitals. *Hanson v. Gass* 685
6. An act complete in itself may amend or modify provisions of existing statutes without contravening provisions of the Constitution relating to amendments. *Scott v. Dohrse* 847
7. Repeal of a statute, without a saving clause, destroys all rights founded thereon. *City of Beatrice v. Gage County* 850
8. In considering an amendatory or substituted statute, it is proper to consider the old law with the new one to ascertain the legislative intent, and all provisions of the original statute not carried into the new law are annulled by the repealing statute. *Mills v. Mills* 881

Taxation.
1. Liability of county to holder of tax sale certificate for refund of taxes illegally assessed is measured solely by statute. *Kennedy v. Dawes County* 227
2. Payment of a realty tax may be "voluntary," though made unwillingly and only as a choice of evils or of risks. *Riggs-Orr Investment Co. v. City of Omaha* 697
3. Payment of realty tax *held* to be voluntary. *Riggs-Orr Investment Co. v. City of Omaha* 697
4. 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. *Riggs-Orr Investment Co. v. City of Omaha* 697
5. One invoking the statutory right to recover a tax voluntarily paid must show substantial compliance with the statute. *Riggs-Orr Investment Co. v. City of Omaha* 697
6. Property is taxed when the tax is levied, and not when valued by the assessor. *Hardin v. Pavlat* 829

Trial. SEE APPEAL. CRIMINAL LAW.
1. Submitting to jury a material issue on which there is no evidence is erroneous. *Tighe v. Interstate Transit Lines* 5
2. Where evidence in a law action is insufficient to support a verdict for plaintiff, a peremptory instruction for defendant is not erroneous. *Conklin v. Lincoln Traction Co.* 28
3. A directed verdict for plaintiff is proper where the evidence is insufficient to sustain a verdict for defendant. *Stockmens State Bank v. Pollat* 244

4. Refusal to submit to jury defense not supported by evidence *held* proper. *Sterns v. Hellerich* 251
5. Instruction assuming material fact to be established is erroneous, where evidence as to existence of fact is conflicting. *Howe v. Provident Loan & Investment Co.* 469
6. Instruction stating issues *held* not prejudicial in view of the whole charge. *Kuhlman v. Schacht* 511
7. Evidence tending to establish fact in controversy must be received if competent. *Coulthard v. Board of Adjustment* 543
8. Receiving incompetent evidence to prove a fact established by competent evidence is not error. *Smith v. Bankers Nat. Life Ins. Co.* 552
9. In an action for injury to a taxicab passenger, *held* error to permit plaintiff on his case in chief to show that defendant carried liability insurance. *Fielding v. Publix Cars, Inc.* 576
10. Rule of practice, that plaintiff may, in a personal injury action, by appropriate interrogatories on cross-examination, establish that defendant carried liability insurance, revoked. *Fielding v. Publix Cars, Inc.* 576
11. Where the court instructed as to delivery of a check and the jury inquired if that meant delivery in person, an affirmative answer *held* not error, in absence of evidence of delivery in any other manner. *Kuhse v. Luther* 623
12. Submitting to jury a material question of fact on which there is no evidence constitutes prejudicial error. *Roseland v. Chicago, M. & St. P. & P. R. Co.* 637
13. Trial court should direct verdict for defendant where evidence is insufficient to support verdict against him. *Swain v. Cogswell* 709
14. Where there was competent evidence sufficient to sustain a verdict for plaintiff, the trial court properly refused to direct a verdict for defendant. *Serratore v. Miller* 908

Trusts.

1. While, generally, a family settlement may provide for disbursement of testator's estate in a manner at variance with his will, a valid, unexecuted testamentary trust cannot thus be modified or destroyed. *In re Estate of Mowinkel* 10
2. A trustee is bound to perform faithfully duties relating to his trust, and in doing so he cannot allow his own interests to interfere. *Lancaster County Bank v. Marshel* 141

3. To prevent evil consequences from growing out of advantages which a trustee's position gives him, it will be presumed that what he does in relation to interests or property involved in trust is done in a representative capacity. *Lancaster County Bank v. Marshel* 141
4. Mortgagor *held* entitled to return of collateral security deposited with mortgagee. *First Trust Co. v. Shurtleff* 476
5. Contract *held* insufficient to create a trust. *Crancer v. Reichenbach* 645
6. Whether a contract, in clear, unambiguous language, creates a trust relation between parties thereto must be determined by intention of parties as deduced from language of contract. *Crancer v. Reichenbach* 645
7. Trustee's violation of duty placed on him by law is a breach of trust. *Wells v. Carlsen* 773
8. All who knowingly participate or aid in committing a breach of trust are responsible for the wrong. *Wells v. Carlsen* 773
9. Where a trustee has practiced concealment, evasion, or misrepresentation depriving the *cestui que trust* of material information relative to the subject of the trust to his injury, the trustee and others participating in the wrong are liable in damages. *Wells v. Carlsen* 773
10. Beneficiary *held* not barred from suing at law for damages for breach of trust, because of a former suit to recover the trust assets. *Wells v. Carlsen* 773
11. Assignments by bondholders *held* to confer on assignee right to sue for damages for breach of trust. *Wells v. Carlsen* 773

Vendor and Purchaser.

A purchaser who has actual knowledge of assertion by third party of claim to property under a prior contract takes subject to third party's legal rights against vendor. *Morison v. Fremont Joint Stock Land Bank* 104

Venue.

1. In a personal action, service of summons in county where suit is brought against a defendant whose interest is moot does not confer authority on the court to issue a summons to another county. *Platte Valley Irrigation District v. Bryan* 657
2. An action against a public officer for an act done in virtue of or under color of his office, or for neglect of official duty, must be brought in the county where the cause or some part thereof arose. *Platte Valley Irrigation District v. Bryan* 657

3. Summons cannot be issued to a defendant in another county, where there is no issuable controversy as to defendant in county where suit is begun. *Platte Valley Irrigation District v. Bryan* 657

Waters.

1. An irrigation company is a common carrier, and its rates are subject to regulation. *Laier v. South Side Irrigation Co* 713
2. Contracts between an irrigation company and landowners for use of appropriated water and maintenance of works are subject to right of state to regulate rates. *Laier v. South Side Irrigation Co* 713
3. The Constitution and laws of the state relating to irrigation and use of water of streams for such purpose form part of contract for use of such water and maintenance of irrigation works. *Laier v. South Side Irrigation Co* 713
4. An operator of an irrigation system must deliver all water legally appropriated to parties entitled to its use at rates fixed by the railway commission. *Laier v. South Side Irrigation Co* 713
5. Landowner *held* not required to pay maintenance charges accruing during litigation as a condition precedent to delivery of water for irrigation. *Laier v. South Side Irrigation Co* 713
6. A landowner granting an irrigation company a right of way in consideration of a perpetual water right *held* liable for maintenance charge for use of water. *Laier v. South Side Irrigation Co* 713

Wills.

1. Agreement between a widow and heirs for distribution of her deceased husband's estate *held* to estop widow from claiming a homestead interest. *McManus v. Farrell* 69
2. An act or agreement which disappoints the settlor's purpose by divesting trust property or income from the purpose indicated by the will establishing the trust is void *ab initio*. *Lancaster County Bank v. Marshel* 141
3. So long as the trustee, either expressly or by implication, has imposed on him some affirmative duty respecting the trust property, the trust remains active. *Lancaster County Bank v. Marshel* 141
4. Particular form of words is not necessary to create restrictions rendering interest of beneficiary of tes-

tamentary trust inalienable and placing it beyond reach of his creditors, and restrictions need not be expressed directly in the testamentary language employed, but may be implied if ascertainable from the will and surrounding circumstances. *Lancaster County Bank v. Marshel* 141

5. Courts look at all provisions of a will and the circumstances under which it was made, including the beneficiary's condition, and if intent to restrict the beneficiary's interest in property devised is reasonably plain, courts will give effect to such intent. *Lancaster County Bank v. Marshel* 141
6. Placing property by will in hands of a trustee evidences testator's intent to put it beyond power of beneficiary to alienate or his creditors to seize. *Lancaster County Bank v. Marshel* 141
7. Undue influence exercised by any one, whether he or another gains by its exercise, renders worthless a will or other instrument thus procured. *Gidley v. Gidley* 419
8. A will, to be valid, must be signed by testator or by some person in his presence and by his express direction, and attested and subscribed in testator's presence by two or more competent witnesses. *In re Estate of Smith* 739
9. Attestation required of witnesses to a will consists in their seeing that statutory requirements are complied with. *In re Estate of Smith* 739
10. Statutory provisions regarding the manner in which wills must be executed are generally held to be mandatory and subject to strict construction. *In re Estate of Smith* 739
11. No presumption of due execution of a will arises from the presence of a perfect attestation clause reciting facts necessary to its due execution, where the subscribing witnesses testify positively that the necessary facts did not occur. *In re Estate of Smith* 739
12. Certain deeds, accepted by heirs, and will construed, and *held* to preclude the heirs from further participation in the estate. *Blochowitz v. Blochowitz* 789

Witnesses.

1. A party testifying as a witness may be asked on cross-examination if he did not, on a specified occasion, make a statement contradictory to his present testimony. *Havlik v. Anderson* 94
2. A third party is competent to testify to conversation

between deceased and another in which witness took no part. *Dvorak v. Kucera* 341
3. In an action against maker of note by receiver of payee bank, maker *held* competent to testify as to transactions with deceased bank president. *Luikart v. Braasch* 361
4. In an action to determine right to proceeds of insurance policy, where both parties claim proceeds as beneficiaries, testimony of either party as to transactions with deceased assured is admissible. *Smith v. Pacific Mutual Life Ins. Co* 501
5. In an action against an estate for money loaned, a disinterested witness may testify to admissions against interest by deceased as to what she owed claimant. *Tyler v. Estate of McDougal* 633
6. A witness may not testify as to a conversation with a decedent in any civil action in the result of which such witness has a direct legal interest, when the adverse party is the representative of such decedent, unless the evidence of decedent shall have been taken and read in evidence, or unless a witness of such representative shall have testified to the conversation. *Mills v. Mills* .. 881